EXPLORING RAPE CONVICTION RATES: CONSENT, FALSE ALLEGATIONS AND LEGAL OBSTACLES

Abstract: In Ireland, the conviction rate for reports of rape involving female victims is extremely low. This article addresses such low conviction rates relating to the crime of rape and attempts to understand the issues surrounding it. Analysing society's view of women in the history of the development of the prosecution of rape, the disproportionate attention false allegations receive and setting out the obstacles faced when prosecuting rape are used as the basis for setting out potential practical solutions.

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Introduction

Sexual offences constitute a very particular type of crime and one that has attracted a broad range of academic commentary.[1] Throughout the history of this offence there has existed a tension between the desire to vindicate the rights of victims, and the fear that false accusations provoke. This conflict may be reduced, at its simplest, to a barely palatable example of Blackstone's ratio, 'it is better that ten guilty persons escape than that one innocent suffer'.[2] While this prioritisation of innocence is admirable, and indeed so essential as to have been judicially entrenched in the Irish constitution,[3] given the particularity of the nature of sexual offences and more specifically rape, it has perhaps prompted some perverse results: in 2019, crime figures from the UK showed that as few as 1.5% of reports of rape resulted in a charge or a summons;[4] in statistics obtained from the Central Criminal Court in 2009, only 8% of reports of rape resulted in a conviction;[5] and more recently, statistics from the Central Statistics Office confirm that this figure was around 11% in 2018.[6] In terms of complaints that reach trial and are prosecuted, statistics obtained from the Central Criminal Court show that year on year, the chance of achieving a conviction once a rape case reaches

[1] See generally Susan Leahy, 'When honest is not good enough: the need for reform of the honest belief defence in Irish rape law' (2013) 23 ICLJ 102; Susan Leahy, 'In a woman's voice: a feminist analysis of Irish rape law' [2008] ILT 203; Brónach Rafferty, 'Rape: Struggling with the forces of perception – Part 1 and 2' (2017) 35(13) ILT 171; Aisling Murray, 'The Mens Rea of Rape in Ireland: Legal, Moral and Social Consequences'(2017) 27(1) ICLJ 2; Law Reform Commission, *Report on Sexual Offences and Capacity to Consent* (LRC 109-2013); O'Malley, 'The New Law on Sexual Offences' [2017] 27(3) ICLJ 78; Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law* (LRC 122-2019); Yvonne Marie Daly, 'Knowledge or belief concerning consent in rape law: recommendations for change in Ireland' (2020) 6 Crim LR 478.

[2] Sir William Blackstone, *Commentaries on Laws of England* (19th edn, W.E. Dean 1841) 289.

[3] Article 38 of the Constitution; *Hardy v Ireland* [1994] 2 IR 550; *O'Leary v Attorney General* [1995] 1IR 454.

[4]Owen Bowcott and Caelainn Barr, 'Just 1.5% of all rape cases lead to charge or summons, data reveals' *The Guardian* (26 July 2019) <https://www.theguardian.com/law/2019/jul/26/rape-cases-charge-summons-prosecutions-victims-england-wales> accessed 14 July 2020.

[5] Mary-Louise Corr and others, 'Country Briefing: Ireland' (Child & Woman Abuse Studies Unit 2009) <https://cwasu.org/wp-content/uploads/2016/07/ireland.pdf>accessed 11 August 2020.

[6] 'Recorded Crime Detection 2018' (Central Statistics Office) <https://www.cso.ie/en/releasesandpublications/ep/p-rcd/recordedcrimedetection2018/#:~:text=Introduction,must%20be%20identified%20and%20sanctioned.> accessed 14 August 2020.

court remains consistently below 50%.[7] Arguably, there is something awry here (at least to a sufficient extent as to warrant further examination); in no other offence as serious as rape are conviction rates as low.[8] As such, it is the intention of this article to ask what drives such an apparently skewed set of outcomes and what, if anything, might rebalance the outcome.

To this end, the first task at hand is to place the law on rape in context. At this point, it must be noted that this article will focus exclusively on rape involving female victims. While men can be, and indeed are victims of rape and sexual assault, when contextualising this crime, its gendered history and origins are important; much of the analysis provided flows from this fact. Moreover, while sexual offences involving male victims has garnered increased academic attention,[9] this article, with its focus on tracking the history of and law surrounding the crime of rape more generally, is not the place for such a discussion. That being said however, much of the analysis provided is applicable to the situation of male victims, particularly in relation to the legal peculiarities of the crime and suggested solutions.

As such in providing context, the particularity of rape as an offence will be examined first in relation to it being inextricably tied to society's understanding of women, and second, as to the perceived ease by which false accusations can be made. These two distinguishing features will be explored so as to fully understand the uniqueness of the offence. The legal results that have manifested due to these particularities will then be examined. Such results include attaching corroboration warnings to the evidence of complaints, evidence of 'hue and cry,' the control of ordinary relevance as the criterion for the admission of evidence of sexual experience, and questions relating to consent. These are presented as key legal obstacles specific to prosecuting rape and will be discussed broadly so as to obtain a holistic overview. Finally, potential solutions are not beyond rational analysis and this will be posited.

Rape, society and women

It is impossible to properly contextualise and understand the crime of rape without first confronting that it is an offence traditionally understood as being committed against a woman by a man.[10] As has been mentioned earlier, this is not to exclude the experience of male victims of sexual offences from the discussion,[11] but merely to highlight that a distinguishing feature of the crime is that the victim is traditionally considered female.[12] In no other offence are the biological characteristics of the victim as prescribed. Understanding legal rules particular to the offence is therefore inextricably tied to a broader understanding of the place of women in society.

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[7] Statistics were obtained in January 2020 from David McLoughlin, registrar in the Central Criminal Court.
[8] In 2018, the conviction rate for murder (including attempted murder) and manslaughter was 60%. The conviction rate for rape was 46%. In the Scottish context see Sharon Cowan, 'Sense and Sensibilities: a feminist critique of legal interventions against sexual violence' (2019) 23 Edinburgh Law Review 22, 28.
[9] See generally Philip NS Rumney, 'Policing male rape and sexual assault' (2008) 72(1) J Crim L 67; Philip NS Rumeny, 'Male rape in the courtroom: issues and concerns' 2001 Crim LR 205; Siobhan Weare, 'Oh you're a guy, how could you be raped by a woman, that makes no sense: towards a case for legally recognising and labelling "forced to penetrate" cases as rape' (2018) 14(1) Int JLC 110.
[10] 'Recorded Crimes Victims 2019' (Central Statistics Office) set out that 88.6% of victims of sexual violence of recorded crimes in 2019 were female. <https://www.cso.ie/en/releasesandpublications/ep/p-rcvo/recordedcrimevictims2019andsuspectedoffenders2018/recordedvictims2019/> accessed 11 July 2020.
[11] See generally Nicola Gooch, 'The feminisation of the male rape victim'(2005) 12 UCL Juris Rev 196-213.
[12] See David M Doyle, '"The guilty sexual predator" and the "innocent comely maiden". Gender, paternalism and the pregnancy fact' (2011) 21(2) ICLJ 36-40 for an account of how the law on rape has traditionally centred around the protection of young girls.

Feminist theories highlight that there are many roles or archetypes within society that women may assume: the virgin, the wife, the mother, the concubine, the crone.[13] Each position is valued and conceived differently. The virgin, for example, carries with it a certain mysticism,[14] one that is both desired and exalted, and is as such worth protecting. Woman as wife is a role that carries with it a sense of passivity, characterised by a sense of being owned, yet still valued with the woman fulfilling her domestic and reproductive role.[15] As the anthesis, a courtesan is the woman to whom man has no obligation to respect.[16] The filth associated with her is what upholds the social position of the wife, and it is her promiscuity that is the foil to the virtue of the virgin.

The influence of such social values has naturally permeated the development of the law on rape since its conception. Consider from the outset the argument that legal ideas of what constitutes genuine rape stem from an understanding of an uncorrupted and sexually innocent victim who is unwittingly and violently overcome by a predatorial man.[17] This ideal victim is the type of woman that the law has deemed most worthy of its protection, or alternatively least likely to deceive in relation to sexual crimes. What can be noticed in the following historical examples is first, that the moral culpability of the crime of rape, or indeed whether the act is a crime at all, has depended on the personal attributes of the victim, and second that the law on rape is structured in such a way as to attach credibility to situations which fit snuggly into its understanding of rape as a violent and unsuspected attack on innocent, virginal victim.

This 'ideal' scenario is one which can even be seen in the nomenclature of rape under Roman Law: *raptus* meaning to carry a woman away by force.[18] Rape was understood as a form of theft committed against the man who owned the woman in question.[19] Here is the *fons* of many of the problems: as the victim of rape was the man possessing the woman involved, as father or slave owner or husband, the woman's role in the offence came down to her social value or the extent to which the violation of her, adversely affected a man. Within the generation of law premised on such ideas, the offence of rape developed to protect the most valuable form of property involved or, in other words, the type of woman deemed socially to be most worthy of protection. Therefore, far from legal thought at this time were questions of consent or the complexity of sexual relationships, and instead what motivated the formation of the law was this damsel-attacker conception of the crime.

This idea is also evident under ancient Irish Law where much of the focus was on the victim herself. A married woman who went to an ale house alone could not ordinarily be the victim of rape as 'it was wrong for her to be in the ale house without her husband to protect her'.[20] Promiscuous or adulterous women, such as an unreformed prostitute or a married woman who agreed to meet another man, could not get redress if they were raped. The amount of redress that would be awarded also depended on the characteristics of the women. For example, a concubine was given half the redress that a girl of marriageable age, a chief's wife

[13] For a boarder discussion on this see Simone de Beauvoir, *The Second Sex* (Translated by Constance Borde and Sheila Malovany-Chevallier, Vintage Books 2011).
[14] ibid 470.
[15] ibid 452.
[16] ibid 613.
[17] Jack Farrell, 'Vixens, Sirens and Whores: The Persistence of Stereotypes in Sexual Offence Law' (2017) 20 TCL Rev 32, 43.
[18] David Missirian and Marianne Kulow, 'Defenseless against rape: outdated laws and a proposed legal solution' (2019) 28 American University Journal of Gender, Social Policy & the Law 1, 6.
[19] ibid.
[20] Fergus Kelly, *A Guide to Early Irish Law* (Dublin Institute for Advanced Studies 1988) 135.

or a nun would receive. This is a clear way of understanding how women were valued at the time. And women worthy of redress would only be believed if they acted in a certain way; if assaulted in town, as opposed to in the wilderness, a woman was legally obliged to call for help. This sense of distrust continued through other social arrangements, and consequently points to the male attitude that underlay the parameters of the crime. In 13th century England, if a woman bore a child consequent of rape she would not have been believed and there would be no charge as it was thought that to conceive, a woman needed to secrete a certain seed that only occurred if she was sexually satisfied.[21] Furthermore, if a woman brought forward a claim of rape, she often needed male corroboration.[22] These ideas prevailed into and solidified in the 16th century, in Sir Matthew Hale's influential Pleas of the Crown, where emphasis was placed on the attributes of the victim: if a woman was of ' good fame', by virtue of her sexual history, or lack thereof, and had made early 'hue and cry', claiming forthwith rather than keeping the matter private, she might be more trusted.[23] It is worth noting that much of Lord Hale's perspective was informed by his judicial experience of accusations where a rape could not have occurred; one case in particular concerned a man whose sexual parts were so distorted by a hernia that the jury, on examining him privately, declared that he could not perform.[24] So, it could be said that from one inguinal hernia came the parameters of the law's approach. What continues to prevail is the fear of women as false witnesses; the fear that she uses the attribute of physical desirability as a weapon against mankind.

The point being made is that while criminal law seeks to objectively pursue the truth, in the case of rape, this desire for objectivity of proof, while noble, is nonetheless unsustainable because the protection of woman, in terms of physical separateness and integrity, as opposed to perceived virtue, is undermined. Whether it be a view that to rape a women is to damage the property of her clan and therefore the extent of that damage depends on the women herself, as it was in ancient Ireland, or the peril that women could not be trusted with making such a serious accusation as rape, as was viewed by Lord Hale, the law on rape should be viewed in the context of a cumulation of complex issues of gender and social ideals relating to women. The impact of this culmination has manifested itself in both the structural hurdles and the institutionalised values which may continue to be detected in the law on rape.[25] Furthermore, the ingrained relationship between rape and society's understanding of women distinguishes the crime from other branches of criminal law.

False Allegations

The second means of distinguishing rape from other crimes is the perceived ease and common-placeness of false allegations. This perception has both influenced the definitional development, and the enforcement of rape, ostensibly justifying many of the specific rules relating to the offence.[26]And while the prevalence of false allegations diverts attention away from genuine victims and may discourage complainants from reporting,[27] they represent

[21] Shulamth Shahar, *The Fourth Estate: A History of Women in the Middle Ages* (2nd edn, Routledge 2003).
[22] Missirian and Kulow (n 18) 8.
[23] Sir Matthew Hale, *The History of the Pleas of the Crown* (Nutt and Gosling 1736) 633.
[24] ibid 636.
[25] Farrell (n 17) 32.
[26] Philip NS Rumney, 'Flase allegations of rape' (2006) 65(1) CLJ 128.
[27] ibid 130.

potential miscarriages of justice with obvious and immediate implications for an innocent person.[28]

From the outset, it is important to note that when referring to false allegations what is meant are situations where the complainant describes an event they know has never actually occurred; this is distinct from situations where there is insufficient evidence, or situations where there was a genuine but mistaken belief that a rape had occurred, such as if the complaint believed there had been a genuine incident due to intoxication, but on medical examination there had been no sexual contact.[29] False allegations therefore imply either a degree of maliciousness or genuine mistake.[30] The following example may be illuminating. In *The People (DPP) v Feichín Hannon*, the Court of Criminal Appeal awarded damages to the accused, who had been wrongly convicted on charges of assault and sexual assault in 1997. The surrounding events took place in Cleggan, County Galway. The ten-year-old complainant had alleged, in some detail, a collection of most serious crimes against the accused. After the case was completed and the accused sentenced, the complainant emigrated to the USA. Nine years after the alleged incident, the complainant arrived back from America, as an adult. On arriving back to Ireland, she retracted her statement, saying that she had made it up because of a family feud with the accused. However, statistics show that false allegations such as this are relatively low with 4% of cases reported in the United Kingdom being found, or suspected to be, false.[31]

There are a number of international examples which also flesh out falsity and extreme peril to an innocent person through maliciously untrue allegations of violation. In 2014, Carl Beech sparked a multi-million pound police investigation when he made a series of serious allegations concerning a supposed VIP paedophile ring involving UK public figures such as Sir Edward Heath and Lord Bramall. While the police initially deemed Beech to be a credible source, all his allegations were inevitably found to be entirely fanciful, despite having already attracted widespread media coverage.[32] In 2020, following a high-profile trial, George Pell was acquitted of five counts of sexually abusing two 13-year-old choirboys in the 1960s in the context of liturgical duties as a Roman Catholic hierarch.[33] The High Court of Australia, applying the test of residual doubt possible on appeal in that jurisdiction, found that 'making full allowance for the advantages enjoyed by the jury', there remained a 'significant possibility' that the alleged assaults had not taken place.[34] Recently, a young British woman was convicted in Cyprus for having 'falsely' alleged that several Israeli soldiers had raped her. She had retracted her complaint after having been held, it is alleged, by police for 8 hours and

[28] Vanessa Higgins, 'Rape: fresh evidence - evidence of complainant making numerous false complaints – effect on credibility' (2008) 5 Criminal Law Review 394, 395.
[29] Rumney (n 26) 130.
[30] It is worth noting however that statistics have shown that instances of false allegations are relatively uncommon with 4% of cases reported in the United Kingdom being found, or suspected to be, false. See David Lisak, Lori Gardinier, Sarah C Nicks and Ashley M Cote, 'False allegation of sexual assault: an analysis of 10 years of reported cases' (2010) 16(12) Violence Against Women; Lisa Lazard, 'Here's the truth about false accusations of sexual violence' *Irish Examiner* (28th September 2018); 'Debunking rape myths: Overview Resource' (Dublin Rape Crisis Centre, 1 July 2020) <https://www.drcc.ie/news-resources/resources/drcc-resource-debunking-rape-myths-2020/> accessed 22 October 2020.
[31] David Lisak, Lori Gardinier, Sarah C Nicks and Ashley M Cote, 'False allegation of sexual assault: an analysis of 10 years of reported cases' Violence Against Women 16 (12) 2010; Lisa Lazard 'Here's the truth about false accusations of sexual violence' *Irish Examiner* (28th September 2018).
[32] 'Carl Beech: "VIP abuse" accuser jailed for 18 years' (BBC, 26 July 2019). <https://www.bbc.com/news/uk-49130670> accessed 5 August 2020.
[33] [2019] VCC 260.
[34] [2020] HCA 12, [127].

pressured into withdrawing her allegations.[35] Each of these factual scenarios raise different issues that arise in cases involving allegations of rape. The first could be considered an exemplar of the ability of one individual to make manifestly untrue statements with far reaching consequences. The second, if one considers, as the High Court did, the accused to have been unlikely to have been involved in the alleged conduct, is an example of a media frenzy capable of carrying a prosecution away from the realms of common sense.[36] If one still posits, purely as a hypothesis, that the accused may have played a part in what was alleged, this case highlights the difficultly in prosecuting historic cases of child abuse and the quickness, in the sense of singling out only cases where an objective doubt may linger, at which not meeting the request legal standard may result in complaints in being considered entirely false. The third example also goes to this point and exemplifies the pressure complainants may face and the adverse legal, social and psychological consequences they may suffer if their allegation seems likely to fail at trial.

What then can be drawn more generally from this? It can rationally be said that false allegations of rape often attract a disproportionate level of public attention and discussion. Acquittals, however, most certainly do not: defamation laws militate against the simplistic equation that acquittal, because a jury has found there is a doubt, equals objective innocence. Thus, genuine victims whose cases go wrong in court are also effectively silenced. From a feminist perspective, one could argue that this occurs as reports of false rape allegations play into the mainstream male narrative or traditional viewpoint, like the one once expressed by Lord Hale, that rape is 'an accusation easily to be made and hard to be proved and harder to be defended by the party accused'.[37] At a lower level of abstraction, it is perhaps easier to argue that a false allegation of any crime makes a good news story because it is dramatic and almost cinematic. The unfortunate reality is that in relation to serious crimes, false allegations are most likely to occur in sexual offences as the physical effect or manifestation of the crime endured by the victim is typically invisible. Consider that in a murder investigation, it is impossible that the body in the mortuary will suddenly be resurrected and run to the police to inform them that the event being investigated was entirely fictitious, or that a victim of a gruesome beating, having been medically examined, could inform the police that they had not actually been injured at all.[38] In rape allegations, however unlikely, this remains a possibility and the result of this possibility manifests in certain ways which will be examined in Part III.[39]

Before moving on, it remains necessary to make a brief point in relation to media coverage and false allegations. In a landscape in which the way news stories are reported and engaged with is evolving, it is important at the outset to highlight the potential value that social media *et cetera* can have in relation to sexual assault.[40] However, modern means of reporting can be

[35] Lizzy Ioannidou and Iliana Magra, 'British Woman Who Accused Israelis of Rape in Cyprus Is Spared Prison' (New York Times, 7 January 2020) <https://www.nytimes.com/2020/01/07/world/europe/cyprus-uk-rape.html> accessed 5 August 2020.

[36] Melissa Davey, 'Defending George Pell: "I believe Pell's a good man"' (The Guardian, 3 August 2020) <https://www.theguardian.com/australia-news/2020/aug/04/defending-george-pell-i-believe-pells-a-good-man> accessed 5 August 2020.

[37] Sir Matthew Hale (n 23) 635.

[38] Note that what is being said here is not that the actus reus could not be in dispute. It is still possible in both of those examples to find that the accused did not commit an action that attracted criminal liability. More so it is being asserted that it would be essentially impossible to argue that the crime had not occurred in the first place.

[39] See (n 29).

[40] The 'MeToo' movement is arguably an example of this. See Rozina Sini, 'How 'MeToo' is exposing the scale of sexual abuse' (BBC, 16 October 2018) <https://www.bbc.com/news/blogs-trending-41633857> accessed 11 August 2020. For the perspective on the other side see Karlyn Borysenko, 'The Dark Side of

incredibly socially divisive. Indeed, this is not new; the she-said-he-said nature of rape and sexual assault lends itself to this type of social discourse. A pre-social media example of this in the Irish context occurred in 1997 when Ms V, an Irish woman, accused three off-duty Irish soldiers of rape in Cyprus, but after lengthy questioning, retracted her complaint and was rewarded with four months' imprisonment for lying to the authorities. The public debate which ensued in the Irish Times bore many similarities, in terms of substantive argument, to that which surrounded the "rugby rape trial".[41] This of course was the highly publicised Belfast rape trial of three prominent Irish rugby players who were acquitted by the jury in 2018.[42] Those in favour of the victim were horrified at the sexual attitudes displayed in the private social media conversations of the accused and at the lengthy and gruelling judicial process endured by the complainant. Those in favour of the sportsmen were outraged that the case got to trial in the first place and felt that the level of publicity the accused received was unfair in comparison to the anonymity of the complainant. Many of these issues have been brought up before but arguably the intensity of the social division that is now being fostered stems from the fact that many of these debates are now manifesting themselves in public, inflammatory and mob-mentality twitter spats. This is good for neither side and has been the subject of entire books.[43] In the context of this article, the issue of the polarised nature of public opinion is raised for two reasons: first, in the context of false allegations, those who are 'pro-victim' are probably more likely now to readily accept an accusation of rape, risking adverse effects for the accused, and those who are 'pro-accused' are more likely to dismiss allegations as being fabricated, bringing down adverse consequences on to all genuine victims. There is a continued absence here of reasoned objectivity. Second, before delving into a discussion of what the law has done in response to the issues raised in attempts to prosecute rape and what the law could do (the focus of Part IV), it is useful to understand the social context in which decision makers would have to make such changes.

Obstacles

It is apt to note that there is of course difficulty in prosecuting any crime: evidence must be adduced, witnesses examined, and the building blocks of the prosecution's case carefully positioned so as to convince a jury beyond a reasonable doubt of the accused's guilt. However, the statistics relating to prosecuting rape and the particularities of the crime,

#MeToo: What Happens When Men Are Falsely Accused' (Forbes, 12 February 2020) <https://www.forbes.com/sites/karlynborysenko/2020/02/12/the-dark-side-of-metoo-what-happens-when-men-are-falsely-accused/#4b9702b6864d> accessed 11 August 2020.

[41] See Michael Jansen, 'Irish woman jailed in Cyprus for false rape complaint' (Irish Times, 9 August 1997); Michael Jansen, 'Sister of woman jailed in Cyprus says she is confused and terrified' (Irish Times, 12 August 1997); 'Sharp division of opinion on sentence in Cyprus rape case' (Irish Times, 16 August 1997).

[42] See Conor Gallagher, 'Inside Court 12: the complete story of the Belfast rape trial' (Irish Times, 28 March 2018) <https://www.irishtimes.com/news/crime-and-law/inside-court-12-the-complete-story-of-the-belfast-rape-trial-1.3443620> accessed 5 August 2020; Susan McKay, 'How the "rugby rape trial" divided Ireland' (The Guardian, 4 December 2018) <https://www.theguardian.com/news/2018/dec/04/rugby-rape-trial-ireland-belfast-case> accessed 5 August 2018.

[43] An idea laid out in Sarah Schulman, *Conflict is not Abuse: Overstating Harm, Community Responsibility and the Duty of Repair* (Arsenal Pulp Press 2016). Valeriya Safronova, 'Lawyer in Rape Trial Links Thong With Consent, and Ireland Erupts' (New York Times, 15 November 2018) <https://www.nytimes.com/2018/11/15/world/europe/ireland-underwear-rape-case-protest.html> accessed 22 October 2020, provides an account of how substantial the public outcry over issues concerning rape trials can be. The incident in question concerned the admittance of the complaint's underwear as evidence at trial. This was considered particularly alarming, as it was argued to play into more traditional ideas that a woman's underwear can reveal a level of promiscuity that somehow lessens her accusation.

highlight the acute issues facing prosecutors and victims in this context. At the outset, it must be noted that this challenge is multifaceted: there are specific issues in relation to the reporting of rape,[44] and more broadly, in relation to society's perception of the women, as delineated above. The task for those objectively analysing unnecessary barriers to valid convictions remains to focus squarely on the legal problems surrounding the crime. As such, it is intended that a general overview of such barriers will presently be provided.

First, one striking and unique legal issue in prosecuting rape is the discretion of the trial judge to attach a warning to the uncorroborated evidence of the victim.[45] Prior to the Criminal Law (Rape) (Amendment) Act 1990, the trial judge had to warn the jury 'in unmistakable terms' of the dangers in convicting the accused on the uncorroborated testimony of the complainant.[46] Since whether or not corroboration was to be found was a matter for the jury, in practice every retiring jury has had this form of warning tingling in their ears; no matter how clear it was to the judge that the evidence supported that of the prosecution. This requirement arose out of historical context and is more than likely largely linked to the influential views of Lord Hale, himself probably reflective of wider and exclusively male judicial mores. Indeed, it is hard not to see that attitude of immediate suspicion as not being borne out of ideas that genuine rape occurs when an 'innocent' girl is aggressively overpowered by her attacker: if a person was really raped she would have screamed, called for help and attracted attention; she would have struggled desperately and would have been left with marks on her body; there would be corroboration. As such, it could conceivably be argued that the warning serves to undermine the complex power dynamics at play in sexual offences,[47] the varied reactions such a traumatic assault is capable of invoking in the victim,[48] and the inescapable fact that most sexual activity occurs in private.[49] The mandatory requirement that a warning must always be given was removed by s 7 of the 1990 Act, which set out that a warning could be given at the discretion of the trial judge 'having regard to all the evidence given'. Yet, the warning has continued to play a role.[50] In *The People (DPP) v Molloy* for example, the Court of Appeal stated that it was 'prudent practice' for the trial judge to provide the jury with a warning.[51] In subsequent discussions of the warning, appellate courts have reemphasised that it is no longer the case that a warning must be provided and the decision to provide a warning must be based on the evidence.[52] The corroboration warning therefore remains an alive, albeit curtailed, yet dangerously uncertain aspect of rape trials. Its application is to be determined on a case by case basis. Hence, its mere existence raises many of the same concerns, at least in theory, that the mandatory warning carried with it. It is unclear why victims of sexual offences should be treated any differently to victims of

[44] See generally Carol Withey, 'Female rape – an ongoing concern: strategies for improving reporting and conviction levels' (2007) 71(1) Journal of Criminal Law 54.
[45] The Criminal Law (Rape) (Amendment) Act 1990, s 7.
[46] per Maguire CJ in *The People (AG) v Cradden* [1955] IR 130, 141. See also Paul A. O'Connor, 'The Mandatory Warning Requirement in Respect of Complaints in Sexual Cases in Irish Law' (1985) 20 Ir Jur 43.
[47] See *B v DPP* [1997] 3 IR 140 for a discussed of the exercise of dominion in cases concerning child sexual abuse, lasting even after childhood.
[48] For example, in the case of *R v Olugboja* [1982] QB 320 one victim did not struggle, cry for help or offer any resistance as the accused raped her. This was found not to constitute consent particularly in light of the circumstances.
[49] Aya Gruber, 'Corroboration is not required' (The Hill 10 March 2018) <https://thehill.com/opinion/judiciary/409635-corroboration-is-not-required> accessed 17 August 2020.
[50] For use of the warning see *The People (DPP) v PJ* [2003] 3 IR 550 and *The People (DPP) v Gentleman* [2003] 4 IR 22.
[51] [1995] 7 JIC 2801, [30]. See also *The People (DPP) v Reid* [1993] 2 IR 186, 197 for statements on the continued relevance of the warning.
[52] *The People (DPP) v Jem* [2001] 4 IR 385; *The People (DPP) v C* [2001] 3 IR 345.

other crimes, and the potential injustices such a warning may provoke is self-evident, prompting serious questions as to the necessity of the warning in the first place.

Second, there are specific rules surrounding the timing of a victim's complaint. If a victim of a sexual offence reports the incident or merely tells someone about it at the first reasonable opportunity, and this report is not evoked by pressurised questioning, this can serve as evidence of consistency of the victim's testimony.[53] This rule operates as a necessary and exceptional inroad into the rule against self-corroboration. It finds its origin in medieval times when a victim was expected to give 'hue and cry' at the first opportunity so as to allow her community to observe the 'torn garments of the ravished woman.'[54] This rule, perhaps obviously, has at least the capacity to serve the interests of the victim; for a crime that usually occurs in private and is often impossible to corroborate, it is useful that there is a means by which the victim can point to something to support the consistency of her version of events. Critics of the rule, however, point out that equating consistency with swift complaint fails to fully take account of the myriad of factors which might cause a victim of a sexual offence to delay revealing an act of violence.[55] Victims may feel overwhelmed by feelings of humiliation, shame or shock; they may be fearful of being disbelieved; or they may experience immediate or delayed trauma which causes them to suppress any reminder of the event.[56] The point being that while delayed complaints are not definitively reliable, delay in complaining does not objectively prohibit them from being reliable. In relieving such concerns, the burden rests on trial judges in deciding whether evidence of consistency should go to the jury by the application of the legal test of 'first opportunity after the offence which reasonably presents itself' not having been elicited 'by questions of a leading and inducing or intimidating character' to determine whether the complaint was made voluntarily and as soon as reasonably possible.[57] In the Irish context, the application of this test has varied. For example, in *The People (DPP) v Brophy*,[58] despite the complaint having been made a matter of hours after the alleged event, it was not admitted. In *The People (DPP) v Kiernan*,[59] while the court acknowledged that it was reasonable that the victim had waited to complain to her boyfriend instead of her family as her boyfriend's brother was a social worker and could have offered assistance, evidence of consistency was not admitted as she had not told her boyfriend at first opportunity. In *The People (DPP) v Roughan*,[60] the fact that the victim had not told her husband that her sister's partner had raped her until the next day on their way home did not affect the admissibility of the evidence of the complaint as, because the victim's husband had a known explosive temper and because the pair had been staying with her sister and her partner, the complaint was deemed to have been made at the first reasonable opportunity. Reasonableness is clearly then not simply a matter of time but also of opportunity and in assessing reasonableness of opportunity, it is suggested that the diverse reactions rape can provoke in victims should inform compassionate legal reasoning. While the idea of 'hue and

[53] *The People (DPP) v Brophy* [1992] ILRM 709 [37]-[42]. See also *R v Lillyman* [1896] 2 QB 167 and *R v Osborne* [1905] 1 KB 551 for an understanding of the origin of the offence.
[54] Brian Foley, 'The Doctrine of Recent Complaint Revisited" (2001) 11(3) ICLJ 20.
[55] Una Ní Raifeartaigh, 'The Doctrine of Fresh Complaint in Sexual Cases' (1994) 12 Irish Law Times 160, 162; Foley (n 54).
[56] This is of course not an exhaustive list. See generally Burgess and Holmstrom, 'Rape Trauma Syndrome' (1974) 131 American Journal of Psychiatry 981; for a practical example see the Scottish case *Donegan v HM Advocate* [2019] HCJAC 10 [51].
[57] [1905] 1 KB 551, 561.
[58] [1992] ILRM 709. Note that there were other issues at play here, in particular inconsistencies in the victim's version of events.
[59] [1994] 3 JIC 1101.
[60] [1997] 6 JIC 2301. The circumstances of the case being described by Barrington J as 'rather extraordinary', [8].

cry' came from what some may see as ancient wisdom, it is necessary that our understanding of what constitutes 'hue and cry' be in line with modern understandings of the experience of victims.

A third legal particularity in the prosecution of rape concerns the determination of relevance, something which occurs at every criminal trial, but which has a specific impact on sexual offences: the question of admissibility of the complainant's sexual experience evidence. The issue of relevance at a criminal trial was recently examined by the Supreme Court in *The People (DPP) v Almasi*:[61]

> Facts are relevant because of their relationship with facts in issue and assume importance in terms of weight as the jury assesses the facts. Central to any issue of relevance is to ask what case is being made and whether ordinary sense and reason renders a fact disputed as to relevancy more likely in consequence of being considered as part of the overall body of evidence. Such an analysis can also result in a fact being considered more unlikely if it is part of the building blocks of the prosecution case or the defence case to disprove a disputed fact.[62]

The test then is whether the evidence renders an important fact more or less likely.[63] In relation to sexual offences, evidence relating to sexual experience was historically deemed to be relevant as (a) a victim was considered more likely to have consented by reason of her previous sexual activity and (b) the victim was considered to be a less credible witness as to not consenting if she had an extensive sexual history.[64] As such, the use of sexual experience evidence has been subject to wide critique and in the context of this discussion, its use could be argued to unconsciously point to the ideal type of women that the law has traditionally sought to protect. This is not to say that this type of evidence can never be relevant. As a matter of simple logic, variably dependent on facts as presented, relevance depends on issues in the case and it is foreseeable, at least in theory, that there could be a case where, for example, the nature of the alleged sexual misconduct is so specific and niche, and relates so closely to the sexual experience of the prosecutrix, that it should be admitted. Of course, this does not mean that prior consent to an act or a type of sexual activity renders future consent automatic, but in the unlikely circumstances where the particularities of a previous event so closely align with the particularities of an event in question, the evidence could be relevant. Arguably, rules surrounding the admissibility of this type of evidence evolved in a time prior to ideas of female sexual autonomy or during a time when a promiscuous woman was not considered worthy of respect. However, as the normalisation of sexual freedom increases, one could assert that so too does the bar required to render evidence of sexual experience relevant. Hence, the more normalised having non-monogamous sex becomes, the more specific or niche evidence of sexual history would need to be in order to be considered relevant.

As the law stands, legislation sets out that evidence of sexual experience will not be admitted unless the trial judge is satisfied that 'it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked' or, in other words, that in the absence of such evidence 'the jury might reasonably be satisfied beyond reasonable doubt

[61] [2020] IESC 35 [23]-[29].
[62] ibid [24].
[63] See *CM v HM Advocate (No 2)* [2013] HCJAC 22, [28]; James Fitzjames Stephen, *Digest of the Law of Evidence* (12th edn, Macmillan 1948) art 1.
[64] Gerard Murphy, 'The Admissibility of Sexual Experience Evidence in Ireland' (2006) 16(4) ICLJ 15; *R v Seaboyer*, McLachlin J (1991) 83 DLR (4th) 258; CM (n 63) [12].

that the accused person is guilty' and if the evidence was admitted they might not be so satisfied.[65] On examination of the case law, commentators have noted that under the legislative scheme 'anything can be made to appear relevant to anything',[66] and some have expressed concerns at the increased frequency sexual experience evidence is sought to be admitted and is admitted, even in cases where consent is not at issue.[67] Arguably these criticisms come down to the potential relevance of sexual experience evidence being understood too broadly. A narrower understanding of what could reasonably affect the determination of guilt could alleviate some of these issues. Of note therefore is the approach taken in Scotland, where the relevance of evidence pertaining to collateral issues, including evidence of sexual experience and of previously made allegations of sexual abuse, is interpreted strictly.[68] The question of relevance is considered one of degree and requires an inquiry as to 'whether [the evidence has] a reasonably direct bearing on the subject under investigation.'[69] This type of collateral evidence does not generally render a fact at trial more or less probable but can only, at most, have an indirect impact on a matter at issue. The logic being that the advantage that could be gotten from the evidence, given its indirect nature, is outweighed by its distraction from the issues of the case or the confusion it might provoke in the jury.[70] The Scottish courts have also emphasised that this is not simply a question of doing justice in an individual case but also of protecting witnesses, who should not be reasonably expected to defend themselves against personal attack.[71] While based on a different legislative scheme, an understanding of relevance which focuses squarely on the facts contested at trial could be useful in the Irish context.

Last, legal issues surrounding the *mens rea* requirement in rape warrant discussion, particularly as this requirement is central to the issue of consent. From the outset, it must be noted that with the increased use of DNA evidence reducing focus at trial on the *actus reus*, the issue of consent and by extension the *mens rea* of the accused, has now become the focal point of almost every case.[72] Of course this relates closely to the nature of the crime itself: privacy and consent being characteristic of the act. Historically, the mental requirement for rape was knowledge, meaning that a man had to actually be aware of the fact that the woman was not consenting.[73] The necessity that a convicted person realise that the victim was not consenting stems from the purpose of criminal law being inextricably tied to moral blameworthiness.[74] This link is evident in the House of Lords decision in *DPP v Morgan*,[75] where it was decided that if a man genuinely believed that a woman was consenting, that belief, no matter how unreasonable, entitled them to an acquittal. While *Morgan* has been hotly debated given the fact that it concerned a member of the Royal Air Force who told his colleagues that his wife liked 'rough sex' so they could ignore her objections during a gang rape, the House of Lords

[65] Criminal Law (Rape) Act 1981, s 3(2)(b).
[66] Peter Charleton and Stephen Byrne, 'Sexual Violence: Witness and Suspects, A Debating Document' (2010) 1 IJLS 1, 69; see also Sarah Bryan O'Sullivan, 'Sexual Experience Evidence – The Continued Search for a Balance Approach' (2018) 28(1) ICLJ 2, 5.
[67] Ivana Bacik, Ciara Hanley, Jane Murphy and Aoife O'Driscoll, 'Separate Legal Representation in Rape Trials' (Rape Law - Victims on Trial, Dublin Rape Crisis Centre and the Law School Trinity College Conference, Dublin Castle, January 2010).
[68] *CM* (n 63) [31]; *McDonald v HM Advocate* [2020] HCJA 21.
[69] *CM* (n 63) [28].
[70] ibid [31].
[71] ibid [32].
[72] Charleton and McDermott, *Criminal Law* (Bloomsbury 1999) [8.105].
[73] John F. Archbold, *Pleading, Evidence and Practice in Criminal Cases* (26th edn, Romme and Ross 1922) 119-20/448.
[74] Charleton and McDermott (n 72) [1.02].
[75] [1976] AC 182.

did find that, in light of the evidence adduced at trial, no person could have reasonably held that belief,[76] and, as Smith and Hogan have stated, there is little empirical evidence of successful *Morgan* defences.[77] Even still, that in practice may not be the point. Juries do not benefit from being confused by obtuse legal reasoning far removed from human reality. Following *Morgan*, the mental element for rape was put on a statutory footing,[78] and in Ireland this is governed by s 2 of the Criminal Law (Rape) Act 1981:

> (1)A man commits rape if—
> (a)he has sexual intercourse with a woman who at the time of the intercourse does not consent to it, and
> (b)at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it, and references to rape in this Act and any other enactment shall be construed accordingly.
> (2)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 inter-course, 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.

S 2 does not represent a chasmic shift in the law: the mental element is primarily subjective; a man will be guilty of rape if he knew or was reckless to the absence of consent, and if there was a mistaken belief as to consent, the reasonableness of this belief is to be assessed by the jury.[79] This *mens rea* requirement was, however, recently focused on by Charleton J in *The People (DPP) v O'R,*[80] in such a way as to bring factual analysis back onto a common sense basis: in short, the reasoning being that sexual activity is communication. In its judgment, the Supreme Court tightens much of the law relating to consent. Notably, it was stated that consent is the 'active communication' that the woman agrees to sexual intercourse, and that such communication is to be understood 'in the normal sphere of relations between men and women' as information that is exchanged between both parties.[81] Against this backdrop, and with recklessness defined as 'the taking of a serious and unjustified risk', to have sex with someone on the basis that they might have been consenting is rape.[82] In other words, it is to enter the realm of recklessness for the accused not to communicate and proceed notwithstanding his doubting the presence of consent. Furthermore, while a mistaken belief as to consent will result in acquittal, the jury should be instructed that they are not 'under any obligation to believe an obviously false story.'[83] These statements are both sensible and provide the kind of leadership a court of final appeal is there to give. The link between moral culpability and the subjective nature of the *mens rea* for rape has been subject to criticism;[84] cases devolve to an issue of he-said-she-said, and in the absence of other evidence (evidence which could succumb to the legal rules above), faced with a subjective standard of *mens rea*, it is diminishingly likely that adequate proof of guilt will be established. Despite this, sane judicial analysis such as that of the Supreme Court, could prove useful ammunition in assessing the reasonableness of the accused's asserted, but perhaps untenable, point of view.

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[76] ibid 235.
[77] David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th edn, OUP 2018) 790.
[78] And following the recommendations of the The Heilbron Committee, Report of the Advisory Group on the Law of Rape (1975) Cmnd 6352.
[79] Murray (n 1) 3.
[80] [2016] IESC 64.
[81] ibid [36].
[82] ibid [47].
[83] ibid [53].
[84] Murray (n 1); Rafferty (n 1).

Furthermore, it provides support for the obvious but hitherto unstated proposition that to fail to seek communication of consent is to act recklessly as to its absence.

Solutions

The problems in prosecuting rape are clearly multifaceted. There are difficulties relating to the reporting of rape and sociological issues which this paper would not be properly positioned to address. An article detailing the Rape Crisis Network's proposed non-legal, legislative and procedural solutions for example,[85] gives an indication of the sheer breadth and depth of reform that could be argued for, as does the working group chaired by Tom O'Malley's report on the investigation and prosecution of sexual offences.[86] It is intended therefore, that practical legal solutions will presently be explored.

The obstacles discussed above all involve an element of trial judge assessment so individual as to be capable of being described as discretion: the decision to give a corroboration warning; the decision to admit evidence of 'hue and cry'; the decision to admit sexual experience evidence; and the way *mens rea* is explained to the jury in the trial judge's charge. All of these decisions have an impact. Therefore, what is needed is clear, unifying and up-to-date thought on how such decisions should be made. To that end, it is firstly suggested that trial judges should exercise sparingly their discretion in issuing a corroboration warning and that the absence of such a warning should not be appealable. It is argued that the existence of the warning misunderstands the secluded setting most sexual violence occurs in. Its use should be isolated to extreme cases where, for example, there is tangible evidence to show that the prosecutrix is unreliable, there is evidence of a substantial grudge towards the defendant, or there is evidence of a relevant previous malicious or vexatious complaint. Furthermore, should a warning be given, it should never be put in terms that 'it is dangerous to convict if the jury do not find corroboration', redolent of unjustifiable male suspicion of women, but rather that 'it *may* be dangerous'. Second, it is submitted that evidence of 'hue and cry' should be admitted even if it is not given at the first reasonable opportunity, if a reasonable explanation can be given as to the delay. Allowing for reasonable excuse would facilitate the adaption of the law to the myriad of reactions rape can provoke in victims and this may relax the court's traditionally 'restrictive approach' to this type of evidence.[87] In assessing the reasonableness of the excuse, when an opportunity on appeal arises, it is to be hoped that the court would have regard to research relating to the various response rape can provoke.[88] Third, it is suggested that a restrictive approach be taken in relation to the admittance of evidence of sexual experience. For evidence to be considered relevant, it is necessary that there be some tangible and not merely arguable connection in time, character or circumstance.[89] If sexual experience evidence was ever to be admitted, it would need to relate specifically to the facts of the case and it is difficult to envisage circumstances where such evidence could be adduced.

[85] Caroline Counihan, 'Rape Crisis Network Ireland Perspectives on Sexual Violence and the Criminal Justice System' (2013) 23(4) ICLJ 115-123.
[86] Tom O'Malley, Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (2020).
[87] Foley (n 54).
[88] Burgess and Holmstrom (n 56).
[89] *CM* (n 63) [46].

Fourth, there is a need for a more standardised direction to be given to the jury. Principally, it is argued that greater reliance should be placed on the comments of the Supreme Court in *O'R* expressing the crucial nature of communication in consent:

> Whereas older authorities tended to concentrate on whether force had been used, the definition of rape is not at all dependent on force. Lack of consent constitutes rape. Consent is the active communication through words or physical gestures that the woman agrees with or actively seeks sexual intercourse. In the normal sphere of relations between men and women, consent does not simply exist in the mind of the woman: if there is desire for sexual intercourse then that is communicated. Because insensibility, be it caused by sleep or an intoxicated or drugged state, cannot be any expression of consent, it follows that there should be communication from the woman through the senses that intercourse is to be allowed.[90]

Every jury needs to hear this. Recklessness is a concept which permeates the criminal law; it refers in simple terms to a culpable ignorance of risk.[91] A person can be reckless in lighting a fire in their garden which spreads to their neighbours property and a person can be reckless as to the absence of consent but it is necessary to consider what this recklessness actually translates to in reality. Sex is an emotional and physical interaction between to two sentient beings, who throughout the course of their actions, are in constant and intimate communication by both words and touch. How then can a man be anything other than reckless in not asking 'do you really want this?' His job is to remove doubt, but certainly the Supreme Court equate not removing doubt to serious fault. The absence of consent in sex constitutes rape, and to not seek consent is to take a serious and unjustified risk.[92] The above quotation antidotes earlier judicial pronouncements exemplified by Lord Hale and shatter any notion of sex and consent being external to communication. An absence of consent rests on an absence of communication, and a decision to be wilfully blind to seeking such communication impacts recklessness by being now judicially defined as recklessness. It is hoped then that the sentiment of the Supreme Court in *O'R* could be built on through developing a standard direction to the jury that emphasises the onus to seek out consent and points out that a failure to do so could result in an accused person being considered reckless by the jury. Additionally, and in relation to a trial judge's direction to the jury, practical experience indicates that it has become common practice that counsel will compare 'beyond a reasonable doubt' to the shock of being woken by a phone call and being told an unbelievable story that a close relation has committed a serious crime.[93] It is submitted that such an understanding of reasonable doubt has no place in a trial, potentially serving as an inappropriate counterbalance to proper legal direction from the judge. As such, it should be explained that the reasonable doubt standard requires shrewdness and common sense, and is more akin to beginning the consideration of a case with blank slate, as opposed to emotional disbelief. This kind of silly rhetoric is a legal violation of the true standard and should be outlawed: no one is entitled to judge their own son's or daughter's criminal case for the most obvious reasons.

Lastly, it is suggested that rules surrounding 'self-serving statements' should be revisited. At first principle, the unsworn statement of the accused may be admitted into evidence where the statement is against the accused's own interest. However, if the accused makes a

[90] *O'R* (n 80) [36].
[91] See *The People (DPP) v Cagney and McGrath* [2008] 2 IR 111; *The People (DPP) v Murray* [1977] IR 360.
[92] *O'R* (n 80) [47].
[93] *The People (DPP) v Eadon* [2019] IESC 98, [12].

statement that is both part admission and part denial, it is read out in full to the jury.[94] In rape cases, this typically and frequently takes the form of a written statement emanating from the accused admitting to having had sex with the prosecutrix but denying the absence of consent, often in graphic form and drafted with the assistance of a solicitor while he is in custody.[95] Commentators have noted that the unfairness in such statements lie in the fact that the prosecutrix must give live evidence and be subject to cross-examination, while the accused's versions of events are related to the jury in a written statement, absent of cross-examination.[96] It has further been submitted that this may be a breach of the human rights principle of equality of arms.[97] It is submitted then that the admission of such statements should be reconsidered or that if admitted, these statements should always be accompanied by a warning that the evidence was not given under oath or on a solemn occasion, and that the evidence was not subject to cross examination. These reforms thus depend upon a standard and universally used form of direction, or trial manual, for sexual offences.

Conclusion

It is very easy when reviewing a crime such as rape to become lost in the technicalities of the law: although individual cases focus on particular issues, a general understanding of law surrounding rape is crucial. Fundamentally, the law is about people and criminal law is about people and society. In this context, and in light of the fractional chance in attaining justice, attention must be focused on the victims of the crime (only 11% of whom are likely to obtain a guilty verdict); on wrongly accused persons who may find themselves at the whim of damaging allegations; and on society, which has an interest in condemning those who violate women. All of these interests must be protected and the correct balance must be struck. This is not an easy task. Objective academic analysis has illuminated the difficulties in achieving this. This crime concerns all of us and mere rhetoric is of little use. More importantly then it is intended that the posited recommendations for reform might be helpful. However, it cannot be said that these recommendations would by themselves rectify the low conviction rate of rape offences. The obstacles set out above, the analysis of rape, society and women, and the discussion of false allegations show that there are much larger societal issues that need to be addressed if there is to be any notable improvement on the conviction rate of the offence of rape in Ireland.

[94] *R v Sharp* [1988] 1 WLR 7.
[95] Peter Charleton and Ciara Herlihey, 'Truth to be told: Understanding truth in the age of post-truth politics' (2019) 1 IJSJ 1, 15.
[96] ibid 17.
[97] ibid 18.