

LAW AND GENDER IN MODERN IRELAND



Critique and Reform

Edited by

Lynsey Black and Peter Dunne

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Law and Gender in Modern Ireland: Critique and Reform is the first generalist text to tackle the intersection of law and gender in this jurisdiction for over two decades. As such, it could hardly have come at a more opportune moment. The topic of law and gender, perhaps more so than at any other time in Irish history, has assumed a dominant place in political and academic debate. Among scholars and policymakers alike, the regulation of gendered bodies, and the legal status of sexual and gendered identities, is now a highly visible fault line in public discourse.

Debates over reproductive justice (exemplified by the recent referendum to remove the '8th Amendment'), increased rights for lesbian, gay, bisexual and transgender persons (including the public-sanctioned introduction of same-sex marriage) and the historic mistreatment of women and young girls have re-shaped Irish public and political life, and encouraged Irish society to re-examine long-unchallenged gender norms. While many traditional flashpoints remain such as abortion and prostitution/sex work, there are also new questions, including surrogacy and the gendered experience of asylum frameworks, which have emerged. As policy-makers seek to enact reforms, they face a population with increasingly polarised perceptions of gender and a legal structure ill-equipped for modern realities.

This edited volume directly addresses modern Irish debates on law and gender. Providing an overview of the existing rules and standards, as well as exploring possible options for reform, the collection stands as an important statement on the law in this jurisdiction, and as an invaluable resource for pursuing gendered social change. While the edited collection applies a doctrinal methodology to explain current statutes, case law and administrative practices, the contributors also invoke critical gender, queer and race perspectives to identify and problematise existing (and potential) challenges. This edited collection is essential reading for all who are interested in law, gender and processes of social change in modern Ireland.

Law and Gender in Modern Ireland

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INTRODUCTION

LYNSEY BLACK AND PETER DUNNE

I. Overview

Law and Gender in Modern Ireland: Critique and Reform is the first generalist text to tackle the intersection of law and gender in Ireland for over two decades. As such, it could hardly have come at a more opportune moment. The topic of law and gender, perhaps more so than at any other time in Irish history, has assumed a dominant place in political and academic debate. Among scholars and policy-makers alike, the regulation of gendered bodies, and the legal status of sexual and gendered identities, is now a highly visible (and continuously divisive) fault line in public discourse. Indeed, beyond these spheres, discussion of how our laws should conceptualise issues of gender and sex has assumed a critical function throughout all sections of Irish society.

The growing importance of the intersection of law and gender in recent years has manifested across many discrete areas. Debates over reproductive justice, increased rights for lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, and the historic mistreatment of women and girls have dominated public discourse, encouraging Irish society to re-examine long unchallenged gender norms. While many traditional flashpoints such as abortion and prostitution/sex work remain, new issues have emerged, such as surrogacy, and the gendered experience of the asylum process.

Many of the chapters in this collection address issues that were less visible, or entirely invisible, as recently as the 1990s. Subjects such as transgender rights had little public or political traction until recently. Over the past three decades, significant changes have occurred in Irish attitudes towards sexuality, alongside the inevitable expansion in gender models that this allows. The decriminalisation of sodomy in 1993 was just over 20 years removed from the 2015 referendum to affirm same-sex marriage rights. Meanwhile, although many married couples in Ireland experienced separation, until 1996 none of these couples could obtain a divorce. The shifts in relationships, and in the official sanctioning of different forms of relationship, which have taken place have occasioned reforms in areas such as leave entitlements for parents, the provisions of custody arrangements for separating parents, and framing a new legislative structure for surrogacy.

The position of women in these years has undergone something of a cultural shift. In 1996, Ireland's last Magdalene Laundry closed its doors, without fanfare or public comment. This edited collection reflects on the twists and turns of public and official conceptions of institutions such as these and their new status as symptoms of a shameful past. The recognition of such institutionalisation as a form of gendered harm, has joined other developments in recent decades to signal a (slightly) greater willingness to name harms which have been

experienced – often at disproportionate rates by women. The criminalisation of marital rape in 1990, for example, offered some recognition of bodily autonomy. The reforms to our law on sexual offences continue this process but fall short in many ways.

In May 2018, the bodily autonomy rights of women in Ireland experienced a highly symbolic moment: the repeal of the 8th Amendment to the Constitution. The 8th Amendment recognised the equal right to life of women and of the ‘unborn child’, resulting in the criminalisation of abortion save where there existed a threat to the life of the woman. Since its passage into law (with overwhelming public support) in 1983, it has stood, perhaps more than any other legal instrument, as the representation of past and present State control over female bodies, of a denial of women’s agency and consent, and as a reminder of the explicit ways in which, since the foundation of the State, Irish law has hidden, censored and punished female sexuality. While repealing the 8th Amendment will have great practical implications for the many thousands of Irish women who, for decades, have faced the necessity to travel to the United Kingdom and Europe to access basic reproductive healthcare, it also stands as a symbolic affirmation of the changing status of women in Irish society.

Perhaps it is no coincidence that, in the past three decades, women’s visibility in Ireland’s public sphere has increased and women’s voices have been heard more clearly. Women have entered the workforce in ever-greater numbers and begun (very slowly) to enter the realm of politics and, alongside, critical questions have been raised regarding fundamental notions of gender.

Ireland’s new position in a globalised world has also brought new challenges related to gender and sexuality. Although traditionally a country of net outward migration, in recent years, the position of persons seeking asylum in Ireland has taken on significant salience and urgency, provoking necessary legislative responses, which must be cognisant of the role of gender and sexuality. In sum, the list of subjects which have attained greater salience in recent years is staggering, and it is no coincidence that most revolve around questions of gender and sexuality. The chapters of this volume ably demonstrate the seismic shifts in this area which have occurred over recent decades in Ireland.

The book is not, however, an unqualified celebration of gendered laws and gendered experiences of legal regulation. While, as compared with the position of women and LGBTI persons three decades ago, there is much to praise in contemporary laws and policies, the various chapters in this volume illustrate an acute awareness of the ways in which gendered inequality and stereotyped norms remain key features of contemporary Irish law. In some respects, what the contributions to this volume reveal is a twenty-first century Ireland where, although the prevailing legal structures suggest a departure from historic inequity, the lived-experience of law, for many persons, remains anchored to gender-related vulnerability, precariousness and risk. This book acknowledges and highlights this experience – drawing attention, across the Irish legal and political landscape, to the ways in which women and LGBTI populations continue to be economically, socially and culturally marginalised. The editors and contributors are committed to offering an honest and critical assessment of the relationship between law and gender in the modern Irish State.

In 1993, Alpha Connelly’s edited collection, *Gender and the Law in Ireland*,¹ was published. Although the current text is not an updated edition of that work, it is, in many

¹ Alpha Connelly (ed), *Gender and the Law in Ireland* (Cork, Oak Tree Press, 1993).

ways, its spiritual successor. While numerous recent works have considered specific cases, individual topics and feminist methodologies,² the present work, as a broad, generalist text, offers an introduction to law and gender in Ireland, incorporating recent reforms, current debates, and possible future developments. Through the contributions to follow, this book provides a holistic ‘state of the nation’ for gender and Irish law.

Crucially, the book is not, and cannot be, a comprehensive treatment of all facets of gender and the law in Ireland. No such book could be written, nor indeed should it be, as there can be no definitive ‘truth’ on the myriad issues suggested by such a title. However, the text does provide a considered analysis of many areas of central concern. To that end, 17 substantive legal or socio-legal topics have been identified, and each chapter provides an accessible overview of the law in this area. In particular, contributors have attempted to answer three general questions:

- (1) What is the existing law?
- (2) What are the critiques of the existing law?
- (3) What are the suggestions for reform?

It is hoped that these lines of enquiry will frame the chapters for the reader. Individual contributors look at international best practice, international comparators and employ existing research and commentary from non-governmental organisations, academics, and policy-makers to overview the good, the bad and the potential for reform.

In terms of approach, the contributions incorporate a descriptive methodology to explain current statutes, case law and administrative practices. There is no single theoretical perspective running through the chapters, but the individual authors have drawn on critical feminist, queer and race perspectives where relevant, and where theoretical frameworks can illuminate key insights on a topic. In this vein, the chapters also reveal the tensions within theoretical approaches. This is evident, for example, in Ivana Bacik’s contribution, highlighting that even choices of terminology – such as either ‘prostitution’, ‘sex work’ or ‘sexwork’ – can be a telling reflection of ideology.

II. Structure

The book is organised into three parts: ‘Gender and the Criminal Law’, ‘Family and Relationships’, and ‘Law in a Changing Society’.

A. Gender and the Criminal Law

Susan Leahy (Chapter 1) examines the law on sexual offences, looking at the recent Criminal Law (Sexual Offences) Act 2017, and focusing specifically on the issue of consent.

² See eg Jennifer Redmond, Sonja Tiernan, Sandra McAvoy and Mary McAuliffe (eds), *Sexual Politics in Modern Ireland* (Newbridge, Irish Academic Press, 2015); Máiréad Enright, Julie McCandless and Aoife O’Donoghue (eds), *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity* (Oxford, Hart, 2017); Ivana Bacik and Mary Rogan (eds), *Legal Cases that Changed Ireland* (Dublin, Clarus Press, 2016).

Leahy explores the legal framework of sexual offences within the context of socio-cultural expectations of gendered behaviour and gendered violence, and the influence of rape myths. The chapter looks closely at the definition of consent, introduced for the first time in Irish law through the 2017 legislation. Leahy welcomes this development, and the introduction of ideas of mutuality and communicative sexuality into Irish law. However, she highlights the ongoing issues, focusing in particular on the problem of the ‘honest belief’ defence in Irish law, and looking at some of the persistent critiques of Ireland’s law on sexual offences.

In her contribution on prostitution/sex work, Ivana Bacik (Chapter 2) adopts a comprehensive policy and political analysis to investigate the motivating factors behind the Criminal Law (Sexual Offences) Act 2017. This legislation introduced the new offence of the purchase of sex, and effectively decriminalised the selling of sex. Bacik outlines the political currents which led to this substantial law reform, which saw the ‘Nordic’ model adopted in Ireland. Notably, Bacik’s chapter outlines the contentious nature of the debate on prostitution/sex work, between those who view prostitution as a gendered form of exploitation and harm, and those who adopt a harm reduction and agency-focused approach.

The global phenomenon of trafficking forms the subject of Monica O’Connor and Nusha Yonkova’s contribution (Chapter 3), which takes as its focus the issue of trafficking for sexual exploitation. Examining the EU and Irish legislative framework, the chapter enumerates the various measures in place to tackle trafficking and offers a critique of the effectiveness of these measures, in particular, Ireland’s Criminal Law (Human Trafficking) Act 2008 and the relevant EU Directives. Notably, the authors contend that until anti-trafficking provisions reflect the complex interplays between gender, migration, trafficking for sexual exploitation, and prostitution, they will be of little practical use to victims of trafficking.

Máiréad Enright (Chapter 4) explores the contentious issue of abortion. As a subject which, in many ways, has framed the Irish political landscape for several generations, Enright considers the constitutionalisation of abortion through the 8th Amendment. Her chapter addresses and reveals the pernicious ways in which the domestic law – constitutional, legislative and judicial – curtailed women’s agency, denied basic physical autonomy and fell hardest upon individuals who lay at the intersection of multiple vulnerabilities. Enright discusses historic strategies for reform, landmark moments in the campaign towards reproductive justice and, ultimately, the transformative ‘Together for Yes’ movement, which resulted in the successful repeal of the 8th Amendment in May 2018. Looking to the future, Enright outlines proposed legislative intervention, and asks what this will mean for bodily autonomy rights in modern Ireland.

B. Family and Relationships

Fergus Ryan (Chapter 5) discusses movements towards greater rights in Irish law for gay, lesbian and bisexual (LGB) persons. From a recent position of criminality (for gay men), Ryan charts legal developments in the areas of, *inter alia*, hate speech legislation, employment equality and, ultimately, partnership recognition. Ryan addresses the legal and social context in which such reforms came about, and he reflects upon the impact of rapid (legal) change, culminating in the popular affirmation of same-sex marriage rights in

2015. Ryan does not offer a utopian vision of LGB equality in modern Ireland. Recognising the significant law-based and cultural barriers which remain, Ryan provides a balanced analysis of the transformations which LGB individuals have experienced over the past quarter century.

Brian Tobin (Chapter 6) considers the gendered dimensions of Ireland's parental laws, placing a particular focus on the status of 'guardians'. Noting how automatic guardianship rights operate only in favour of married couples and unmarried women, Tobin suggests that current laws reinforce the privileged position of marital unions and discriminate against unmarried men. His chapter advocates a more balanced, modern vision of parenthood in Ireland, where men's legal role in their children's lives does not depend upon formal relationship or legal gender.

Andrea Mulligan (Chapter 7) explores the intersections of law, surrogacy and gender. She approaches the topic through a clearly defined lens: the way in which surrogacy law in Ireland impacts on women. Mulligan has four women in contemplation in her chapter: the surrogate; the egg donor; the commissioning mother with a genetic link to the child; and the commissioning mother without a link to the child. She begins by setting out the existing legal framework (or lack thereof), and proceeds to critique the law from the perspective of the women involved, with a particular focus on the protective purpose of the law. Mulligan's central thesis is that the absence of specific legal regulation of surrogacy has unwittingly resulted in a *de facto* legal regime for the regulation of surrogacy which is male-centred, and which fails to protect the interests of the female parties to a surrogacy transaction.

Louise Crowley (Chapter 8) looks at how issues of gender interweave with social, legal and political responses to domestic violence. She recalls how Irish law's attempts to protect victims of domestic violence have been frustrated by a combination of historical reluctance to intervene and a begrudgingly piecemeal approach to remedies. The pre-1976 absence of State action, the non-criminalisation of marital rape until 1990, the vague evidentiary thresholds in the governing statutes, and the longstanding restriction of the availability of remedies to married applicants have perpetuated and sustained the weaker position for domestic violence victims (most typically women suffering at the hands of men). However, Crowley also outlines recent international developments, including the Istanbul Convention, which better prioritise the needs of victims. She concludes with the hope that the Domestic Violence Act 2018 (explained in detail) can (and will) enhance the rights of domestic violence victims in this jurisdiction.

Deirdre McGowan (Chapter 9) addresses the law governing property rights on the breakdown of marital unions. She begins with an outline of property ownership during marriage, contextualising the relevant rules by reference to social practice and behaviours. As the chapter progresses, McGowan introduces the current framework for property allocation when marital unions end, placing particular focus on court applications for judicial separation and divorce. McGowan explains the pertinent legislative principles and how they are applied by the Irish courts, drawing specific attention to the impact of gender roles in marriage. Finally, as the chapter concludes, McGowan identifies key difficulties with the existing marital property framework. She reflects upon both the potential for, but also the limitations of, marriage law reform as a way to promote gender equality.

Mary Donnelly (Chapter 10) views the gendered narratives of the financial crisis through the lens of 'sexually transmitted debt'. Looking first at the treatment of this issue outside of Ireland, Donnelly contrasts two dominant trends, the gender-neutral approach espoused by

the House of Lords in *Royal Bank of Scotland plc v Etridge (No 2)* and the gender-specific approach adopted by the High Court of Australia in *Garcia v National Australia Bank*. She then turns to the relevant jurisprudence in Ireland, selecting cases for closer analysis both in terms of the gender narratives which emerge from them, and the judicial approaches employed. Through her research, Donnelly makes visible the gendered nature of this aspect of the Irish financial crisis. She concludes by locating her discussion within the broader context of feminist critiques of private law and advocates a structural analysis of private law in Ireland, grounded in the identification of the impact of factors, such as gender, which are otherwise hidden in plain sight.

Tanya Ní Mhuirthile (Chapter 11) considers the development of transgender and intersex rights in Ireland. Describing the historical moves towards legal recognition of preferred gender, Ní Mhuirthile recalls the highly publicised litigation pursued – over a period of nearly two decades – by Dr Lydia Foy, who sought a new birth certificate with her correct, female, gender marker. Ní Mhuirthile explores various efforts by successive Irish governments to resist Dr Foy’s demands, and the resulting, ultimately successful, litigation, in which Dr Foy engaged. In 2015, the Oireachtas passed the Gender Recognition Act, which now permits individuals to obtain formal State acknowledgment of their affirmed identity. While praising the positive (even transformative) nature of the 2015 Act, which incorporates and prioritises the principle of self-determination, Ní Mhuirthile also observes how such legislation continues to fail and erase key demographics, including transgender children, non-binary individuals and those who experience intersex variance.

C. Law in a Changing Society

Alan DP Brady (Chapter 12) looks at the relationship between gender and the Constitution, with a particular emphasis upon care and the status of women who work in the home. Brady reflects on the symbolism of Article 41.2 of the Constitution and discusses the historical and contemporary arguments for reform. Throughout the chapter, Brady critically engages with High Court and Supreme Court jurisprudence, suggesting that Ireland’s senior judges have (to a large extent) endorsed existing substantive inequalities in the name of preserving freedom between unequally situated parties (often opposite-sex spouses). Finally, in the latter part of his chapter, Brady argues that judicial resistance to positive obligations and socio-economic rights is both a perpetuating factor for gender inequality (regardless of the wording of Article 41.2) and also a reason to be sceptical about the potential for a gender-neutral recognition of care in the Constitution to achieve any meaningful change.

Lucy-Ann Buckley (Chapter 13) explores the concept of ‘doing gender’ in the context of Irish employment law, drawing upon the Employment Equality Acts 1998–2015, and the relevant EU law provisions. Ireland has historically had very low levels of female participation in the workforce. Buckley examines the development of women’s role in paid employment and investigates the binary gender regime which relegated women to the domestic sphere. The chapter explores the law’s failure to adequately respond to complaints of discrimination experienced by transgender persons, and its inability to consider the effects of intersectionality in discrimination. Buckley then turns to look at protective leave entitlements – specifically maternity, adoptive and parental leave – and argues that these are

structured in such a way as to reinforce the existing gender binary, further pushing women away from full workforce participation.

Patricia Brazil (Chapter 14) considers the role and status of gender within Ireland's asylum decision-making processes. Noting that gender/sex is not specifically mentioned within the Convention Relating to the Status of Refugees 1951, Brazil nevertheless observes how – within international 'best practice' – gender has been identified as a potential source of unlawful persecution, placing women within the framework of a 'particular social group'. Brazil's chapter explores Irish judicial (and administrative) responses to gender as a ground for asylum and illustrates how the existing case law has failed to properly vindicate the rights of female-identified asylum applicants.

James Gallen (Chapter 15) explores redress mechanisms for historical mistreatment in Ireland, examining in particular the Magdalene Laundries, symphysiotomy (a surgical procedure carried out during childbirth) and Mother and Baby Homes. Gallen's discussion situates these institutions/practices within a broader nation-building project, which aimed to produce a narrow morality and role for women in early-twentieth-century Ireland. Through his contribution, Gallen illustrates how, although past rights violations and harm are increasingly being addressed, there remains a gendered dimension in the sequencing of investigation and redress. Gallen evaluates these latter processes as they apply to Magdalene Laundries, symphysiotomy and Mother and Baby Homes. He identifies a piecemeal approach – which seeks to minimise legal recognition of wrongdoing – across all three institutions and practices, and he concludes that challenges remain to effectively confront the gendered nature of the harm and the failures to date of redress strategies.

Throughout the contributions in the collection, the necessity of political representation to achieve progressive aims is clear. Fiona Buckley and Yvonne Galligan (Chapter 16) explore women's political representation in Ireland and look at the trajectory of women's participation in politics from independence in 1922 up to the most recent general election. In particular, Buckley and Galligan analyse the Electoral (Amendment) (Political Funding) Act 2012, which holds that political parties will forfeit 50 per cent of funding unless at least 30 per cent of their candidates are women. The chapter examines the intangible but very real structural barriers to women's participation in politics in Ireland and examines the moment of change presented through the 2008 financial crisis. Buckley and Galligan note that the political will to act stemmed from dissatisfaction with Ireland's informal and localised political nature. However, while they welcome the 2012 legislation, they affirm a need to monitor its effectiveness in light of case studies from elsewhere in Europe.

Finally, Mary O'Toole (Chapter 17) looks at the lived-experiences of female practitioners within the Irish legal system. Drawing from data across the legal profession, but with a particular emphasis on the Bar, O'Toole identifies key access barriers – such as informal 'old boys' networking, financial precariousness and childcare responsibilities – which obstruct female advancement within the law. While, as is evident throughout the collection, many of these factors also impede women's opportunities in other spheres of society, they are particularly exclusionary in the individualised and idiosyncratic context of the legal profession. O'Toole considers the structural changes that would be required to better accommodate female participation (including baseline acknowledgment among male practitioners that gender inequality exists) and evaluates the measures which the professional bodies are already applying.

III. Themes

Throughout this volume, there are a number of themes which recur with some frequency. These themes are considered and analysed in depth in the concluding chapter, providing a holistic assessment and reflection upon the relationship between law and gender as revealed in the 17 substantive contributions. However, as a final introductory note, and in order to create a frame through which readers can approach the chapters, these themes are identified and (briefly) overviewed in this section.

One bright thread evident throughout the text is the role of activism and cultural shifts in achieving legal changes in recent years. The tireless advocacy of many individuals and groups over two decades has caused fundamental shifts in how Irish society views itself. This flurry of hopeful advocacy and campaigning stands in marked contrast to the historic function of gender as a tool in nation-building. Many of the revolutions occurring in contemporary Ireland are happening against and in opposition to independence-era aspirations. The founders of the new Irish State envisioned a nation made stable through the strong bonds of family – based on marriage – with a conservative and communitarian society which favoured conformity over individualism. The very tangible repercussions of this ideology pervade discussion of the intersections of law and gender in Ireland and have circumscribed the roles available for women and other marginalised groups in Irish society for decades.

Pertinent to the national and conservative hopes for a newly independent Ireland, was the minimising of women's agency and bodily autonomy, and the downgrading of women's consent – in women's confinement in religious institutions, sexual contact or medical procedures, or indeed in the inability of women to make decisions about their own health. Attempting to 'unpick' this pernicious legacy, one of the persistent questions has been the extent to which law should embrace either gender-neutrality or gender-specificity. It seems that Ireland has the worst of both worlds. At the constitutional level, Ireland enshrines the role of women in the home, as domestic and maternal. Meanwhile, elsewhere, there is refusal to recognise the lived experience of certain harms as uniquely gendered.

In remaking Ireland's relationship with gender, the influence of international law stands out. Many of the most progressive legal reforms have come about because of Ireland's obligations as a member of various supranational bodies. This stands true for the recognition of transgender individuals and the decriminalisation of sodomy. This sphere also suggests some future reforms, for example in the legal recognition of cross-border surrogacy. The influence of international opinion, for example in the UN criticism of Ireland's treatment of the victim-survivors of Magdalene Laundries, cannot be underestimated. The criticism in this specific instance caused embarrassment on the international stage and was a factor which helped persuade law-makers to consider how they wished Ireland to be viewed.

Related to the nature of globalised law-making, the exploration of intersectional concerns also comprises a central aspect of the chapters herein, evident for example in the discussions of trafficking or refugee law. Elsewhere, other contributions consider the differential impacts of various policies, such as the contention that unpaid parental leave will, inevitably, be availed of by the lower earning parent – who is most likely to be a woman, as women continue to earn less than men – thereby perpetuating gendered and classed caring imbalances. Some of the contributions particularly highlight the seeming unwillingness by

legislators to conceptualise the multiplicative effects of factors such as gender, class and race. Both O'Connor and Yonkova, and Brazil, are critical of the unidimensional nature of State understandings of hardship.

The exposure of this failure to assess lived-experience as a holistic and complex phenomenon, rather than a checklist of attributes, perhaps leads well to the final overarching strand which one can draw from the contributions to this book: the idea that the law is limited in what it can achieve. No collection on gender and the law can avoid this conclusion. While legal reform has been welcome, it is not a simple stand-in for societal values and norms. Legal protections can speak to, but cannot resolve, the structural barriers to equality which persist in Irish society.

PART I

Gender and the Criminal Law

Sexual Offences Law in Ireland

Countering Gendered Stereotypes in Adjudications of Consent in Rape Trials

SUSAN LEAHY

I. Introduction

Set as it is against a backdrop of society's understandings of appropriate and inappropriate sexual behaviour, there are few areas of the law more impacted by gender roles and stereotypes than the law on sexual offences. Ideals and societal expectations of appropriate socio-sexual behaviour for men and women, boys and girls, permeate every aspect of the law in this area. Indeed, entire volumes have been dedicated to discussions of these issues.¹ Given the inevitable space limitations of one chapter, it is not possible to fully rehearse the myriad ways in which gender considerations have influenced the development and implementation of the substantive and procedural law on sexual offences. The substantive rules relating to adjudications of consent in rape trials is the chosen focus here, as they represent a paradigm example of the impact of gendered stereotypes on the operation of sexual offences law. Further, an examination of this area of the law is timely, as the Criminal Law (Sexual Offences) Act 2017 has for the first time introduced a statutory definition of consent in Ireland. Although welcome, this reform effort remains unfinished as the rules relating to the defendant's mens rea regarding consent, namely, the honest belief in consent defence, have yet to be reformed. This chapter is an opportunity to reflect on recent achievements whilst highlighting that much remains to be done if the influence of gendered stereotypes on the difficulties of proving an absence of consent in rape trials is to be tackled effectively.

The chapter begins with a consideration of how societal factors affect the operation of rape law and, specifically, impact upon adjudications of consent in rape trials. The substantive rules on consent and honest belief will then be discussed and critiqued and suggestions

¹ See generally S Brownmiller, *Against Our Will: Men, Women and Rape* (New York, Fawcett Books, 1987); S Estrich, *Real Rape: How the Legal System Victimizes Women Who Say No* (Cambridge MA, Harvard University Press, 1987); S Lees, *Ruling Passions: Sexual Violence, Reputation and the Law* (Buckingham, Open University Press, 1997); S Lees, *Carnal Knowledge: Rape on Trial*, 2nd edn (London, The Women's Press, 2002); J McGregor, *Is it Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Farnham, Ashgate 2005); J Temkin, *Rape and the Legal Process*, 2nd edn (Oxford, Oxford University Press 2002).

for further reform will be offered. The chapter concludes with a reflection on the need for change outside the formal legislative process if real progress is to be made in this area.

II. Rape Myths and Realities: The Attitude Problem in Rape Trials

The impact which prejudicial and erroneous attitudes about rape and rape victims exert on the operation of the law was first highlighted by radical feminists in the latter decades of the twentieth century. Commentators like Estrich suggested that the problem with rape law was ‘not the wording of statutes per se but rather our understanding of them ... how a judge interprets and directs a jury, the “common sense” understandings of rape against which a juror will assess a rape allegation.’² Unfortunately, these ‘common sense’ understandings are often imbued with misperceptions about rape and rape victims. These misperceptions may be classified as ‘rape myths’, that is, ‘descriptive or prescriptive beliefs about rape (ie about its causes, context, consequences, perpetrators, victims and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women.’³ Although the theory that societal attitudes (which may be erroneous and/or prejudicial) influence sexual offence trials was originally posited by feminists, it is now a generally accepted fact. For example, in the first edition of his seminal text on Irish sexual offences law, O’Malley acknowledges that ‘The study of sexual offences is in many ways a study of social values.’⁴ Similarly, McCullagh suggests that jurors’ ‘common sense’ understandings of consent ‘may reflect and embody the range of sexual stereotypes of rape that exist in Irish society.’⁵

The most oft-cited rape myth is the ‘real rape’ stereotype. Estrich defines ‘real rape’ as ‘a sudden surprise attack by an unknown, often armed, sexual deviant’ which ‘occurs in an isolated, but public, location and the victim sustains serious physical injury, either as a result of the violence of the perpetrator or as a consequence of her efforts to resist the attack.’⁶ The effect of this myth is that attacks which do not adhere to the ‘violent stranger in a dark alley’ stereotype are less likely to be seen as rape. This is problematic because, contrary to the myth, the majority of rapes involve offenders who are known to their victims, occur in private locations and typically involve little, if any, physical violence and serious injury such as wounds or broken bones. The erroneous nature of the ‘real rape’ stereotype is neatly illustrated by the findings in *Rape and Justice in Ireland* (hereafter ‘*RAJII*’), the most comprehensive and detailed Irish research on rape.⁷ There were three strands to this research, focusing on the primary attrition points for rape cases: (1) the victim’s decision to

² Estrich, *Real Rape* (n 1) 4.

³ G Bohner et al, ‘Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs that Blame the Victim and Exonerate the Perpetrator’ in M Horvath and J Brown (eds), *Rape: Challenging Contemporary Thinking* (Cullompton, Willan Publishing, 2009) 19.

⁴ T O’Malley, *Sexual Offences: Law, Policy and Punishment* (Dublin, Round Hall Sweet and Maxwell, 1996) 1.

⁵ C McCullagh, *Crime in Ireland: A Sociological Introduction* (Cork, Cork University Press, 1996) 107.

⁶ Estrich, *Real Rape* (n 1) 4.

⁷ C Hanly et al, *Rape and Justice in Ireland, A National Study of Survivor, Prosecutor and Court Responses to Rape* (Dublin, The Liffey Press, 2009).