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CONSEQUENCES OF REFORM:
PENNY PETHER ON RAPE LAW IN ILLINOIS AND AUSTRALIA

MARK SANDERS*

WHEN I first opened Penny Pether's *Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project*,¹ I found it a difficult text, and did not finish reading it. It was the summer of 2013, and my difficulty surely stemmed in part from my sadness at knowing that my friend was fighting for her life, and that the odds were against her. I realize now, however, that this was probably not the only source of difficulty. Her article is subtle, at times counterintuitive, and immensely sophisticated. My academic training is in literature, languages, and literary theory, so it is possible that one who was a lawyer by profession would more readily have grasped what was at stake in it. I shall wager, however, that this was not necessarily the case.

When a scholar like Penny Pether passes on in full career, she is bound to leave projects unfinished. One could therefore pause and meditate on the incompleteness of any pensive project, indeed of all of our own. The valedictory moment of silence can be filled with thoughts of one's own mortality, and of the vanity of scientific and humanistic endeavor. This is an old theme, and not a bad one. But such thoughts need not stand in the way of our drawing insight from the work that Penny was not given time to finish. The path of thought that I follow leads across more than a decade, measured by date of publication, and two law review articles, in addition to the one mentioned.² I shall endeavor to outline the problem in rape law that her articles identify and the impasse that they reach in their critical evaluation of attempts to solve it through reform.

I.

In the earliest of the three articles, Penny Pether argues for the relevance of critical discourse analysis for reading jury instructions and appellate decisions in rape cases in Illinois and South Australia.³ This feminist advocacy of post-structuralist theory seemed to me entirely in character

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1. Penelope Pether, *Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project*, 24 S. ILL. U. L.J. 53 (1999) [hereinafter Pether, *Critical Discourse Analysis*].

2. See generally Penelope Pether, *Reading the Northern Territory 'Intervention' from the Margins: Notes Toward a Feminist Social Psychoanalytic Ethics of Governmentality*, 33 AUSTL. FEMINIST L.J. 19 (2010) [hereinafter Pether, *Reading the Northern Territory*]; Penny Pether, *What Is Due to Others: Speaking and Signifying Subject(s) of Rape Law*, 18 GRIFFITH L. REV. 237 (2009) [hereinafter Pether, *What Is Due to Others*].

3. See generally Pether, *Critical Discourse Analysis*, *supra* note 1.

with the fellow immigrant that I knew,⁴ schooled in literary theory, and teaching to change the minds of her students at the University of Southern Illinois, her first law school appointment in the United States, where she was Director of Lawyering Skills.⁵

What became more interesting to me as I reread the article was Pether's contention, building on the influential work of Susan Estrich,⁶ that rape law reform in Illinois, as in other United States jurisdictions, had led to the exclusion from consideration at trial of both the mens rea of the defendant and the actual state of mind of the victim. In other words, these reforms brought about a systematic exclusion of the subjective.

I begin by quoting the relevant paragraphs:

In Illinois, in order to be convicted of sexual assault an accused rapist must be proven to have used force or the threat of force in perpetrating one of the specified kinds of prohibited sexual penetration. No mens rea is specified. The alleged victim's consent, however, is a defense to a sexual assault charge.

The Illinois pattern jury instructions on sexual assault reflect this apparent disarticulation of force and consent on the one hand, and force and any mental element on the other. Instruction 11.55, the "Definition of Criminal Sexual Assault," reads in pertinent part: "[a] person commits the offense of criminal sexual assault when he . . . commits an act of sexual penetration upon the victim by the use of force or threat of force." Instruction 11.63, headed "Defense of Consent," reads: "[i]t is a defense to the charge . . . that [alleged victim's name] consented." However, in Instruction 11.63A, the "Definition of Consent," the imbrication of force and consent becomes evident: "[t]he word "consent" means a freely given agreement to the act . . . in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the defendant shall not constitute consent."

As these two factors reconnect, so we see various ghosts in the machine. Apparently, forceful intercourse can be consistent with consent. While no mens rea is specified in the definition of the offense, the victim's state of mind needs to be read when the defendant raises the affirmative defense of consent, claiming that the alleged victim has "freely" agreed to forceful intercourse. But how does the law read the mind of a rape victim: what signs are visible and how do they signify? The slippage from the ox-

4. See generally Mark Sanders, *Remembrance for Penny*, 26 LAW & LITERATURE 257 (2014).

5. For a critical dissection of this institutional position, see Penelope Pether, *Discipline and Punish: Despatches from the Citation Manual Wars and Other (Literally) Unspeakable Stories*, 10 GRIFFITH L. REV. 101 (2001).

6. See generally Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

ymoronic definition of consent as “freely given agreement” to a description of symptoms that will be read as nonconsent is revealing. If force results in the absence of the verbal and/or bodily performance of what courts will recognize as nonconsent, it promises, nonconsent will be presumed. This both equates forced submission with lack of resistance, and renders the victim’s actual state of mind irrelevant.⁷

Pether situates the Illinois reform within the second of two waves of United States rape law reform. This wave, from the 1970s, was “prompted by feminist analysis of sexual assault law.”⁸ In this second wave, among other measures, “additional alterations [were made] in the substantive requirements of force and nonconsent to facilitate convictions.”⁹ For me, as a literary scholar and theorist interested in law, the paragraphs that I have quoted did not come clear at a first reading, and they still require some unpacking. What I take Pether to be arguing is that, by making force and nonconsent substantive requirements for a conviction for rape, while at the same time failing to specify a mens rea for the offense, the Illinois jury instructions of 1995, in effect, instituted an asymmetry under the guise of a symmetry. When Pether writes of an “apparent disarticulation of force and consent on the one hand, and force and any mental element on the other,” the emphasis must fall on the word “apparent.”¹⁰ There are a number of factors in play. First, the apparent disarticulation of force and consent in the instructions is contradicted by the working assumption that women consent to forceful intercourse. Second, at another level, as is evident from some Illinois cases,¹¹ *force* and *consent* are conceptually interdependent. Appealing to common understanding, one court reasoned, for example, that if a victim was “forced to perform an act,” then that act will have been nonconsensual, and, further, that “if the prosecution shows that there was an act of sexual penetration by force, that evidence demonstrates that the act was nonconsensual.”¹²

There is, in other words, an immense grey area here, between the victims *having been forced*—which in ordinary language can simply mean having been made to do something against one’s will—and the defendant’s having brought this about *by force*—which, in ordinary language, tends to mean through the use or threat of physical force.¹³ The trouble is that, in practice, this grey area is being rendered black and white, not by

7. Pether, *Critical Discourse Analysis*, *supra* note 1, at 64–65 (alterations in original) (footnotes omitted).

8. *Id.* at 64.

9. *Id.*

10. *See id.* at 64–65.

11. *See id.* at 68–72.

12. *Id.* at 69 (quoting *People v. Haywood*, 515 N.E.2d 45, 50 (Ill. 1987)).

13. One of Estrich’s objections to law reform along these lines is that types of coercion, pressure, and deception short of the use of physical force, but which go to mens rea, are left out of consideration. *See* Estrich, *supra* note 6, at 1105–21.

establishing the defendant's mens rea, but by inquiring into the victim's state of mind. A more serious logical flaw emerges, when, in order to determine if the act in question took place *by force*, evidence is presented that the victim *was forced*. What the reformed statutes and jury instructions do not admit is that there is no such thing as force *per se*.

Thus, in practice, even if a required mens rea is not specified for the defendant, and force is defined without reference to any "mental element," the fact that the victim's consent is an affirmative defense means that, logically, it *is* considered—for how can it be a defense if it is not a statement as to the defendant's knowledge?

There is some debate, which is acknowledged by Pether, as to whether Illinois law, as in other jurisdictions, does in fact do away with "a mens rea as to the victim's consent," but this is left in the footnotes, suggesting that, although not an unimportant factor, the drift of her argument is to show that even if mens rea is (or appears to be) excluded in the statute or jury instruction, it tends to enter into the legal code and legal proceedings in other ways.¹⁴ That is to say that the apparent symmetry introduced by the law is no symmetry at all—since the defendant's (actual) mental state comes into play, but *not* the victim's, even if it seems to because the emphasis falls on consent.

The conduct of Pether's argument here is somewhat elliptical. Whereas, on the one hand, it would be facile to conclude, from the Illinois jury instruction on the definition of consent,¹⁵ that force simply implies nonconsent, Pether, showing how force and consent "reconnect," writes: "Apparently, forceful intercourse can be consistent with consent."¹⁶ In other words, the victim can "'freely' agree[] to forceful intercourse."¹⁷ This is a *logical* possibility in terms of the jury instruction, but more clearly could also be a *practical* one in terms of the instruction, where it concerns consent as an affirmative defense: "While no mens rea is specified in the definition of the offense, the victim's state of mind needs to be read when the defendant raises the affirmative defense of consent, claiming that the alleged victim has 'freely' agreed to forceful intercourse."¹⁸ Because, at its limit, the law "promises" the presumption of nonconsent in the absence of recognizable "verbal and/or bodily performance," this introduces the question of *reading*.¹⁹ Pether sums up by giving two consequences. When she writes that the instructions "equate[] forced submission with lack of resistance," I think "equate" is to be understood as non-exclusive, since it is one example of what the law allows as forced submission.²⁰ The second consequence is that this "renders the victim's actual state of mind irrele-

14. Pether, *Critical Discourse Analysis*, *supra* note 1, at 64 n.32, 66 n.35.

15. Illinois Pattern Jury Instructions, Criminal, No. 11.63A (4th ed. 2000).

16. See Pether, *Critical Discourse Analysis*, *supra* note 1, at 65.

17. See *id.*

18. See *id.* at 65; see also Illinois Pattern Jury Instructions, Criminal, No. 11.63.

19. See Pether, *Critical Discourse Analysis*, *supra* note 1, at 65.

20. See *id.*

vant.”²¹ This would, as I take it, follow not only in the case of a lack of recognizable resistance, but more generally—since, if Pether is right, in *reading* the victim (as, I assume, distinct from accepting the victim’s evidence), it is *never* the victim’s *actual* state of mind that is read, but always some substitution in its place of a generalization.

This means, Pether continues, that when a juror decides on whether the victim did or did not consent, which the juror still must do according to the law, a “cultural story” of what women generally would do tends to substitute for facts.²² Quoting Estrich, Pether observes that:

Prohibited force turns on the judge’s evaluation of a reasonable woman’s response, or that of a jury. And the reasonable woman in this context is the product of cultural stories about femininity, chastity, masculinity, sexuality and so on. And judges, like jurors, each with their specific habitus, bring these stories to their embodied judgment of whether this was a “real” rape or not. Thus the effective substitution of force for mens rea persists in “silently” requiring resistance, and the necessity for resistance imports the requirement of a normative and normalized cultural fiction about women and sex. The understanding of force, then, is gendered.²³

Argued in detail with reference to the Illinois cases,²⁴ this point is underlined through comparison with a notorious jury instruction in a South Australian spousal rape case dating from 1992, *R. v Johns*.²⁵ Pether begins by telling us that:

Unlike the United States norm of which the Illinois law is an example, South Australian rape law has a specified mens rea element. The actus reus is sexual intercourse without the consent of the other person; the mens rea is knowledge of nonconsent or reckless indifference as to the other’s consent. The legislation specified that if the mens rea and actus reus were present, the defendant would be guilty “whether or not physical resistance is offered by [the] . . . other person.”²⁶

The defendant in *Johns* was acquitted, but sections of the jury instructions were judged by the appeals court to be in error.

The public furor occasioned by the decision centered, in part, around the judge’s statement that:

21. *See id.*

22. *See id.* at 78–79.

23. *Id.* at 68 (footnote omitted) (citing Estrich, *supra* note 6, at 1106–08).

24. *See id.* at 68–79.

25. Supreme Court, SA, No. SCCRM/91/452, (unreported Aug. 1992).

26. Pether, *Critical Discourse Analysis*, *supra* note 1, at 80 (alteration in original).

There is nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling. It may be, in the end, that handling and persuasion will persuade the wife to agree. Sometimes it is a fine line between not agreeing, then changing of the mind, and consenting.²⁷

The phrase “rougher than usual handling” became, as Pether points out, the object of much satire in Australia.²⁸ Citing Peter Goodrich, Pether analyzes the judge's words as “an example of oratorical definition,” which “does not rely on logic or morality or ethics to define such behavior as criminal.”²⁹ What it relies on, in conjunction with the authority of the position of judge, is a story. “There is,” Pether writes,

the assumption that women consent to forced and violent sex, and that it is acceptable for men to use force and violence to “persuade” women of their acquaintance to have sex with them. . . . [P]articlar kinds of cultural stories about women and men and sex are embedded in both Justice Bollen's instructions and in the much less revealing Illinois pattern instructions.³⁰

Pether's conclusion is that:

[i]f a change in jury behavior is desired by those who make and administer 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.³¹

Although Pether's advocacy is for post-structuralist critical discourse analysis, which interrogates the influence of subject formation (Foucault) and *habitus* (Bourdieu) on judge and juror,³² there appears to be a more profound strain to her argument that is classically humanist—namely that, in curtailing consideration of the subjective (*mens rea* for the defendant, state of mind for the victim), rape law reform leads to a substitution of fiction for fact. This appears to affect victims asymmetrically. As I understand it, this has two classical consequences. First, jurors are placed in the impossible (although surely common) position of having to determine the facts of the case when they are not (or not to be) put before the court, meaning that a fiction can tend to substitute. Although one hesitates to equate the state of mind of victim and defendant, this, more generally,

27. *Id.* at 82 (quoting *Johns*, No. SCCRM/91/452, at 5–13 (instructing jury)).

28. *See id.* at 82.

29. *Id.* at 83.

30. *Id.* at 85–86.

31. *Id.* at 86.

32. *See id.* at 87–94.

makes it so that the elements of the crime cannot be established—other than by speculation. What we thus see is not simply a bias against women, or a differentiation between women according to norms of femininity, but an erosion of the legal process itself.³³ Second, and this is not explicitly stated by Pether, it deprives the acts of the subject before the law of the very element that makes them acts of a human being.

On this score, it may be instructive to compare Pether with Estrich, who throughout her important article, appeals for “according respect to a woman’s words,” and for “defin[ing] consent in a way that respected the autonomy of women.”³⁴ Pether cites Estrich’s alternative.³⁵ Respect is a powerful concept; in Kant, respect for somebody is respect for the moral law that she embodies. Autonomy has equal conceptual weight—literally, it is the law one gives to oneself. Respect for autonomy thus has a twofold structure: respect for the law and respect for the principle that I am the one who gives law to myself. Although it is not what makes rape unique, for a liberal jurist in the classical mold, rape is an exemplary crime because it is an offense against the law in this twofold sense. Whereas neither Pether nor Estrich moves in this direction, although Pether’s anti-humanist learning suggests that she would be the one more ready to do so, can one not then say, at another level, that the “autonomy” of the subject has its conditions of possibility in a “heteronomy,” in the sense that it is a clear set of rules and principles that allow it to be specified—for the sovereign law-giving subject, for the respectful other, and, when a law is broken, the court? Mens rea would be an example and so would consent/nonconsent. The question would then arise: Can one still call this humanist? But, beyond such labels, which are at best a rough guide, the question remains whether laws, in these instances, are safeguarding autonomy and creating the conditions of possibility for autonomy to be respected, instead of progressively eroding it, as both Pether and Estrich show that they have in the reforms they examine.

II.

When Penny Pether revisits the subject of rape law reform in two subsequent articles, she adds a new element, which connects it with a different political history. In *What is Due to Others: Speaking and Signifying Subject(s) of Rape Law*, published in the *Griffith Law Review* in 2009,³⁶ Pether surveys various attempts at rape law reform in the United States and Australia and their lack of significant impact on reporting, prosecution, and conviction, a trend for which she uses the term “attrition.”³⁷ The piece registers a reconsideration of her previous approaches to the question,

33. See *id.* at 68.

34. Estrich, *supra* note 6, at 1093, 1095.

35. See Pether, *Critical Discourse Analysis*, *supra* note 1, at 67.

36. See generally Pether, *What Is Due to Others*, *supra* note 2.

37. See *id.* at 240–44.

such as in her 1999 Illinois article, and she contemplates a different understanding.³⁸ This is to link rape with what Michel Foucault called *biopolitics*. Taking up the work of historian Ruth Miller,³⁹ which is informed by Foucault's ideas, Pether observes that although, in the specification of mens rea in the reformed New South Wales statute,⁴⁰ the burden of proof (of consent) appears to have been shifted onto the defendant, "the resonating histories of the texts of positive law's refigurings of rape do not encourage unreflective hope, or perhaps any hope, that these reforms will alter attrition or do justice to those who experience rape or live lives diminished and circumscribed by its shadows."⁴¹

Invoking Miller, as well as our friends Nan Seuffert and Joseph Pugliese, Pether continues, outlining two broad biopolitical consequences. The first specifically affects victims of rape and is linked rhetorically and practically to a regulation of sex. The second is that rape law, the reform of which in New South Wales was partly in reaction to the highly publicized *Skaf* and *K* gang rape cases in Sydney,⁴² works hand in hand with a racist, anti-Muslim, and xenophobic nationalism:

Further, if Ruth Miller's disconcerting account of the emergence of the new passive feminine, universal citizen of modern biopolitics is correct—and the texts of the New South Wales Parliament's legislative sessions introducing the state's recent rape law reforms, with their focus on the consent of the victim and on her bodily integrity, are replete with evidence that (at least for a rhetorician) suggest it is—not merely the reduction of women's bodies to passive space, starkly visible in the persisting sections of the definition of sexual assault in New South Wales (themselves the creatures of twentieth century reforms) is in evidence

There is also evidence in the texts surrounding the reforms that in biopolitical regimes, including [MHR Chris] Hartcher's discourse on children and elderly women—paradigmatically "innocent," and thus deserving, victims because their integrity and autonomy, the latter figured as the incapacity to consent—are taken for granted, written on their bodies, [according to Miller] "[r]ape is a crime not because there is an absence of consent, but because sex is an assault on politically defined biological boundaries." [Again, according to Miller]:

[t]he conflation of autonomy and integrity that we see . . . in contemporary rape legislation—the positing of an attack on both in the event of criminal sex—produces an impor-

38. See *id.* at 247–48.

39. RUTH A. MILLER, THE LIMITS OF BODILY INTEGRITY: ABORTION, ADULTERY, AND RAPE LEGISLATION IN COMPARATIVE PERSPECTIVE 5 (2007).

40. See Pether, *What Is Due to Others*, *supra* note 2, at 248–50.

41. *Id.* at 251.

42. See *id.* at 248.

tant backdrop for early twenty-first century sovereign relations . . . The result is a completely passive sexualized body, a body ready (via integrity) and willing (via autonomy) to operate as a setting for the spectacle of the rule of law.

Law's somatechnological production of women's gendered bodies, then, operates at once to promise the archetypically sexually passive "intact" woman or girl that her "human dignity"—the currency of rights, which government bestows while representing itself as fettered by them—and the "citizenship" which binds her to, and defines her in terms of, her subjection to the governmentality contiguous with the nation formed upon "boundaries, and enemies", [sic] [citing Seuffert,] [will be affirmed,]⁴³ and to ensure that they are partial, "prosthetic." It effaces the gendered violence its institutions, discourses and subjects—from perpetrators to police to prosecutors—make real in the lives of rape's real victims, and all women who live in the shadows cast by the "inexhaustible futurity" [citing Pugliese] that fear of rape shares with fear of terrorism, playing out the logic of the liberal state, promising gender equality while delivering the inequality on which it is hierarchically predicated.

If law always-already writes itself on bodies, then texts always bespeak contexts. The emergent biopolitical discourse on the rape victim/citizen who, so the texts of and discourses on New South Wales' recent rape law reforms suggest, at last calls positive law and society to "justice" is likely to operate as biopolitics does, managing populations, [again citing Miller,] "turn[ing] sex into something in need of constant regulation."

. . . .

Recent sexual offenses legislation in Australia . . . can be read not as "progressive" reforms able at last to do justice to the state of exception in which simple rape really flourishes and women's citizenship is at once paradigmatic and partial, but as a biopolitical technique for production of a new category of "real" rape, committed by newly cultivated categories of strangers to be managed, not men and boys "like us": foreigners, of whom the Islamic [sic] immigrant and the "animal" who is the sexually violent predator are the (present) paradigm. And likewise, they can be read as a way to manage a passive citizenry through techniques drawn from the politics of hate and fear⁴⁴

43. I have added the phrase in brackets in order to complete, grammatically, the first part of the sentence, in relation to which the second part, beginning with "and to ensure," appears to state a contradiction of principle in practice: ". . . at once to promise [X and Y] . . . and to ensure [less of X and Y]."

44. Pether, *What Is Due to Others*, *supra* note 2, at 251–52, 255–56 (seventh, eighth, and thirteenth alterations in original) (footnotes omitted).

Pether makes a similar analysis, explicitly related to her previous two articles on rape law reform, in her critique of the so-called Northern Territory “Intervention.”⁴⁵ This was the Australian federal government’s assumption in June 2007 of emergency powers over certain Northern Territory Aboriginal communities, mainly on the pretext of widespread sexual abuse of Aboriginal children.⁴⁶

Although not a large part of her discussion in *What Is Due to Others*, when Pether brings up the subject of mens rea, whoever has read *Critical Discourse Analysis* is able to discern another layer of argument—which, it appears, is taken up, only to be dropped again. Commenting on the New South Wales mens rea provision, Pether writes:

It effectively defines “knowledge” as knowledge, recklessness or negligence. One could say many things about the provision, including admiring the ingenuity with which positive law’s silence about the experience and facticity of rape was made to speak about what “simple rape”, [sic] which is actually the dominant reality of rape, is; or registering the sleight of hand that has redefined a restrictive *mens rea* term so it no longer means itself, has become untethered from doctrine’s solipsism.⁴⁷

And she continues. There appears to be more than a little irony in play, and even some sarcasm, as Pether expresses surprise at the fact that a defendant’s knowledge (of the victim’s nonconsent) could be defined, for the purposes of mens rea, as recklessness or negligence. The classic study of mens rea in English quite clearly classifies recklessness and negligence as “forms of . . . intentionality.”⁴⁸ It is not particularly surprising, therefore, that law reform in New South Wales would follow these lines; after all, South Australian law does.⁴⁹ Is Pether therefore suggesting something else—namely, that it was high time that rape law reform in New South Wales include a more comprehensive tabulation of mens rea for the crime of rape? Probably. But what Pether also seems to be saying is that none of this really matters, when what takes place is the rhetorical substitution, in practice (documentable substitutions, including jury instruction, jury deliberation, judge’s decision, and so forth), of something else for mens rea, as for victims’ actual state of mind: a cultural story, fiction for fact, and the like. In these later articles, this must also mean bringing into question the criterion of autonomy, which, pivotal in Susan Estrich, whom Pether does not interrogate in 1999 in *Critical Discourse Analysis*, works, in the terms that Pether takes up from Ruth Miller, as an alibi for the rule of law as

45. Pether, *Reading the Northern Territory*, *supra* note 2, at 19–20.

46. *See id.* at 26–28.

47. Pether, *What Is Due to Others*, *supra* note 2, at 251 (footnote omitted).

48. DOUGLAS AIKENHEAD STROUD, *MENS REA, OR, IMPUTABILITY UNDER THE LAW OF ENGLAND* 5 (1914).

49. *See* Pether, *Critical Discourse Analysis*, *supra* note 1, at 80.

biopolitical control.⁵⁰ Heteronomy is not, in this instance, felicitous. There is, as is explicitly sounded after her expression of irony, accordingly, a note of despair; reforms of positive law “do not encourage unreflective hope, or perhaps any hope”⁵¹ This is the note on which her project is left unfinished, at least as a project for lawmaking in the narrow sense, as Penny Pether turns from jurisprudence toward its political conditions of possibility.

50. See Pether, *What Is Due to Others*, *supra* note 2, at 252.

51. See *id.* at 251.

