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Troubling Waters: Speaking (of) Forbidden (Legal) Subjects

edited by
Joseph Pugliese and Jillian Kramer

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Introduction
Troubling Waters:
Speaking (of) Forbidden (Legal)
Subjects
Special Issue to
Commemorate Penny Pether

Joseph Pugliese and Jillian Kramer

On the 10th of October 2013, Penelope Jane Pether passed away. Penny, as she was known to all of us, left an acute sense of loss and absence in our lives. To a degree, this acute sense of absence is graphically evinced by the image of the empty bench that graces the cover of this special issue of *Law Text Culture*. The bench was inaugurated by her colleagues at the School of Law, Villanova University, Philadelphia, at the end of a symposium held to celebrate her extraordinary achievements and to mark her sorrowful passing. In the face of the emptiness that hollows out that memorial bench, a bright yellow sunflower continues to burn. The luminous sunflower strewn across that otherwise empty bench evokes some haunting lines from a poem by the Italian poet, Eugenio Montale. In his paean to the sunflower, and its ability to transcend the harrowed ground of life, he writes:

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Portami il girasole ch'io lo trapianti
nel mio terreno bruciato dal salino

...

portami il girasole impazzito di luce.

...

Bring me the sunflower so I can transplant it
in my earth scorched by the saline

...

bring me the sunflower impassioned by light.

(Montale, 1997: 53. Translation by Joseph Pugliese)

Penny was our fulgorant sunflower: dazzlingly bright, lightning fast in her delivery of sardonic one-liners that promptly punctuated inflated egos, impassioned by her thirst for knowledge oriented by social justice concerns, and, invariably, radiating a loving warmth to her dear friends.

From a terrain scorched by the trauma of her battle with a fatal illness, Penny continued to shine regardless. From a ground inscribed by our sense of disconsolate loss, Penny continues to shine regardless – both in our memories of her and through her brilliant scholarly corpus. In an epigraph to one of her essays, 'The Prose and the Passion' (2007: 43), she cites E M Forster: 'she might yet be able to help him to the building of the rainbow bridge that should connect the prose in us with the passion. Without it we are meaningless fragments' (1910: 197).

Throughout the course of her life, Penny exemplified the power to build rainbow bridges that brought disparate souls together. She had the rare ability to trigger dialogue between the people she encountered and, effortlessly, to set them on the way to enduring friendships and fruitful exchanges. She was the charged connector that facilitated the building of bridges across heterogeneous and often seemingly unbridgeable disciplinary, ideological and personal divides. Her passion for knowledge and for social justice worked to alchemise our prosaic dross into charged poetry. Without Penny, things remained as meaningless fragments in an already fractured world. After Penny's

intervention, these fragments were mobilised into agentic formations that were oriented to transforming the world: because she believed in us, because she was unwavering in her intuitive understanding that she had seen a spark there that just needed to be prodded to burst into incandescent flame. In wake of the felt, material absence of Penny, we are left with a scholarly corpus that continues to magnetise us. In the wake of her disembodied absence, it is her textual body that now works to incite us to connect the mere prose in us with her passion for social justice transformation.

This special issue of *Law Text Culture* is devoted to Penny Pether. It marks Penny's coming home to the very journal she co-founded. In 1994, a group of young and febrile academics, including Penny, Robyn Handley, Joseph Pugliese, and Maurie Scott, got together and decided to found a journal that would cut across a range of discrete disciplines. Animated by a transversal movement, the hope was that the interdisciplinary crossings that the journal would generate would work to bring into critical focus previously unseen relations and, in the process, precipitate transformations that would resonate across the bodies of law, text and culture. In its challenging of borders, disciplinary orthodoxies and received knowledges, the journal effectively embodied the generative and irreverent spirit of Penny.

The essays that constitute this special issue arise from a memorial symposium organised by Joseph Pugliese and Nan Seuffert at the Legal Intersections Research Centre, School of Law, the University of Wollongong on 18 July 2014. Titled 'Troubling waters: speaking (of) forbidden (legal) subjects,' the symposium sought to mark in a formal and celebratory manner Penny's extraordinary scholarly legacy. At the same time, the symposium was driven by a desire to continue and to extend Penny's work by drawing on her scholarly corpus *and* by transposing it to new ground. This collection also includes work that was not presented at the symposium, but that clearly fulfills Penny's social justice imperatives to, wherever and whenever possible, establish platforms for disenfranchised subjects to speak on their own terms and through their own voices. Thus we include two powerful visual essays. One is by Eaten Fish, an asylum

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seeker incarcerated by the Australian government in one of its offshore gulags on Manus Island, Papua New Guinea. As Janet Gailbraith writes in her powerful introduction to *Eaten Fish*'s work:

With bans against media and little access to communications the drawings of *Eaten Fish* are a voice of resistance, exercising his agency against particular experiences of laws that would attempt to silence and present him as a non-person. The profundity of his work, for me, is in his ability to strip away rhetoric and draw from the heart calling into question the propaganda of the Australian Government that would present him and others as illegal (Galbraith 2015: 117).

The other visual essay is by Zanny Begg. Titled 'Doing Time', it resonates profoundly with Penny's own practice of teaching incarcerated men and women in the United States with the Inside-Out Prison Exchange Program. Begg shares a series of photographs and film-stills from projects she undertook in collaboration with a group of seven 14 and 15 year old boys incarcerated in Reiby Juvenile Detention Centre. In line with the overrepresentation of racialised children in the New South Wales juvenile justice system, almost all of the kids in the Centre were Indigenous. Begg's images powerfully articulate their identities. Against the backdrop of their compound bordered with razor wire, her images feature murals that she made with the boys for their bedroom walls, including one of a tropical island populated by dinosaurs. They also picture boys wearing jackets adorned with self-designed shields, many an ingenious combination of commodity symbols such as the Nike tick, the Aboriginal flag and messages of solidarity such as: 'Koori Boys, Family'. As Begg writes, her project aimed to give the boys a voice: "Through the residency I hoped to challenge, even if fleetingly, the institutional disempowerment these boys faced" (Begg 2015: 155).

The practice of challenging institutional disempowerment is one Penny championed. In the opening essay of this special edition, Terry Threadgold offers a chronicle of the ways in which, over the course of her life and career, Penny's scholarship tirelessly 'troubled' institutions such as the law, the state and the university. In 'Critical and Feminist Legacies: Unmaking Law to Make Better Futures. An Introduction

to a Celebration of Penny Pether's Life and Work', Threadgold paints a vivid picture of Penny as a path-breaking scholar whose work forged the foundations of many fields of study, including the work that follows throughout this special edition on indefinite detention, colonialism, race, literature and gender. This opening essay also captures Penny's wit, acuity and impassioned pursuit of social justice. Threadgold weaves Penny's own words throughout her paper, writing: 'I believe that what she had to say *matters*. It intervened, it changed things, it challenged the taken for granted – and it still does' (Threadgold 2015: 10).

Nan Seuffert's article demonstrates the ways in which Penny's scholarship continues to resonate, and *matter*, today. In 'Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps', Seuffert takes her point of departure from one of Penny's unfinished projects, a proposal for a book entitled *'Perverts', 'Terrorists' and Business as Usual: Comparative Indefinite Detention Before and After 9/11*. In particular, she draws together Penny's understanding of the ways indefinite detention works to enforce settler-colonial sovereignty in order to perform a timely analysis of the laws that sanction the Australian state's incarceration of asylum seekers in violent offshore camps. Seuffert argues that this regime must be named as a form of sovereign warfare, as she writes: 'The suicide attempts, sexual assaults and deaths in the camps result, as far as can be discerned, in little, if anything changing, escaping discernable legal repercussions. These men are the racialised and sexualised populations who are subjected to necropolitics, conditions of life which are marked for death' (Seuffert 2015: 56).

In the face of this necropolitical legal regime, Joseph Pugliese explores the possibilities for social justice. His paper, 'Geopolitics of Aboriginal Sovereignty: Colonial Law as "a Species of Excess of Its Own Authority", Aboriginal Passport Ceremonies and Asylum Seekers', is oriented by Penny's commitment to decolonising practice and her illuminating critique of the legal apparatus that attempts to extinguish Indigenous sovereignty over Country. It examines two Ceremonies held by Uncle Ray Jackson in which Aboriginal Passports were given to refugees and non-Indigenous Australians. Pugliese

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articulates what is at stake when Jackson re-signifies the passport, arguing that Jackson's activism:

[D]efies the settler-colonial state's ongoing attempts to silence his voice as an Aboriginal elder of this country and his right to offer welcome and hospitality to asylum seekers and refugees seeking refuge in his lands. Through the exercise of a counter-discursive move of Indigenous sovereignty, he enunciates what he terms an 'Act of State' in offering welcome to refugees and asylum seekers, simultaneously as he enacts the instantiation of Indigenous justice (Pugliese 2015: 111)

Jillian Kramer continues to pursue the colonising apparatus deployed by the Australian state. In "Legitimizing Fictions": The Rule of Law, the Northern Territory Intervention and the War on Terror', she responds to Penny's prescient calls for scholars to interrogate appeals to the 'rule of law'. Writing in the context of the Howard Government's 2007 Northern Territory Intervention, she asks the question: 'how do invocations of the 'rule of law' work in this context to not only justify Howard's policy but also legitimate white Australia's claims to sovereignty?' (Kramer 2015: 129). Inspired by Penny's forensic analysis of language, she then proceeds to unpack the political and legal discourses reproduced by Howard. She exposes the ways in which race works as an *a priori* to not only reproduce the legal fiction of *terra nullius* but also implicate targeted Aboriginal communities within the Western framework of the War on Terror.

Maria Giannacopoulos also draws on Penny's critical legal methodologies in order to elucidate the connections between the Australian state's '*terra nullius* project' and seemingly disparate imperial formations. In 'Sovereign Debts: Global Colonialism, Austerity and Neo-Liberal Assimilation', she brings into focus a compelling paradox. She writes:

While Greece is currently synonymous with sovereign debt crisis, the foundational sovereign debt crisis in Australia remains unrepresentable. I revisit *Mabo* and build on Penny Pether's important critique of the High Court as a colonial institution, in order to argue that the 'illegitimate' colonial power asserted by the High Court is a necessary pre-condition for the continued effacement of sovereign debt (Giannacopoulos 2015: 166-167).

Giannacopoulos painstakingly analyses a diverse archive of texts – from current affairs programs, to policy documents and legislation – in order to graphically locate the sites of violence, suffering and loss that mark both Greece and the Australian continent. So often overlooked, she argues that these sites are linked by global modes of colonial governance.

In ‘*Brokeback’s* Bareback: Queering *Lex Populi*’, William MacNeil turns a critical lens on another form of legislative violence: homophobic injustice and discrimination. Inspired by a conversation with Penny, he stages a queer reading of Ang Lee’s *Brokeback Mountain* in order to excavate the profound ambivalences that mark the film and its socio-legal context. He writes:

What genuinely surprised both of us, however, was the widespread interest and support that the film secured from mainstream audiences in America, Europe and Australasia. Which prompted me to ask of Penny Pether then, and in this article in the here-and-now: *Why did Brokeback Mountain* become one of the top films of 2005–2006, all the while depicting in the most uncompromising manner imaginable, a tabooed desire, homosexuality, the love that still ‘dares not speak its name’ and is still seen, in many places, as *contra naturam*? (MacNeil 2015: 195).

In order to answer this question, MacNeil implicates this film within complex genealogies of law, literature and film that span from the 1960s to the present. He skilfully unpicks crucial scenes, film commentary, legal cases and legislation in order to expose the ‘troublesome’ contradiction that belies the film’s celebratory embrace. MacNeil suggests that this film not only consigns institutionalised homophobic violence to the ‘past’; it may also serve to ‘domesticate’ the queer: dispatching the ‘the passionately orgiastic, even epiphanic ‘enjoyment’ of *Brokeback Mountain*’ to the heteronormative confines of the ‘liberal legality’s fantasy space of marriage equality’ (MacNeil 2015: 211).

Building on Penny’s founding work in feminist legal studies, Julia Quilter also identifies the confines of law. Her paper, ‘Rape Trials, Medical Texts, and the Threat of Female Speech: The Perverse Female

Rape Complainant', takes as its point of departure a 'dilemma' identified by Penny that continues to persist today. Against the backdrop of ostensibly progressive reforms to rape law, she poses the question: Why do conviction rates for rape and sexual assault remain so low? Utilising an attentive study of medical jurisprudential discourses from the nineteenth century and the 1900s-1980s, Quilter names and unravels a powerful myth that resonates within the juridical system. She argues:

these discourses rework a long history of associating the "true" woman with 'closure' and the 'false' woman with 'openness'. Within this framework, the rape complainant – with her open mouth and her position in the public domain – is *a priori* associated with falsity (Quilter 2015: 259).

Quilter honours Penny's legacy as she troubles the existing criminal justice system and, in doing so, lays the foundations for productive change.

The final piece in this special edition also honours Penny's pursuit of social justice, in the form of a review essay, speaking as well to that first issue of *Law Text Culture*. Elaine Laforteza's piece reviews *At the Limits of Justice: Women of Colour on Terror*, a volume edited by Suvendrini Perera and Sherene H Razack that assembles 29 essays by women of colour activists and scholars who attended a workshop in Canada to reflect on the issues of racism, gender and systemic violence in the context of the still-unfolding War on Terror. Larfoteza offers a moving review that highlights the importance of the questions posed throughout the volume. She draws together their powerful testimonies and exposes the vital contribution these authors make to both existing scholarship and activist networks. Crucially, Laforteza also exposes the ways in which their collective work is vested with political potential. She writes: 'Most importantly, the volume asks us to account for own complicities and how we are implicated in ongoing relations of power, terror and justice' (Laforteza 2015: 284).

This call to action resonates with Penny's repeated and challenging exhortations for scholars to name and identify what remains 'unspeakable' or 'forbidden' within the law, popular texts and culture. In this special issue, *Troubling Waters: Speaking (of) Forbidden (Legal)*

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Subjects, we hope to honour this transformative vision as we ‘trouble’ the institution of the law on multiple fronts and engage with the urgent and ongoing issues of social justice that compel her extensive body of work. As Penny writes:

Studies of the possibilities for productive change offered by inscribing the facticity of law in action in its textual practices, troubling both the doctrinalism and the presently dominant models for the construction of professional legal identity, are called for ... Carefully theorised and situated, insisting on engaging politics and law, [such scholarship] also charts ways for law and its subjects to use power, do justice (Pether 2014: 338).

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