

Do You Honestly Believe a Statutory Definition of Consent is Enough? Rape Myths, Gender Stereotypes and Legislative Solutions

Louise McCormack

Abstract

While Ireland's new statutory definition of consent respects the female voice in its promotion of communicative sexuality, the current subjective formulation of the honest belief defence continues to exclusively support and endorse the perspective of the male accused. By bolstering this male perspective, the law operates to perpetuate a number of damaging rape myths and gender stereotypes. In order to dispel such misconceived societal attitudes, and in light of the Law Reform Commission's recent *Report on Knowledge or Belief Concerning Consent in Rape Law*, this paper aims to highlight the need for the Oireachtas to make immediate amendments to this contentious area of the law on sexual offences.

Introduction

With the advent of the Ireland's first statutory definition of 'consent' in 2017 came greater autonomy for female rape victims and the promotion of communicative sexuality. Yet the current

subjective formulation of the honest belief defence continues to encourage reliance on harmful rape myths. An adherence to dubious procedural practices influenced by gender stereotypes and misconceptions reveals the criminal justice system's systemic discrimination of women. While the new law on consent seeks to change societal attitudes surrounding appropriate socio-sexual behaviour, it does not go far enough.

Part I of this paper will examine a number of prevalent rape myths that exist in Irish society and the many procedural barriers to justice which victims of rape continue to endure. Part II will then look at the new statutory definition of consent and will critique and propose potential reforms of the honest belief defence in light of the Law Reform Commission's recent *Report on Knowledge or Belief Concerning Consent in Rape Law*.¹ While it is acknowledged that legislative solutions alone are inadequate, this paper will focus exclusively on the substantive legal changes required to curb the influence of rape myths and stereotypes in Irish society.

I. Myths, Stereotypes, Procedural Barriers to Justice and Systemic Discrimination

Although rape myths and gender stereotypes are not unique to Irish society, the history of abuse and mistreatment of women in 20th century Ireland is particularly appalling and noteworthy. Following the establishment of the Irish Free State in 1922, the Government maintained "inherited networks of social control", the most infamous of which were the Magdalene Laundries.² The Laundries claimed to pursue the goal of housing and reforming

¹ LRC 122-2019.

² E O'Sullivan and I O'Donnell, *Coercive Confinement in Post-Independence Ireland* (Manchester University Press) 258.

‘fallen women’: the outcasts of conservative Irish society.³ Unmarried mothers, prostitutes and those women engaged in extramarital sexual activity were committed to these harrowing institutions which were breeding grounds for intense physical and emotional abuse. The Church’s “construction of a normative Irishwoman”⁴ and its oppression and subordination of anyone who deviated from this model entrenched sexism and discrimination of women deep into the Irish psyche. Although Irish society has certainly evolved in recent years, toxic attitudes and an inherent distrust of women still affect sexual offences law and its actors and often lead the courts to approach rape allegations with unwarranted suspicion.

As Mandhane, Chief Commissioner of the Ontario Human Rights Commission, posits, “[l]ike much of the systemic discrimination in the criminal-justice system, failure to properly investigate and prosecute sexual offences likely begins with an over-reliance, whether consciously or unconsciously, on stereotypes.”⁵ Rape culture is a product of institutionalised

³ James Gallen, ‘Redressing Gendered Mistreatment Magdalene Laundries, Symphysiotomy and Mother and Baby Homes’ in Lynsey Black and Peter Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform* (Hart Publishing 2019).

⁴ *ibid*; This construction of a normative Irishwoman as a wife capable of bearing and rearing a large family of children in the context of marriage is still encompassed in Article 41.2 of the Irish Constitution which states:
1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

⁵ Renu Mandhane, ‘Unfounded sexual assault cases: A human-rights issue’ *The Globe and Mail* (14 April 2017).

patriarchal norms.⁶ Fallacious and sexist myths obfuscate blatant gender imbalance and exclude the female perspective on rape, which is “drowned in a male chorus”.⁷ In a trial setting, jurors have a propensity to be influenced by prejudicial and erroneous attitudes and they will often be unduly sceptical of allegations which fall outside the stereotypical rape.⁸ McCullagh notes that jurors’ understandings of consent “may reflect and embody the range of sexual stereotypes of rape that exist in Irish society”.⁹

1. The Most Prevalent Rape Myths in Irish Society

Rape myths and stereotypes reflect society’s binary ideas of masculinity and femininity and our preoccupation with socio-sexual ‘scripts’. When internalised, these myths may justify sexual violence¹⁰ and lead to victim blaming, which in turn leads to underreporting.¹¹ These prejudices which permeate the minds of lawyers, jurors and even victims “impose harsh and unnecessary

⁶ Mamello Mosiana, ‘Rape Culture is a product of systemic and institutionalised patriarchy’ *Daily Maverick* (24 May 2017).

⁷ Caroline Fennell, ‘Criminal Law and the Criminal Justice System: Woman as Victim’ in Ailbhe Connolly, (ed), *Gender and the Law in Ireland* (Oak Tree Press 1993)151 at 169.

⁸ Susan Leahy ‘Bad Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction Rate for Rape in Ireland’ (2014) 14(1) *Irish Journal of Applied Social Studies* 3.

⁹ C McCullagh, *Crime in Ireland: a Socio- logical Introduction* (Cork University Press 1996) 107.

¹⁰ Kimberly A. Lonsway and Louise F. Fitzgerald, ‘Rape Myths: In Review’ (1994) 18 *Psychology of Women Quarterly* 133.

¹¹ NM Heath, SM Lynch, AM Fritch, & MM Wong, ‘Rape Myth Acceptance Impacts the Reporting of Rape to the Police: A Study of Incarcerated Women.’ (2013) 19(9) *Violence Against Women* 1065.

burdens on complainants in prosecutions of sexual offences.”¹² Sex-role paradigms embedded in Irish society question the sexual encounters of women who are perceived as passive, and sympathise with male perpetrators who are assigned the role of natural aggressor in a sexual context.¹³ The most prevalent of such paradigms are the ‘real rape’ stereotype and the myth of the ‘ideal victim’.

(i) Real Rape

The ‘real rape’ stereotype is perhaps the most pernicious myth which pervades contemporary sexual offences law. Estrich defines ‘real rape’ as “a sudden surprise attack by an unknown, often armed, sexual deviant” which “occurs in an isolated, but public, location [with] the victim sustain[ing] serious physical injury, either as a result of the violence of the perpetrator or as a consequence of her efforts to resist the attack”.¹⁴ This myth stems somewhat from the “etymological meaning of rape as a concept imbued with aspects of force and violence”.¹⁵ Rapes which do not adhere to the ‘violent stranger in a dark alley’ stereotype are less

¹² Claire L’Heureux-Dubé, ‘Still Punished for Being Female’ in *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (2012) University of Ottawa Press 1.

¹³ Katherine K Bake, ‘Sex, Rape, and Shame’, (1999) 79 Boston University Law Review 663.

¹⁴ Susan Estrich, *Real Rape: How the Legal System Victimizes Women Who Say No* (Harvard University Press 1987) 4.

¹⁵ Jack Farrell, ‘Vixens, Sirens and Whores: The Persistence of Stereotypes in Sexual Offence Law’ (2017) 20 Trinity C.L. Rev. 30, 36.

likely to be considered 'rape' in a trial setting.¹⁶ This reality is startling given that recent statistics gathered by the Rape Crisis Network suggest that 85% of rape perpetrators are known to their victims.¹⁷

Although Irish law provides that "failure or omission (...) to offer resistance to the act does not of itself constitute consent to the act",¹⁸ the potential for punishing non-violent encounters is utterly stymied by the expectation that a 'real rape' involves force and injury.¹⁹ Without resistance, a lack of consent will be much more difficult for the prosecution to prove at trial. Temkin and Krahé posit that "[t]here is probably no other criminal offence that is as intimately related to broader social attitudes and evaluations of the complainant's conduct as sexual assault."²⁰ Unfortunately, this resistance element of the real rape stereotype places the behaviour and reaction of the complainant under scrutiny, deflecting attention from the man's alleged misconduct.

(ii) Ideal Victim

¹⁶ Susan Leahy, 'Sexual Offences Law in Ireland: Countering Gendered Stereotypes in Adjudications of Consent in Rape Trials' in Lynsey Black and Peter Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform* (Hart Publishing 2019); *DPP v Farrell* ([2014] IECA 51) provides evidence of the fact that the court believes archetypal stranger rape is more deserving of severity.

¹⁷ Rape Crisis Midwest Network National Statistics 2015 <<https://www.rapecrisis.ie/statistics.html>>

¹⁸ S 9(5) of the Criminal Law (Sexual Offences) Act 2017.

¹⁹ Susan Leahy, 'No Means No, but Where's the Force: Addressing the Challenges of Formally Recognising Non-Violent Sexual Coercion as a Serious Criminal Offence' (2014) 78 J. Crim. L. 309.

²⁰ Temkin and Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008), at 33.

Larcombe notes that “[l]aw’s ‘ideal victim’ (...) is consistent, rational and self-disciplined; she rarely has a history of mental illness or sexual abuse, and she does not drink alcohol to excess or otherwise engage in ‘risky’ behaviour.”²¹ When a complainant falls outside the scope of the socially constructed ‘ideal victim’ caricature she is seen as contributorily responsible for her rape.²² She is seen as unreliable and unworthy of the victim label.²³ Her credibility is tarnished. There is a widely held belief that when women stray from the ideal victim stereotype and disregard “polite society’s rules”, men are justified in straying from the law.²⁴

Alcohol is a common feature in rape cases. Therefore, it is important to note that intoxication works against victims and in favour of defendants.²⁵ Here, the sexist nature of rape myths is revealed. A drunk victim will be blamed for her rape whereas a drunk rapist will seem less culpable in the eyes of the jury. A similar double standard exists with respect to physical attractiveness. The law is biased against the attractive victim and in

²¹ W Larcombe, ‘Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law’ (2011) 19 *Feminist Legal Studies* 27, 37.

²² Louise Ellison and Vanessa E Munro, ‘Of ‘normal sex’ and ‘real rape’: exploring the use of socio-sexual scripts in (mock) jury deliberation’ (2009) 18(3) *Social & Legal Studies*, 291.

²³ Leahy ‘Sexual Offences Law in Ireland’ (n 16).

²⁴ Bake (n 13) 683.

²⁵ Emily Finch and Vanessa E Munro, ‘Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: *The Findings of a Pilot Study*’ (2005) 45(1) *Brit J Crimnol* 25; An *Irish Examiner* study showed that 33 per cent of respondents felt that a woman who had consumed alcohol or taken illicit drugs is partially responsible if she is raped. Eight per cent thought that she is totally at fault. (Ryan, ‘Rape: Our Blame Culture’ *Irish Examiner* (Cork 26 March 2008)).

favour of the attractive defendant.²⁶ The real danger is that these myths are often used as guidelines for the perpetration of sexual aggression. They suggest that it's ok to rape women who dress a certain way or act a certain way.²⁷

Heavily linked to the 'ideal victim' stereotype is the insidious culture of victim blaming in Irish society. Estrich illustrates the common conception that "women who put themselves in compromising positions shouldn't complain when they are compromised."²⁸ Pineau explains the myth that by dressing sexily and engaging in provocative conduct, a woman forms a kind of contract for sexual activity which she is obliged to satisfy.²⁹ The idea that victims 'asked for it' is often attributed to the clothing that they wear. According to the SAVI report published in 2002, 29% of respondents agreed that women who dress provocatively invite rape.³⁰ The ideal victim does not dress sexily. She is not sexually promiscuous. Thus, the more provocative a victim is in her pre-

²⁶ Marsha B Jacobson and Paula M Popovich, 'Victim Attractiveness and Perceptions of Responsibility in an Ambiguous Rape Case' (1983) 8(1) *Psychology of Women Quarterly* 100.

²⁷ Kathryn M Ryan, 'The relationship between rape myths and sexual scripts: The social construction of rape' (2011) 65(11-12) *Sex Roles: A Journal of Research* 774.

²⁸ Susan Estrich, 'Palm Beach Stories' (1992) 11(1/2) *Law and Philosophy* 5, 10.

²⁹ Lois Pineau, "Date Rape: A Feminist Analysis", (1989) 8 *Law and Philosophy*, 217, 227.

³⁰ McGee et al, *The SAVI Report: Sexual Abuse and Victimization in Ireland* (Dublin, The Liffey Press, 2002) 158.

rape behaviour or dress, the more she is considered responsible for her assault.³¹

Controversially, defence counsel tactics can often encourage reliance on the damaging stereotypes illustrated above. In November 2018, a scandal shook the Irish nation and gained global attention.³² A female barrister in a rape trial involving a 17-year-old complainant told jurors to take note of the underwear the girl was wearing in adjudicating on the question of consent: “Does the evidence out rule the possibility that she was attracted to the defendant and was open to meeting someone and being with someone? You have to look at the way she was dressed. She was wearing a thong with a lace front”, she stated.³³ This incident served to highlight the sexualisation of women by our legal system and the extent to which rape myths play out and are exploited in a trial setting.

2. Procedural Barriers to Justice and Systemic Discrimination

Female rape victims are exposed to procedural practices at trial which endorse the rape myths discussed above. They are harassed about their sexual history and vigorously cross-examined, while the male accused is often placed under little scrutiny. Their evidence is served with corroboration warnings and their credibility placed under attack. Victims are subject to a systemic form of

³¹ DJ Schult and LJ Schneider, ‘Role of Sexual Provocativeness, Rape History, and Observer Gender in Perceptions of Blame in Sexual Assault’ (1991) 6(1) *Journal of Interpersonal Violence* 94; The SAVI report found that 29% of those surveyed believed sexy dressing invites rape.

³² Valeriya Safronova, ‘Lawyer in Rape Trial Links Thong with Consent, and Ireland Erupts’ *The New York Times* (New York 15 November 2018).

³³ Olivia Kelleher, ‘Rally against ‘victim blaming’ organised after thong claim in rape trial’ *The Irish Times* (Dublin 12 November 2018).

discrimination, one which deters them from reporting and proceeding to trial with the result being that the crime of rape goes largely unpunished.

(iii) Sexual History Evidence

S 13 of the Irish Criminal Law (Rape) (Amendment) Act 1990 provides that sexual history evidence can only be introduced with the permission of a judge. Despite this, a 2009 study revealed that in twenty-four out of thirty-five cases the victim was questioned about sexual behaviour and in thirteen of the thirty-five cases sexual history evidence was used.³⁴ The admissibility of sexual history evidence in rape trials has long been a contentious issue. Defendants will argue that exposing the sexual experience of the complainant affords them a fair trial.³⁵ On the contrary, complainants and legal feminists will argue that sexual history evidence presents ample opportunity to introduce and reinforce gender stereotypes and rape myths. MacKinnon suggests that allowing such evidence results in victims becoming “pornography in court”.³⁶

³⁴ Rape Crisis Network of Ireland, *Rape and Justice in Ireland: An Introduction and Executive Summary*, 2009. <http://www.rcni.ie/wp-content/uploads/Exec-Summary.pdf> (May 29, 2018).

³⁵ International Commission of Jurists (2015), *Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice*.

³⁶ Catherine A Mackinnon, ‘Reflections on Sex Equality Under Law’ (1991) 100(5) *Yale Law Journal* 1281.

The patriarchal view that if a woman has consented once she will do so again is deeply entrenched in our society.³⁷ A sexually experienced victim is perceived as the “type of person” who gets herself into rape situations.³⁸ In *R v Wagar*,³⁹ a Canadian case from 2015, the trial judge allowed the complainant’s past sexual history to be introduced to the jury whilst stating that her lack of sexual experience revealed that she “had the moral or physical strength to rebuff men if she felt like it”. The judge questioned her: “why didn't you just sink your bottom down into the basin so he couldn't penetrate you”? and “why couldn't you just keep your knees together”.⁴⁰ Even more disturbing is the fact that the judge mistakenly referred to the complainant as “the accused” throughout his judgment before eventually finding that her character was not credible enough to support her claim.

Such sexist ideologies and prejudices also exist in the Irish context. In *DPP v GK*,⁴¹ evidence came forward late in the trial that the complainant, aged thirteen at the time of the alleged assault, had had sex with other boys her age before. Counsel for the accused suggested that such evidence could explain “why the complainant might have made a false allegation.” The court accepted this argument and described her previous sexual experiences as “inappropriate”. The complainant’s credibility was indelibly tarnished. Leahy claims that, “[t]he double standard whereby a male accused's sexual history is left unexplored, while

³⁷ In the English case of *R v A (no. 2)* the House of Lords criticised “the assumption too often made in the past that a woman who has had sex with one man is more likely to consent to sex with other men.” [2001] UKHL 25.

³⁸ Schult and Schneider (n 31).

³⁹ [2015] ABCA 327.

⁴⁰ *ibid* [59 – 61].

⁴¹ [2006] IECCA 99.

the female complainant's sexual past is liable to being picked apart in minute detail under rigorous cross-examination is obviously wholly unacceptable from a feminist perspective.”⁴² The defendant's right to a fair trial should not invariably trump the complainant's right to dignity and respect.

(iv) Corroboration Warnings and Cross-Examination

Frug posits that “one of the most significant problems of women in law is their lack of credibility”.⁴³ Despite the level of false allegations of rape in Ireland estimated to be around 6%,⁴⁴ the SAVI report found that 40% of those interviewed believe accusations of rape are often false.⁴⁵ A pervasive distrust of women perpetuates this myth of false allegations and is what justifies the special corroboration rules which apply in rape cases. A corroboration warning alerts the jury that it is dangerous to convict on the basis of the uncorroborated evidence of the complainant.⁴⁶ Though once mandatory, S 7 of the Criminal Law (Rape) (Amendment) Act 1990 affords discretion to the trial judge in deciding whether or not a warning is required. As Leahy points out,

⁴² Susan Leahy, ‘In a Woman's Voice – A Feminist Analysis of Irish Rape Law’ (2008) 26 Irish Law Times 203, 210.

⁴³ Mary Joe Frug, ‘A Postmodern Feminist Legal Manifesto (An Unfinished Draft)’ (1992) 105(5) Harvard Law Review 1045, 1047.

⁴⁴ Heather D Flowe, Ebbe B Ebbeson, and Anila Putcha-Bhagavatula, ‘Rape Shield Laws and Sexual Behaviour Evidence: Effects of Consent Level and Women's Sexual History on Rape Allegations,’ (2007) 31 Law and Human Behaviour 159, 172.

⁴⁵ McGee et al, *The SAVI Report: Sexual Abuse and Victimization in Ireland* (Dublin, The Liffey Press, 2002).

⁴⁶ Leahy ‘In a Woman's Voice’ (n 42).

however, “since the evidence in many rape cases often boils down to the complainant's word against the accused's, it is likely that trial judges in many cases may feel obliged to give the warning.”⁴⁷

Corroboration warnings certainly act as a barrier to reporting for victims. Women are viewed as deceitful and their stories dubious. An antiquated scepticism is encouraged. For victims, the fear of not being believed is petrifying. Boeschen claims that in rape trials, “the veracity of the victim’s allegations is often on trial at the same time as the defendant’s culpability”.⁴⁸ Particularly in an adversarial system such as that that exists in Ireland, the victim is often reduced to the status of a mere witness.⁴⁹ Coughlin describes courts’ tendency to “represent rapists' victims as the perpetrators of their own victimization.” She argues that law enforcement officials have produced a system for prosecuting rape that “operate[s], in effect, to put the victim-not the attacker-on trial.”⁵⁰ Such systemic discrimination and evidentiary hostility deters many women from bringing rape complaints.

It is rare, particularly in Ireland, for defendants to take the stand and since the presumption of innocence forces the jury to begin the trial believing that the complainant is lying about her non-consent, she is immediately at a disadvantage. It is the victim alone that is submitted to ruthless cross-examination and forced to recount the often traumatic and triggering experience of her assault. In the harsh and austere courtroom environment, trained lawyer’s will inevitably find inconsistencies in a victim’s testimony which

⁴⁷ *ibid.*

⁴⁸ L Boeschen, B Sales and M Koss ‘Rape Trauma Experts in the Courtroom’, (1998) 4 *Psychology Public Policy and Law* 414.

⁴⁹ Ciara Molloy, ‘The Failure of Feminism? Rape Law Reform in the Republic of Ireland 1980-2017’ (2018) 36(4) *Law and History Review* November 689, 702.

⁵⁰ Anne M Coughlin, ‘Sex and Guilt’ (1998) 84(1) *Virginia Law Review* 1, 14.

serve to diminish her credibility and ultimately, humiliate her. Victims are forced to justify why their attack wasn't okay. They are forced to relive their assault in excruciating detail.

II. Ireland's New Statutory Definition of Consent and Honest Belief

Having demonstrated the extent to which rape myths, gender stereotypes and procedural barriers affect adjudications of consent in rape trials, we must now address the substantive law on consent in Ireland. Coughlin believes in the instrumental property of sexual offences law and its ability to subvert the male domination of female sexuality.⁵¹ Recent legislative reform in Ireland has prompted this subversion. The new statutory definition of consent respects the sexual autonomy and integrity of women in its promotion of the female voice. Despite this development however, a great obstacle to the removal of the gender stereotypes and rape myths elucidated above remains - the honest belief defence.

Before discussing the current legislative framework and its flaws in detail, it is important to clearly outline the offence of rape under section 2 of the 1981 Act and its constituent elements. Section 2 rape is composed of both a physical element (the *actus reus*) and a mental element (the *mens rea*). The *actus reus* requires both sexual intercourse and an absence of consent on the part of the complainant. The *mens rea* can be either knowledge of a lack of consent or recklessness as to the woman's lack of consent. The question of consent is therefore inherently linked to both elements of the rape offence and as such, it is worth examining the new statutory definition in greater detail.

⁵¹ *ibid* 18.

1. Statutory Definition of Consent

Section 9(1) of the Criminal Law (Rape) (Amendment) Act 1990, as inserted by section 48 of the Criminal Law (Sexual Offences) Act 2017, provides that “[a] person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.” Section 9(2) of the 1990 Act, also inserted by s48 of the 2017 Act, goes on to list eight specific circumstances wherein consent will automatically be absent. Notably, one such circumstance is if the complainant is unconscious or intoxicated to the point that she is unable to consent.⁵² This section alleviates the burden placed on the prosecution when the facts of a given case align with one of the enumerated paradigms. Moreover, many of the circumstances outlined directly address and dispel the rape myths discussed above. In general, s48 results in both symbolic and practical benefits. The provision provides clear guidance to jurors when deliberating on the question of consent and is unambiguous in its construction and promotion of voluntariness.

(i) More than Codification

The 2017 Act introduced the first ever legislative definition of consent in Irish law. Before its enactment, the courts relied on common law formulations of consent, most of which were flawed. In its recent *Report on Knowledge or Belief Concerning Consent in Rape Law*, the Law Reform Commission stated that s9(1) of the 1990 Act, as inserted by s48 of the 2017 Act “clearly involves a codification of the existing law as to what constitutes consent.”⁵³ Yet, it is submitted that this legislative development was more than a mere codification. The pre-2017 definition most regularly relied on was that set out by Murray J in *DPP v C* who characterised

⁵² Pursuant to s 9(3) of the 1990 Act, the list itself is non-exhaustive therefore affording the opportunity for judicial expansion.

⁵³ *ibid* (n 1) [2.15].

consent as “voluntary agreement or acquiescence to sexual intercourse”.⁵⁴ While a reference to voluntariness is also reflected in s9(1) of the 1990 Act, Murray J’s insistence that acquiescence can constitute consent is problematic. It suggests that passivity may indicate consent, therefore reinforcing the stereotype that women ought to be submissive in their sexual encounters.

The question of acquiescence was disregarded by the Supreme Court in the more recent case of *The People (DPP) v CO’R*. The Court defined consent as “the active communication through words or physical gestures that the woman agrees with or actively seeks sexual intercourse.”⁵⁵ Evidently, this definition lacks any explicit reference to voluntary agreement. Although the requirement of “active communication” is positive, not least in a literal sense, the Law Reform Commission’s suggestion that the new statutory definition is merely a codification and in no sense a reform of the law is misplaced. The statutory definition cements voluntariness as the cornerstone of consent and clarifies that any last remnants of the male-centric, traditional common law definition have no place in Irish law.

(ii) Communicative Sexuality

Rather than looking for an absence of consent, the new statutory definition requires *proof* of consent. The focus is on identifying elements of freedom, choice and capacity, instead of searching for signs of non-consent and factors that vitiate apparent consent (e.g. force, fraud, incapacity).⁵⁶ Therefore, this new definition introduces the concept of communicative sexuality,

⁵⁴ [2001] 3 IR 345, 360.

⁵⁵ [2016] IESC 64 [42].

⁵⁶ Leahy ‘Sexual Offences Law in Ireland’ (n 16).

originally developed by Pineau,⁵⁷ into Irish law.⁵⁸ According to Leahy, the introduction of a definition premised on communicative sexuality “can serve a normative purpose and contribute to counteracting stereotypes by sending a positive message about what constitutes appropriate socio-sexual behaviour.”⁵⁹

Communicative sexuality encourages a contextual and holistic approach to the adjudication of the presence or absence of consent. Whereas traditionally, the common law effectively created a presumption of consent, this new, normative definition promotes the autonomy of both parties and the importance of genuine sexual choice. In encouraging jurors to look for signs of free agreement rather than evidence of male proposition, the provision necessarily aids in the removal of gender stereotypes from the law and the introduction of a female voice. Some argue that this approach continues to place the complainant at the centre of judicial scrutiny.⁶⁰ However, Lacey claims that the value of a definition which incorporates communicative sexuality arises from its ability to induce an examination of the complainant’s behaviour in a broad context whilst predominantly scrutinising the behaviour of the

⁵⁷ L Pineau, ‘Date Rape: a Feminist Analysis’ (1989) 8 *Law and Philosophy* 217.

⁵⁸ Similarly, S 74 of the Sexual Offences Act 2003 introduced communicative sexuality into English law.

⁵⁹ Susan Leahy, ‘Reform of Irish Rape Law: The Need for a Legislative Definition of Consent’ (2014) 43(3) *Common Law World Review* 231.

⁶⁰ Emily Finch; Vanessa E. Munro, ‘Breaking Boundaries - Sexual Consent in the Jury Room’ (2006) 26 *Legal Stud.* 303; As the Canadian Supreme Court found, the belief that women have the burden of actively showing non-consent rather than that men have the responsibility to ascertain consent, “denies women’s sexual autonomy and implies that women are walking around this country in a state of constant consent to sexual activity.” (*R. v. Ewanchuk* [1999] 1 S.C.R. 330, 372 (Supreme Court of Canada)).

defendant.⁶¹ It is this promotion of mutuality in sexual encounters which reduces reliance on harmful myths and stereotypes.

Taking this communication theory somewhat further, Bake advocates for a contractual approach to consent. She argues that contract law's concern with whether it is reasonable to assume the parties have manifested assent should also be the concern of rape law.⁶² Some have gone as far as to take this contractual approach literally. A Swedish lawyer developed an app which provides a digital signature for those engaging in voluntary sexual relations.⁶³ Similarly, in March of last year, Irish newspapers published articles concerning the proposed development of a 'consent app' by medical students in University College Dublin who cited the "ever growing fear of men to be sued post intercourse due to consent not being recorded/denied/retracted" and "the life destroying legal ramifications that follow" as motivation for the app's development.⁶⁴ If anything, this served to highlight that despite our new law on consent, misogyny and distrust of women are rife in Irish society.

⁶¹ N Lacey 'Beset by boundaries: the Home Office review of sexual offences' [2001] Criminal Law Review 3, 12.

⁶² Bake (n 13) 689.

⁶³ Stefan Wahlberg, *Nu kan du signera digitalt innan du har sex – advokaten har tagit fram en samtyckesapp* [Now You Can Sign Digitally Before You Have Sex – Lawyer Produces Consent Application], DAGENS JURIDIK (26 June 2018).

⁶⁴ Eleanor O'Mahony, 'UCD Apologises, After Student Seeks Help With App to Prevent Men Being Sued 'Post-Intercourse'' *The University Times* (Dublin 12 March 2019).

2. The Honest Belief Defence

Section 2(2) of the Criminal Law (Rape) Act 1981 sets out the current subjective construction of the honest belief defence in Irish law:

“It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.”

This subjective formulation derives from the English case of *R v Morgan*,⁶⁵ wherein the House of Lords held that when a man genuinely believes that a woman is consenting, no rape occurs. The press at the time dubbed this precedent a ‘rapist’s charter’.⁶⁶ Some argued that “it did not matter what the victim said or did, however violated she was, there was no crime of rape.”⁶⁷ The subjective test was recently reaffirmed in this jurisdiction in *DPP v CO’R*.⁶⁸ The Supreme Court emphasised that it is “what the individual accused actually believed” that is relevant.⁶⁹ The fact thus remains that a wholly unreasonable and mistaken belief in

⁶⁵ [1975] UKHL 3.

⁶⁶ J Temkin, ‘Sexual History Evidence—Beware the Backlash’ (2003) Crim L.R. 217.

⁶⁷ Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences* (Vol. 1, July 2000), para.2.2.5.

⁶⁸ *ibid* (n 55).

⁶⁹ *ibid* [51].

consent may result in an acquittal. The Court in *CO'R* did however stress that the accused's belief "must be genuinely held"⁷⁰ and that jurors are under no obligation to believe "an obviously false story".⁷¹ Yet it is doubtful whether these cautions have tempered the dangers of the subjective standard in practice.

(i) **Issues with the Current Subjective Formulation**

Feminist scholars have long been critical of the subjective construction of the honest belief defence. Lees argues that the defence "explicitly denies a woman's 'no' if a man reads it as consent"⁷² and O'Malley is of the view that the subjective test "places a premium on ignorance, lack of consideration, and insensitivity".⁷³ The defence operates to undermine the message of affirmative consent, communicative sexuality and mutuality promoted by the new statutory definition of consent. The suggestion that a unilateral and often unreasonable interpretation of a woman's willingness to engage in intercourse is permissible, "perpetuates disrespect for women's sexual autonomy".⁷⁴ In 2000 the English Home Office reviewed the subjective defence and concluded that "[i]t is seen to validate male assumptions that they can assume consent without asking."⁷⁵

⁷⁰ *ibid.*

⁷¹ *ibid* (n 55) [57].

⁷² Lees, *Carnal Knowledge: Rape on Trial* (2nd edn London: Women's Press Ltd 2002).

⁷³ Thomas O'Malley, *Sexual Offences* (2nd edn Dublin: Round Hall 2013) 61.

⁷⁴ *ibid* (n 1) [2.77].

⁷⁵ Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences Volume 1* (2000), at 23.

Rafferty explains that “[t]he male interpretation of consent ignores the true experience of women and instead looks to an experience of women as constructed by men”.⁷⁶ Similarly, MacKinnon suggests that “while the injury of rape lies in the meaning of the act to its victims, the standard for its criminality lies in the meaning of that same act to the accused.”⁷⁷ Thus, female experiences of sexual violence are subordinated to the experiences of men. In its Issues Paper on *Knowledge or Belief Concerning Consent in Rape Law*, the Law Reform Commission suggested that “it is arguable that the defence may even encourage men not to engage in affirmative consent” because “[a]s soon as a man enquires about consent, he may no longer rely on his honest belief in consent premised on the woman’s passivity”.⁷⁸

Another issue with the current formulation of the honest belief defence in Irish law is that it encourages reliance on harmful stereotypes and legitimises and perpetuates sexist myths. A common reaction to rape is that the complainant will freeze out of fear and it has been highlighted that in cases where such a situation arises, the accused could argue that he interpreted this silence as consent.⁷⁹ In *DPP v TV*, counsel for the defence instructed the jury that in considering the appellant’s claim of honest belief they should have regard to the fact that the woman involved did not resist: “She did not cry out or say anything to the appellant, and nor did she physically resist him although it felt like it lasted for a long

⁷⁶ Brónach Rafferty, ‘Rape: Struggling with the Force of Perception – Part I’ (2017) 35(13) *Irish Law Times* 171.

⁷⁷ Catherine A MacKinnon, ‘Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence’, (1983) 8(4) *Signs* 635, 652.

⁷⁸ Law Reform Commission, Issues Paper: *Knowledge or Belief Concerning Consent in Rape Law* (2018).

⁷⁹ Leahy and Fitzgerald O’Reilly, *Sexual Offending in Ireland* (Clarus Press 2017), at 39.

time”.⁸⁰ Failure to express non-consent may therefore justify an honest belief.⁸¹

Furthermore, the defence presents ample opportunity to introduce sexual experience evidence.⁸² The accused can argue that his awareness of the complainant’s previous sexual encounters with him or other men led him to believe that she would willingly engage in consensual intercourse with him. Consent is presumed. The Law Reform Commission concluded in its Report that the honest belief defence as set out in s2(2) of the 1981 Act “bolsters and legitimises sexist stereotypes which lead to attitudes and perceptions that blame the complainant”.⁸³ By allowing the accused to avail of these stereotypes in their defence at trial, the law is “entrenching sexist ideologies” with the knock-on effect of deterring women from reporting their rapes.⁸⁴

(ii) The Need for Reform

It is now widely regarded that the issues with the subjective formulation of the honest belief defence need to be legislatively addressed. In light of these issues and the move away from subjectivity as a standard in most other common law

⁸⁰ *DPP v TV* [2016] IECA 370 [30].

⁸¹ O'Malley (n 73) 37.

⁸² Jennifer Temkin, “Rape and Criminal Justice at the Millennium”, in Donald Nicolson & Lois Bibbings (eds), *Feminist Perspectives on Criminal Law* (Cavendish Publishing, 2000) 183, 198.

⁸³ *ibid* (n 1) [2.78]

⁸⁴ Murray, “The Mens Rea of Rape in Ireland; Legal, Moral and Social Consequences” (2017) 27(1) *Irish Criminal Law Journal* 2, 8.

jurisdictions,⁸⁵ it follows that s2(2) of the 1981 Act ought to be reformed. The Law Reform Commission's *Report on Knowledge or Belief Concerning Consent in Rape Law* concluded that "the arguments against the current law greatly outweigh the arguments for retaining the present honest belief defence."⁸⁶ The Commission advocates for a "mixed test with an objective starting point and some subjective elements".⁸⁷ There are three distinct aspects of this mixed test. The first aspect is concerned with the *mens rea* element of the rape offence under s2 of the 1981 Act. In addition to knowledge of or recklessness as to a lack of consent, the Commission recommend that rape is committed if the man "does not reasonably believe" that the woman is consenting at the time of sexual intercourse.⁸⁸ This addition forms the core objective element of the test for honest belief outlined in the Report – any belief as to consent must be a reasonable belief.

The second aspect of the test set out by the Commission requires that in assessing the reasonableness of a belief in consent, the jury ought to acknowledge "any steps taken by the accused man to ascertain whether the woman consented to the intercourse."⁸⁹ It is important to note that if implemented by the Legislature, this recommendation would not place a positive obligation on defendants to take steps to ascertain consent, rather, if steps *are* taken they will be considered by the jury. Therefore, "a failure to take steps will not, of itself, mean that the accused is guilty of

⁸⁵ In particular, England and Wales, Northern Ireland, Scotland and New Zealand.

⁸⁶ *ibid* (n 1) [2.86]

⁸⁷ *ibid* [3.36].

⁸⁸ *ibid* 4.

⁸⁹ *ibid*.

rape.”⁹⁰ Yet just as the steps taken by the accused will be considered, a failure to take steps will also be noted. Because the steps taken require verbal or physical communication, it is not possible to rely on a woman’s passivity. This approach promotes the notion of communicative sexuality and reinforces the need for mutuality imposed by the new statutory definition of consent. This second element of the test is subjective in nature and is a feature in the legal framework of most common law jurisdictions that take a reasonable belief approach.

The third aspect of the test is also subjective in that the jury is entitled to consider a specific list of circumstances when assessing the reasonableness of the accused’s belief in consent. The circumstances outlined by the Commission are “any physical, mental or intellectual disability of the man, any mental illness of his, and his age and maturity”⁹¹, all of which are conditions over which the accused has no control. This element of the test therefore makes provision for defendants who fall short of the ‘reasonable man’ standard, respecting the accused’s right to a fair trial under Article 38.1 of the Constitution. In discussing this triad of circumstances, the Commission provides a comparative perspective of the law in England. Although the UK Parliament enacted a predominantly objective test under s1(2) of the Sexual Offences Act 2003, the accused is judged from the standpoint of what the reasonable man would have believed, taking into account “*all* the circumstances”.⁹²

⁹⁰ *ibid* [3.102].

⁹¹ *ibid* 4.

⁹² Northern Irish law equally provides that an offence is committed where, consent to the physical act being absent, “A does not reasonably believe that B consents”; Sexual Offences (Northern Ireland) Order 2008 S.I. 1769/2008 (N.I.2.), S 5.

The issue with examining “all the circumstances” is that it is an extremely vague requirement. Withey warns that such a wide, undefined condition could result in a judge directing “the jury on the relevant circumstances based on stereotypical notions.”⁹³ Finch and Munro found that jurors often interpreted the phrase extremely broadly, importing imagery of the ideal victim and scrutinising the complainant’s behaviour.⁹⁴ They warned that although jurors may not personally endorse socio-sexual myths and stereotypes, they may consider that the defendant harboured such prejudices and therefore import them into their analysis of the reasonableness of his belief.⁹⁵ The Law Reform Commission acknowledged these flaws and argued that introducing a reference to “all the circumstances” in an Irish context “could risk eroding the primarily objective standard being proposed by reintroducing a substantial subjective element.”⁹⁶

Conclusion

MacKinnon famously states that “[l]aw, structurally, adopts the male point of view”.⁹⁷ While Ireland’s new statutory definition of consent respects the female voice in its promotion of communicative sexuality, the subjective formulation of the honest

⁹³ Withey, ‘Female Rape—An Ongoing Concern: Strategies for Improving Reporting and Conviction Levels’ (2007) 71 *Journal of Criminal Law* 54, 79.

⁹⁴ Finch and Munro (n 60).

⁹⁵ *ibid* 318.

⁹⁶ *ibid* (n 1) [3.53].

⁹⁷ Catherine MacKinnon, *Toward a Feminist Theory of the State*, 12. *Sex Equality: On Difference and Dominance*, Harvard University Press, Sept 1989.

belief defence continues to support and endorse the male accused's perspective. In bolstering this male perspective, the law contributes to the perpetuation of the rape myths and gender stereotypes discussed in Part I of this paper. Acknowledging the dangers that such prejudicial characterisations of rape pose, the recommendations set out in the Law Reform Commission's *Report on Knowledge or Belief Concerning Consent in Rape Law* promote a positive, communication based approach to consent. In order to dispel misconceived attitudes surrounding rape and rape victims, the Oireachtas ought to implement the Commission's recommendations in full and without delay. The need for legislative action is exceedingly apparent.

Bibliography

- Bake KK, 'Sex, Rape, and Shame', (1999) 79 Boston University Law Review 663.
- Beatley M, 'The shocking rape trial that galvanised Spain's feminists – and the far right' *The Guardian* (London 23 April 2019).
- Black L and Dunne P, 'Conclusions and Analysis', in (eds) Lynsey Black and Peter Dunne *Law and Gender in Modern Ireland: Critique and Reform* (Hart Publishing 2019).
- Boesch L, Sales B and Koss M 'Rape Trauma Experts in the Courtroom', (1998) 4 Psychology Public Policy and Law 414.
- Coughlin AM, 'Sex and Guilt' (1998) 84(1) Virginia Law Review 1.
- Dworkin A, *Right-Wing Women* (1983).
- Ellison L and Munro VE, 'Of 'normal sex' and 'real rape': exploring the use of socio-sexual scripts in (mock) jury deliberation' (2009) 18(3) Social & Legal Studies, 291.
- Estrich S, 'Palm Beach Stories' (1992) 11(1/2) Law and Philosophy 5.
- Estrich S, *Real Rape: How the Legal System Victimized Women Who Say No* (Harvard University Press 1987)
- Farrell J, 'Vixens, Sirens and Whores: The Persistence of Stereotypes in Sexual Offence Law' (2017) 20 Trinity C.L. Rev. 30.
- Fennell C, 'Criminal Law and the Criminal Justice System: Woman as Victim' in Ailbhe Connolly, (ed), *Gender and the Law in Ireland* (Oak Tree Press 1993).
- Finch E and Munro VE, 'Breaking Boundaries - Sexual Consent in the Jury Room' (2006) 26 Legal Stud. 303.
- Finch E and Munro VE, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: *The Findings of a Pilot Study*' (2005) 45(1) Brit J Crimnol 25.
- Flowe HD, Ebbeson EB, and Putcha-Bhagavatula A, 'Rape Shield Laws and Sexual Behaviour Evidence: Effects of Consent Level and Women's Sexual History on Rape Allegations,' (2007) 31 Law and Human Behaviour 159, 172;
- Frug MJ, 'A Postmodern Feminist Legal Manifesto (An Unfinished Draft)' (1992) 105(5) Harvard Law Review 1045.
- Gallen J, 'Redressing Gendered Mistreatment Magdalene Laundries, Symphysiotomy and Mother and Baby Homes' in Lynsey Black and Peter Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform* (Hart Publishing 2019).
- Hale M, *The History of Pleas of the Crown* (1778).

Hanly C *et al.*, *Rape & Justice in Ireland: a National Study of Survivor, Prosecutor and Court Responses to Rape* (The Liffey Press: Dublin, 2009).

Heath NM, Lynch SM, Fritch AM, & Wong MM, 'Rape Myth Acceptance Impacts the Reporting of Rape to the Police: A Study of Incarcerated Women.' (2013) 19(9) *Violence Against Women* 1065.

International Commission of Jurists (2015), *Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice*.

Jacobson MB and Paula MP, 'Victim Attractiveness and Perceptions of Responsibility in an Ambiguous Rape Case' (1983) 8(1) *Psychology of Women Quarterly* 100.

Larcombe W, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 *Feminist Legal Studies* 27.

Law Reform Commission, Issues Paper: *Knowledge or Belief Concerning Consent in Rape Law* (2018).

Leahy S 'Bad Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction Rate for Rape in Ireland' (2014) 14(1) *Irish Journal of Applied Social Studies* 3.

Leahy S, 'In a Woman's Voice – A Feminist Analysis of Irish Rape Law' (2008) 26 *Irish Law Times* 203.

Leahy S, 'No Means No, but Where's the Force: Addressing the Challenges of Formally Recognising Non-Violent Sexual Coercion as a Serious Criminal Offence' (2014) 78 *J. Crim. L.* 309.

Leahy S, 'Reform of Irish Rape Law: The Need for a Legislative Definition of Consent' (2014) 43(3) *Common Law World Review* 231.

Leahy S, 'Sexual Offences Law in Ireland: Countering Gendered Stereotypes in Adjudications of Consent in Rape Trials' in Lynsey Black and Peter Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform* (Hart Publishing 2019).

Leahy and Fitzgerald O'Reilly, *Sexual Offending in Ireland* (Clarus Press 2017).

Lees, *Carnal Knowledge: Rape on Trial* (2nd edn London: Women's Press Ltd 2002).

L'Heureux-Dubé C, 'Still Punished for Being Female' in *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (2012) University of Ottawa Press 1.

Lonsway KA and Fitzgerald LF, 'Rape Myths: In Review' (1994) 18 *Psychology of Women Quarterly* 133.

- MacKinnon CA, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence', (1983) 8(4) *Signs* 635.
- Mackinnon CA, 'Reflections on Sex Equality Under Law' (1991) 100(5) *Yale Law Journal* 1281.
- Mandhane R, 'Unfounded sexual assault cases: A human-rights issue' *The Globe and Mail* (14 April 2017).
- McCullagh C, *Crime in Ireland: a Socio- logical Introduction* (Cork University Press 1996).
- McGee, *The SAVI Report: Sexual Abuse and Victimisation in Ireland* (Dublin, The Liffey Press, 2002).
- McKay S, 'How the 'rugby rape trial' divided Ireland' *The Guardian* (London, 4 December 2018).
- Molloy C, 'The Failure of Feminism? Rape Law Reform in the Republic of Ireland 1980-2017' (2018) 36(4) *Law and History Review* November 689.
- Mosiana M, 'Rape Culture is a product of systemic and institutionalised patriarchy' *Daily Maverick* (24 May 2017).
- Murray A, 'The Mens Rea of Rape in Ireland: Legal, Moral and Social Consequences' (2017) 27(1) *Irish Criminal Law Journal* 2.
- O'Mahony E, 'UCD Apologises, After Student Seeks Help With App to Prevent Men Being Sued 'Post-Intercourse'' *The University Times* (Dublin 12 March 2019).
- O'Malley T, *Sexual Offences* (2nd edn Dublin: Round Hall 2013).
- O'Sullivan E and O'Donnell I, *Coercive Confinement in Post-Independence Ireland* (Manchester University Press).
- Pineau L, "Date Rape: A Feminist Analysis", (1989) 8 *Law and Philosophy*, 217.
- Prochuk A, *Women's Experiences of the Barriers to Reporting Sexual Assault* (West Coat Leaf November 2018).
- Rafferty B, 'Rape: Struggling with the Force of Perception – Part I' (2017) 35(13) *Irish Law Times* 171.
- Ryan KM, 'The relationship between rape myths and sexual scripts: The social construction of rape' (2011) 65(11-12) *Sex Roles: A Journal of Research* 774.
- Ryan, 'Rape: Our Blame Culture' *Irish Examiner* (Cork 26 March 2008).
- Safronova V, 'Lawyer in Rape Trial Links Thong with Consent, and Ireland Erupts' *The New York Times* (New York 15 November 2018).
- Schult DJ and Schneider LJ, 'Role of Sexual Provocativeness, Rape History, and Observer Gender in Perceptions of Blame in Sexual Assault' (1991) 6(1) *Journal of Interpersonal Violence* 94.

Temkin J, "Rape and Criminal Justice at the Millennium", in Donald Nicolson & Lois Bibbings (eds), *Feminist Perspectives on Criminal Law* (Cavendish Publishing, 2000) 183.

Temkin J, 'Sexual History Evidence—Beware the Backlash' (2003) *Crim L.R.* 217.

Withey, 'Female Rape—An Ongoing Concern: Strategies for Improving Reporting and Conviction Levels' (2007) 71 *Journal of Criminal Law* 54.