

LUND UNIVERSITY

European Master's Programme in Human Rights and Democratisation
A.Y. 2025/2026

Irish Rape Law: Still the “Rapists’ Charter”?

Article 3 of the ECHR Compliance in Irish Rape Law: Subjective Belief of Consent
and the Use of Therapy Notes in Rape Trials.

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Word Count Declaration: 28,199

Abstract

This thesis examines whether Irish rape law and criminal procedure complies with positive obligations imposed on State Parties to the European Convention on Human Rights, specifically Article 3. Article 3 of the Convention prohibits torture, inhuman or degrading treatment and punishment and may never be derogated from as it is an absolute right in the Convention. The European Court of Human Rights has expanded Article 3 protections to encompass rape law and procedure, which is what this thesis is concerned with. The perspective used in this thesis is access to justice and focuses on how two elements of Irish rape law act as deterrents to survivors seeking justice. Those two elements are the defence of honest subjective belief of consent and the use of survivors' counselling notes in criminal proceedings. This thesis looks at the low levels of reporting and convictions in rape cases and how these two elements create barriers for survivors in the justice system. This thesis ultimately concludes, with reference to cases from the European Court of Human Rights, that these elements of Irish rape law and procedure raise serious concerns around the right to be free from inhuman and degrading treatment. Cumulatively, these issues suggest a breach of Article 3 of the ECHR. This thesis also explores reforms for both elements of Irish law that may help to strengthen access to justice for survivors of rape and ensure compliance with human rights standards.

Acknowledgements

The opportunity to research and write this thesis is one I will be forever grateful for and while I worked hard, the team of people supporting me worked harder. It is a privilege and an honour to produce this work, which would not have been possible without the wealth of support around me.

First and foremost, I would like to express my deep gratitude to my supervisor, Professor Karol Nowak. You provided me with the courage to explore my curiosities and the confidence to follow this path. Every conversation was a pleasure and always left me excited to learn and write. Without your committed guidance and feedback, this work would not have been possible.

Second, to my gracious friends who are now scattered around the globe. Whether an old friend visiting Lund or Lido, or a new friend I met along the way, I am deeply grateful for your advice, support, and the adventures we shared.

I cannot express my gratitude enough for my family over the past year. To my mum, for answering the many phone calls and always showing up; to my dad, for the unwavering support and believing in me; to Páraic, for being an outstanding role model of a brother and to my late Nana Nancy for her endless wisdom and love.

I would especially like to thank the survivors of rape who have been empowered to share their stories.

Without them, we would not even begin to understand the realities of the criminal justice system.

This thesis is dedicated to the survivors of rape and sexual violence.

Nolite te bastardes carborundorum

- Margaret Atwood, The Handmaid's Tale.

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1. BACKGROUND

This century, attitudes to rape and sexual violence have evolved rapidly. While legislation and court practices in Ireland have reformed quite significantly, not all practices have kept up to date with present standards. The definition of rape has expanded, rape in marriage is criminalised, the definition of consent itself has evolved towards the ‘Yes means Yes’ model, and there are growing restrictions on what can be introduced as evidence in rape trials. Yet the impact of traditional attitudes towards rape lingers on, survivors are not believed and rarely report the crime. Is the gravity of rape truly recognised and reflected in current legislation and court procedures in Ireland?

To be subjected to rape is to be subjected to severe humiliation, debasement and degradation¹. Rape and sexual violence are about power and control over its victims². Rape carries high prison sentences to reflect the serious nature of the crime, as was set out in *Tiernan*³. In Ireland it attracts a seven-year sentence before mitigating factors are considered⁴. Where more violence, intimidation, degradation or an abuse of trust is involved, sentences increase to between 10 to 15 years before mitigating factors. Life imprisonment applies in cases of serious violence, greater humiliation than what is ‘normally associated with a rape offence’, or sexual perversion. A life sentence served is on average 20 years⁵. Despite this, very few rapes are reported to the Gardaí, let alone result in convictions. What sort of attitude to rape does this actually reflect? In this thesis I question current practices in Irish rape law and procedure, looking at specific elements as signifiers of whether they indicate a system that further humiliates and degrades survivors. Is the current system conducive to a victim friendly approach that listens to survivors and respects their dignity? Judith Herman in observing practices of rape procedure in criminal justice

¹ *M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003), *Aydin v Turkey* (1998) 25 EHRR 251.

² AN Groth, W Burgess and LL Holmstrom, ‘Rape: Power, Anger, and Sexuality’ (1977) 134 *The American Journal of Psychiatry* 1239 <<https://doi.org/10.1176/ajp.134.11.1239>>.

³ *People (DPP) v. Tiernan* [1988] I.R. 250; *People (DPP) v. FE* [2019] IESC 85.

⁴ The Judicial Council ‘Sentencing Guidelines and Information Committee – Sentencing Judgements Guidance for the General Public’ <<https://judicialcouncil.ie/assets/uploads/Sentence%20Information%20the%20General%20Public.pdf>> accessed 3 June 2026.

⁵ Diarmuid Griffin, *Sentencing Serious Sex Offenders: How Judges Decide When Discretion Is Wide* (1st edn, Bristol University Press 2025) <<https://doi.org/10.46692/9781529234756>> accessed 5 June 2026. Barry Croft, ‘Life sentences: What is the reality in modern Ireland?’ RTE (Dublin, 28 February 2024) <<https://www.rte.ie/news/primetime/2024/0227/1434651-life-sentences/>> accessed 11 June 2026.

systems explained that there are ‘essentially no guarantees’ for complainants; indeed, if one were to design a system to retraumatise, ‘one could not do better than a court of law’⁶.

This thesis analyses current law and procedure of rape law within the Irish jurisdiction and whether the current practices could amount to a breach of Article 3 of the European Convention of Human Rights. It examines in particular the inhuman and degrading treatment elements of Article 3. The specific elements of Irish rape law and procedure are firstly the ability of the defence to gain access to survivors counselling notes and to use them in the course of their defence, and secondly the ability of a perpetrator to assert they honestly believed that there was consent and therefore be able to walk free regardless of whether the survivor actually consented, regardless of whether that belief was reasonably held. As defined by Charleton and McDermott ‘Rape does not occur where a man genuinely but incorrectly believes the woman to be consenting’⁷. This defence completely disregards the consequences of the rape on the survivor and solely focuses on the beliefs of the defendant. The aim is to identify these key issues in access to justice, the loopholes in the system. Low rape conviction rates are a problem in the Irish courts, there is very little faith in the system. This thesis highlights problems in current rape and sexual violence law and procedure in the Irish criminal justice system. The two problems that this thesis focuses on are the use of survivors’ therapy notes in trial by the defence to contradict the survivors claim, and the subjective belief of consent defence.

1.1. Research Question

The central question in this thesis is whether the current standard of rape law and procedure within the Republic of Ireland complies with positive obligations required of States party to the European Convention of Human Rights, in particular under Article 3 (inhuman and degrading treatment). The topic is concerned with access to justice for survivors of rape, and whether the current criminal justice system subjects survivors to inhuman or degrading treatment. Very few rapes in Ireland result in criminal conviction, this thesis interrogates the gruelling procedure for survivors and analyses this deterrence from

⁶ Judith Herman, *Trauma and Recovery: The Aftermath of Violence* (Pandora, 1992) 72, cited in Louise Ellison and Vanessa E Munro, ‘Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process’ (2016) 21(3) *International Journal of Evidence and Proof* 183, 190.

⁷ Peter Charleton and others, *Charleton & McDermott’s Criminal Law and Evidence* (Second edition, Bloomsbury Professional 2020) 557.

court proceedings. Adequate criminalisation of rape is paramount for a criminal justice system to comply with Article 3⁸.

1.2. Justification

This topic is of quite high importance. At every point of contact that a survivor has with the system that is supposedly designed to protect victims and survivors of crime, the likelihood of achieving justice is lowered. The current criminal justice system is not fit for purpose as too many rapists walk free, without even an investigation done by the police. This thesis seeks to understand this problem of deterrence and suggest an alternative way of gaining access to justice for survivors. In the forthcoming chapters I lay out the law in Ireland and in the ECHR, with reference to the realities of surviving rape in Ireland, to finally conclude whether the system is so poor that it actually amounts to a breach of Article 3 of the ECHR.

1.3. Perspective/Theory

The perspective used in this thesis is that of access to justice. Sexual violence crimes are crimes of a precarious nature and need to be treated with higher respect and care than other crimes of less serious nature. There have been justifications given for the poor standard at present, particularly the use of therapy notes, yet none of them adequately respect the survivor's right to a fair trial or right to privacy. There is little respect given for the traumatic event experienced by the survivor throughout the course of criminal proceedings, and little respect given to the survivor themselves. The importance of access to justice is generally accepted, 'access to justice is foundational to economic and social development'⁹, and this should be no less important in regards to sexual crimes. As it was established by *M.C. v Bulgaria*, an inadequate criminal justice system that does not properly criminalise rape can amount to an Article 3 breach. Therefore, an adequate standard of access to justice should be achieved and maintained in Ireland. Too much importance is put on the possibility of the defendant being not guilty that the survivors experience is disregarded and justice is very rarely served.

⁸ (n 1) *M.C. v Bulgaria*.

⁹ *Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 101 Countries* (World Justice Project 2019) 4.

Access to justice is defined as ‘the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards’ and that it is ‘much more than improving an individual’s access to courts, or guaranteeing legal representation’ it ‘must be defined in terms of ensuring that legal and judicial outcomes are just and equitable’¹⁰. According to The Organisation for Economic Cooperation and Development (OECD) ‘inability to resolve legal problems diminishes access to economic opportunity, reinforces the poverty trap, and undermines human potential and inclusive growth’¹¹. The importance of access to justice has far reaching impacts and ‘should be viewed as a main driver of inclusive development and growth’¹². Access to justice is also part of the United Nations Sustainable Development Goals. Target 16.3 is a commitment to ‘promote the rule of law at the national and international levels and ensure equal access to justice for all’¹³.

Resolving the two issues identified in this thesis will not conclusively result in access to justice for rape survivors, access to justice is not just limited to the institution of the courts. It ‘requires working with different types of institutions and with various actors, such as: the police, the courts, prosecutors, social workers, prison officials, community leaders, paralegals, traditional councils and other local arbitrators; and taking account of the linkages between them’¹⁴.

Naturally, when we talk about rape we are also talking about gender: ‘rape [...] is not a gender-neutral crime’¹⁵. For the most part, it is men who rape and not women¹⁶. Therefore, the language used in this paper will often refer to the rapist as he or the man, and the survivor as her or the woman. However, I have chosen to take the perspective of access to justice because, while gender plays its part in the development of the crime of rape, it affects everyone and anyone who is raped. The flawed system is flawed for everyone; this thesis does not seek to suggest why the system is flawed. Though due to the gendered history of rape, it would seem to play a large role. Instead this thesis seeks to understand flaws within the system with the aim of identifying the severity of those flaws.

¹⁰ United Nations Development Programme, *Practice Note: Access to Justice* (2004), 6.

https://www.undp.org/sites/g/files/zskgke326/files/publications/Justice_PN_En.pdf accessed 11 June 2026.

¹¹ Organisation for Economic Co-operation and Development (OECD) *Towards Inclusive Growth – Access to Justice: Supporting people-focused justice services*. (OECD 2016).

¹² *Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 101 Countries* (n 9) 4.

¹³ *ibid.*

¹⁴ (n 10).

¹⁵ Susan Estrich, *Real Rape* (Harvard Univ Press 1987) 82.

¹⁶ *ibid.*

1.4. Methodology - De lege ferenda, what the law ought to be

The method used in this thesis is that of legal dogmatics. Legal dogmatics can be defined as ‘research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law’¹⁷. To follow this methodology, I provide a systematic exposition of the law in Ireland governing rape, the use of therapy notes, and the defence of subjective belief, and at a European level the law governing inhuman or degrading treatment under Article 3 of the ECHR. I then analyse the relationship of compliance between these two principles, with the aim of understanding whether Ireland is breaching Article 3 in rape law. I also provide a brief discussion on how the identified issues may be solved. To highlight problems and provide possible reforms, I refer to: other elements of the law, such as homicide, and the impacts the current law has on survivors, such as through personal accounts or statistics. The methodology of legal dogmatics involves ‘the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials’¹⁸.

While I am not the European Court of Human Rights (ECtHR) and do not have the authority to definitively find a violation of Article 3, this methodology affords the opportunity to act as such¹⁹.

1.5. Limitations

It is outside the ambit of this thesis to suggest an entirely alternative criminal justice system in regards to rape law and procedure, however I do suggest that adjustments to the law are needed, this is found in Chapter 6 Reform. It would be interesting to explore the workability of an alternative body or court that deals solely with sexual offences that would recognise the severity of the crime and ensure accommodations for survivors. However, this is beyond the parameters of this thesis. It is outside the ambit of this thesis to consider wholly the gendered element of this issue. Women experience rape at higher rates than men do, and men rape at higher rates than women do. My aim is to focus on access to justice for all, as this issue is present for all survivors regardless of gender. This thesis does not discuss

¹⁷ Jan M Smits, ‘What Is Legal Doctrine?: On The Aims and Methods of Legal-Dogmatic Research’ in Rob Van Gestel, Hans-W Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship* (1st edn, Cambridge University Press 2017) 5 <<https://doi.org/10.1017/9781316442906.006>> accessed 5 June 2026.

¹⁸ Council of Australian Law Deans, ‘Statement on the Nature of Legal Research’ (CALD, 2005), 3 <<https://cald.asn.au/wp-content/uploads/2023/11/cald-statement-on-the-nature-of-legal-research-20051.pdf>> accessed 12 June 2026.

¹⁹ Smits (n 17) 6.

the power imbalance and motivations of rape as this is beyond the scope of this legal dogmatics-based thesis. It is also outside the ambit of this thesis to discuss rape of particularly vulnerable members of society such as children, persons with disabilities, the elderly, and others. While it would be of value to be able to look at the particular impacts this aspect may have on court procedure and law, it is more beneficial at this time to look at this issue from a broader standpoint. To my knowledge at the time of writing, there is very little analysis of this topic. Therefore, I posit that a broader analysis is more beneficial currently with the possibility of further research into certain subgroups such as gender, age, race or other.

This thesis does not analyse the role of rape myths in the justice system despite its importance, it is beyond the scope of the paper. Theories suggest that there are alternative trial methods that could be operational, such as a juryless trial as suggested in Scotland²⁰, and that could help access to justice of survivors. However it is beyond the ambit of this paper, which is limited only to the use of counselling notes and subjective belief of consent.

While the right to a fair trial of the accused is of relevance in this topic, this paper does not consider it heavily as Article 3 is a non-derogable right and therefore is not concerned with balancing of rights. However, it must be recognised that the right to a fair trial is a driving factor for the current state of the law on rape.

1.6. State of Research

The state of research is limited in this area to my knowledge, I have found no articles or papers that relate directly to Irish rape law compliance with Article 3 of the ECHR. However, given the significant amount of legal theory and case law that is needed to come to an analysis on this topic, this will substitute for a state of research section. I have drawn from Irish case law, common law from other jurisdictions, cases of the ECtHR, and relevant articles, books, and other sources to establish an answer.

²⁰ Victims, Witnesses, and Justice Reform (Scotland) Bill, SP Bill 26A, Session 6 (2025) [as amended at Stage 2].

1.7. Outline

Chapter One – Introduction

The first chapter introduces the research question central to the thesis: whether Ireland's rape law and procedure comply with positive obligations required of States under the European Convention on Human Rights, particularly Article 3 (degrading treatment). I am writing about issues in the Irish criminal justice system that prevent survivors from gaining access to justice and asking the question of whether this may be a breach of Article 3.

This chapter justifies why I write this thesis and makes clear what the focus will be. At each point of contact with what is supposedly a system designed to protect victims and survivors of crime, the chances of getting justice lowers. This thesis seeks to understand this problem of deterrence and suggest an alternative way of gaining access to justice for survivors. The theory or perspective I use in this thesis is that of access to justice. There are many reasons why justice is not served in this realm of crime, but many of them are unjustifiable.

The methodology used is legal dogmatics, I establish the state of the law as it is in Ireland and in the ECHR, I will analyse compliance in this context which reflects the problem.

This chapter will also outline any limitations, what this thesis is not concerned with but is relevant to the topic itself. This chapter will also explain the technical lack of a state of the research chapter.

Chapter Two – Law in Ireland

In this chapter I outline the law on rape in Ireland. To do so I have referred to Irish legislation and common law on rape, consent, and therapy notes. This chapter introduces what is considered rape under Irish law, and the law surrounding the use of therapy notes and rules of evidence in this regard.

Chapter Three - Law of the European Convention on Human Rights

In this chapter I outline Article 3 of the ECHR, the elements of the article, what is required for a breach and finally a discussion on the breadth of case law that is relevant.

Chapter Four – The Problem

This chapter discusses the problem with current practices in Ireland, the impacts they have on conviction rates, and the low rate of access to justice. There are loopholes in criminal law that allow perpetrators to walk freely. In the majority of cases, there is no accountability. This chapter looks more deeply at the use of therapy notes, the voices of survivors, the perspective of the Psychology Society of Ireland. This chapter looks at the impact that the use of therapy notes in trials has: survivors must choose between therapy and justice. Then I look at subjective belief of consent, the Central Statistics Office (CSO) statistics on sexual violence, low rates of reporting, low rates of conviction, and access to justice

Chapter Five – Ireland in Breach of the ECHR

This chapter takes all of the evidence accumulated into regard and finds whether the current state of the law on rape in Ireland amounts to a breach of Article 3 of the ECHR, inhuman or degrading treatment. Chapter Five is centred around analysis of the information collected from the variety of sources used to come to a conclusion. This chapter is guided by case law of the ECtHR that interprets Article 3 in regards to rape.

Chapter Six– Reform

This chapter suggests the possible alternative available to the criminal justice system. However, this is not the primary focus of the thesis, rather that is found in Chapter Five. The aim of this chapter is to show that alternatives are available, and that the current system can be improved. As the perspective used is access to justice, it is appropriate to therefore find workable solutions that would improve access to justice in Ireland.

Chapter Seven - Concluding remarks

The final chapter summarises the findings of the paper in a succinct manner.

2. IRELAND

This chapter describes the current state of the law in Ireland regarding rape, and procedural aspects regarding evidence. It is descriptive and somewhat lengthy due to the nature of the Irish legal system and how the law on rape has developed over time. Ireland follows a common law system which is: the body of principles and doctrine that have emerged implicitly from the history of decision-making by courts rather than explicitly from politically motivated decisions of legislators²¹. The law on rape developed significantly from common law initially and later was codified into legislation.

2.1. Criminal Procedure

Ireland's criminal justice process is adversarial in nature with a heavy reliance on guilty pleas²². The decision to prosecute is made by the state, either the Director of Public Prosecutions (DPP) or *An Garda Síochána*²³. An Garda Síochána is the Irish police force²⁴ which translates to English as 'Guardians of the Peace', a police officer is a 'Garda'. In the context of rape, which is considered an indictable offence²⁵, the Gardaí conduct an investigation and then refer it to the DPP for prosecution²⁶. Trials will begin in the District Court, the lowest court, usually for initial procedural matters²⁷. Indictable offences must be heard in a higher court²⁸. A rape conviction can lead to a sentence of up to life in prison²⁹. After the District Court cases will either go to the Circuit Court or the Central Criminal Court³⁰. The Central Criminal Court is a higher court than the Circuit Court and has full jurisdiction to hear all criminal matters and exclusive jurisdiction in rape and aggravated sexual assault³¹. Cases in both courts will be heard before a judge and a jury³²

²¹ Jeremy Waldron, *The Law* (Routledge 1990) 15.

²² Law Society Gazette, 'Convictions for Serious Offences Overwhelmingly Result from Guilty Pleas' (6 June 2019).

²³ Marion Eleonora Ingeborg Brien and Ernestine Henriëte Hoegen, *Victims of crime in 22 European criminal justice systems: The implements of recommendations (85) 11 of the Council of Europe on the position of the victim in the framework of criminal law and procedure*; Proegschrift (Wolf Legal Productions 2000) 463.

²⁴ Garda Síochána Act 2005, s 6.

²⁵ James Hamilton, 'The Summary Trial of Indictable Offences' [2004] Judicial Studies Institute Journal 4:2, 155.

²⁶ Garda Síochána Act 2005, s 8.

²⁷ Courts Service, 'Explaining the Courts: An Information Booklet' (Courts Service of Ireland, 2015), 5.

²⁸ James Hamilton (n 26).

²⁹ Criminal Law (Rape) (Amendment) Act 1990, s4(2).

³⁰ Courts Service (n 28)

³¹ Dermot Walsh, *Walsh on Criminal Procedure* (Second, Round Hall 2016) para 4.59

<<https://go.exlibris.link/0TgBKFGGR>>.

³² *ibid* 4.50, 4.61.

Under *Bunreacht na hEireann*, the Irish Constitution, indictable offences are to be prosecuted in the name of the People of Ireland and by the Attorney General (AG). The DPP was established after the AG and has taken over the majority of prosecutions³³. The DPP does not conduct the investigation, but they may request the Gardaí to investigate further. The decision to prosecute a serious crime is that of the DPP. As I discuss in the following chapters, considering the number of rapes that are reported it is rare for a rape to make it to court.

Sources of law in Ireland are *Bunreacht na hÉireann*, legislation, common law (case law), and as Ireland is a member of the European Union, EU law also applies. Ireland uses a dualist legal system which means it had to incorporate the European Convention on Human Rights into domestic law. Ireland did so in the enacted European Convention on Human Rights Act 2003. Ireland has of course enacted other international conventions, but this paper is focused on the ECHR.

2.2. Irish Law

It is first necessary to identify precisely where the law on rape can be found in Ireland. Rape law is found under the Criminal Law (Rape) Act 1981 and the Criminal Law (Rape) (Amendment) Act 1990. According to the 1981 law:

2.—(1) *A man
commits rape
if—*

(a) he has unlawful 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,

(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 intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.

³³ Brien and Hoegen (n 24) 464.

This is illustrated in the following diagram:

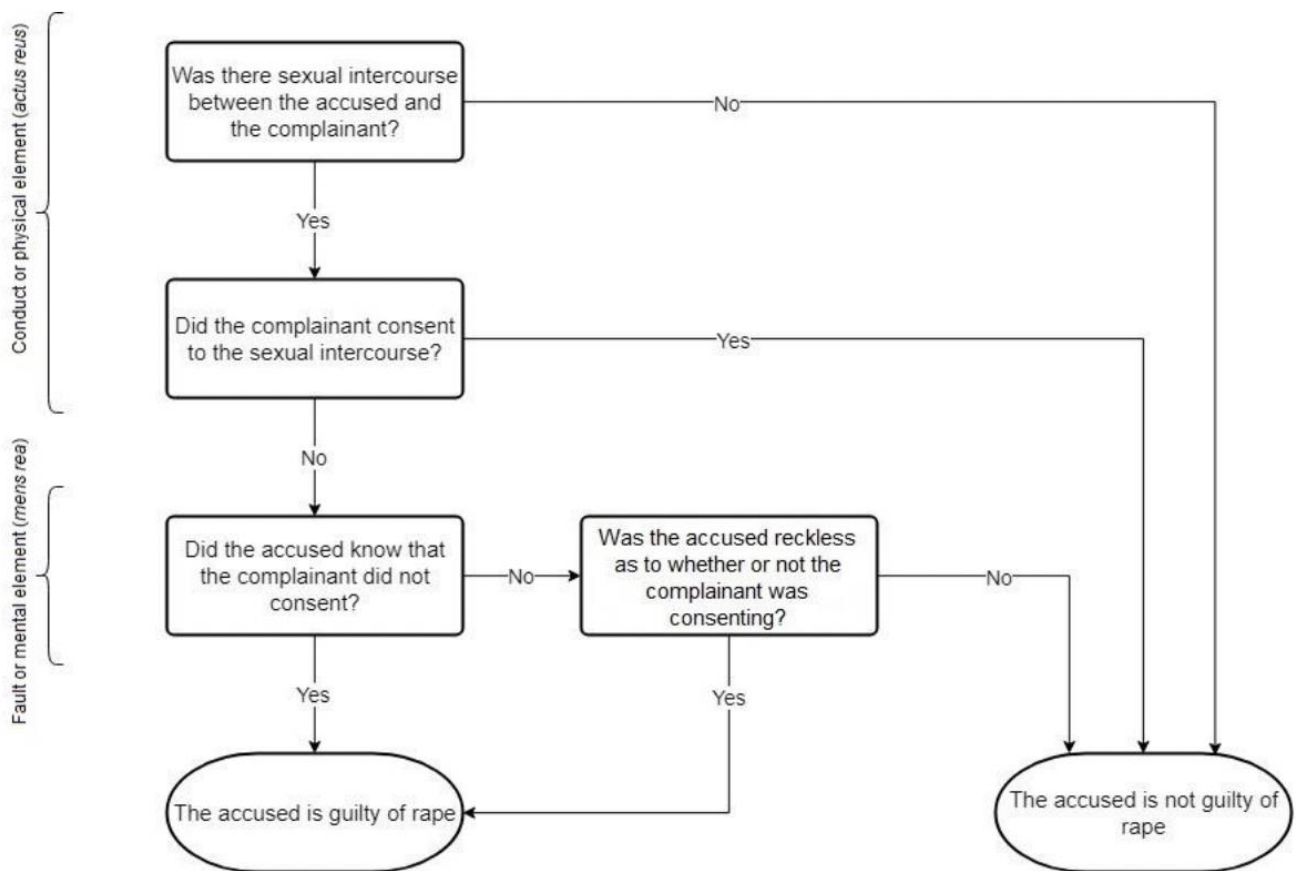


Figure 1³⁴

This diagram is particularly helpful and sets out from the beginning a clear issue around belief of consent. The question of whether the accused knew or was reckless to the fact that the complainant did not consent is asked, if these are answered in the negative the accused is then not guilty of rape. This is regardless of the view of the complainant. This is tested under a subjective test, the view only must be honestly held.

³⁴ Law Reform Commission, 'Knowledge or Belief Concerning Consent in Rape Law' (Law Reform Commission 2019) LRC 122-2019 25.

The view can be entirely unreasonable but still honestly held and therefore it will be of the view of the courts that the accused did not rape the complainant under the eyes of the law.

It is also worth noting that under the 1981 Act, rape is limited to an act done by a man against a woman. Subsequent legislation and case law have broadened this narrow and outdated understanding of rape to include any gender as an injured party.

Moving on to the 1990 which law covers rape and other forms penetration. Both the 1981 and 1990 Acts carry the same maximum sentence of life imprisonment:

4.—(1) In this Act “rape under [section 4](#)” means a sexual assault that includes—

(a) penetration (however slight) of the anus or mouth by the penis, or

(b) penetration (however slight) of the vagina by any object held or manipulated by another person.

(2) A person guilty of rape under [section 4](#) shall be liable on conviction on indictment to imprisonment for life.

(3) Rape under [section 4](#) shall be a felony.

And forms of sexual assault:

Sexual assault 2. —(1) The offence of indecent assault upon any male person and the offence of indecent assault upon any female person shall be known as sexual assault

(2) A person guilty of sexual assault shall be liable on conviction on indictment for a term not exceeding 5 years.

(3) Sexual assault shall be a felony

Aggravated sexual assault 3. — (1) In this Act “aggravated sexual assault” means a sexual assault that involves serious violence or the threat of serious violence or is such as to cause injury, humiliation or degradation of a grave nature to the person assaulted.

(2) A person guilty of aggravated sexual assault shall be liable on conviction on indictment to imprisonment for life

(3) Aggravated sexual assault shall be a felony.

From the outset, the law clearly recognises the potential for humiliation and degradation of a grave nature in cases of rape and sexual violence, specifically where the acts of sexual violence themselves cause humiliation and degradation. This will form a bridge for my analysis later in the thesis.

And as to consent, Section 48 of the Criminal Law (Sexual Offences) Act 2017 amends s 9 of the Criminal Law (Rape)(Amendment) Act, 1990 to read as follows:

1. *A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.*
2. *A person does not consent to a sexual act if-*
 - a. *he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person,*
 - b. *he or she is asleep or unconscious,*
 - c. *he or she is incapable of consenting because of the effect of alcohol or some other drug,*
 - a. *he or she is suffering from a physical disability which prevents him or her from communicating whether he or she agrees to the act,*
 - b. *he or she is mistaken as to the nature and purpose of the act,*
 - c. *he or she is mistaken as to the identity of any other person involved in the act,*
 - d. *he or she is being unlawfully detained at the time at which the act takes place,*
 - e. *the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself.*
1. *This section does not limit the circumstances in which it may be established that a person did not consent to a sexual act.*
2. *Consent to a sexual act may be withdrawn at any time before the act begins, or in the case of a continuing act, while the act is taking place.*
3. *Any failure or omission on the part of a person to offer resistance to an act does not of itself constitute consent to that act.*

The legislation on what constitutes rape has been outlined, now the paper establishes the legislation on the use of counselling notes in evidence against the complainant. Currently in Ireland, if someone makes

a complaint to the Gardaí of rape and it reaches the courts, the defendants can make a request for any therapy or counselling notes of the complainant. The notes can be then used to contradict the complainants testimony.

The following is the relevant excerpts from Section 39 of the Criminal Law (Sexual Offences) Act 2017 inserted the following law in regards of counselling notes. I have highlighted in bold the most relevant elements.

‘counselling’ means listening to and giving verbal or other support or encouragement to a person, or advising or providing therapy or other treatment to a person (whether or not for remuneration);

‘counselling record’ means any record, or part of a record, made by any means, by a competent person in connection with the provision of counselling to a person in respect of whom a sexual offence is alleged to have been committed (‘the complainant’), which the prosecutor has had sight of, or about which the prosecutor has knowledge, and in relation to which there is a reasonable expectation of privacy;

‘sexual offence’ means an offence referred to in the Schedule to the Sex Offenders Act 2001 .

*(2) In criminal proceedings for a sexual offence **the prosecutor shall notify the accused of the existence of any counselling record** but shall not disclose the content of the record without the leave of the court given in accordance with this section.*

*(3) **An accused who seeks disclosure of the content of a counselling record may make an application (‘disclosure application’), in writing, to the court—***

(a) providing particulars identifying the record sought, and

(b) stating the reasons grounding the application, including grounds relied on to establish that the record is likely to be relevant to an issue at trial.

(4) An accused who intends to make a disclosure application shall, not later than the beginning of such period as may be prescribed in rules of court, notify the person who has possession or control of the counselling record, the complainant, the prosecutor and any other person to whom the accused believes the counselling record relates of his or her intention to make the application.

(5) Where no disclosure application has been made by the accused in respect of a counselling record under subsection (3) and the prosecutor believes that it is in the interests of justice

*that the record should be disclosed, **the prosecutor may make a disclosure application in writing to the court.***

(6) Where the prosecutor intends to make a disclosure application under subsection (5), he or she shall, not later than the beginning of such period as may be prescribed in rules of court, notify the person who has possession or control of the relevant record, the complainant, the accused and any other person to whom the prosecutor believes the counselling record relates of his or her intention to make the application.

(7) The court may, at any time, order that a disclosure application be notified to any person to whom it believes the counselling record may relate.

*(8) **The court shall hold a hearing to determine whether the content of the counselling record should be disclosed** to the accused and the person who has possession or control of the counselling record shall produce the counselling record at the hearing for examination by the court.*

(9) The person who has possession or control of the counselling record, the complainant and any other person to whom the counselling records relates shall be entitled to appear and be heard at the hearing referred to in subsection (8).

*(10) **In determining (...) whether the content of the counselling record should be disclosed to the accused under subsection (11), the court shall take the following factors, in particular, into account:***

*(a) **the extent to which the record is necessary** for the accused to defend the charges against him;*

*(b) **the probative value** of the record;*

*(c) **the reasonable expectation of privacy** with respect to the record;*

*(d) **the potential prejudice to the right to privacy of any person to whom the record relates;***

*(e) **the public interest in encouraging the reporting of sexual offences;***

*(f) **the public interest in encouraging complainants of sexual offences to seek counselling;***

*(g) **the effect of the determination on the integrity of the trial process;***

*(h) **the likelihood that disclosing, or requiring the disclosure of, the record will cause harm to the complainant including the nature and extent of that harm.***

*(11) (a) Subject to paragraph (b) and subsection (12), after the hearing referred to in subsection (8), **the court may order disclosure of the content of the counselling record to the accused and the prosecutor where it is in the interests of justice to do so.***

(b) The court shall order disclosure of the content of the counselling record to the accused where there would be a real risk of an unfair trial in the absence of such disclosure.

(12) (a) Where an order is made pursuant to subsection (11), in the interests of justice and to protect the right to privacy of any person to whom the counselling record relates, the court may impose any condition it considers necessary on the disclosure of the record.

(b) Without prejudice to the generality of paragraph (a), one or more of the following conditions may be included in an order made pursuant to subsection (11)—

(i) that a part of the content of the counselling record be redacted,

(ii) that a copy of the counselling record and not the original be disclosed,

(iii) that the accused and any legal representative for the accused not disclose the content of the counselling record to any person without leave of the court,

(iv) that the counselling record be viewed only at the offices of the court,

(v) that no copies, or only a limited number of copies, of the counselling record, be made,

(vi) that information concerning the address, telephone number or place of employment of any person named in the counselling record be redacted from the record,

(vii) that the counselling record be returned to the person who owns or controls the said record,

(viii) that the counselling record is used solely for the purposes of the criminal proceedings for which the record has been disclosed.

(13) The court shall provide reasons for ordering, or refusing to order, disclosure of the content of a counselling record pursuant to subsection (12).

(14) (a) Subject to paragraph (b), a disclosure application shall be made before the commencement of the trial of the accused.

(b) Where, upon application by the accused, the court considers that the interests of justice require the making of a disclosure application after the commencement of the trial, the court may direct that such an application may be made.

(17) This section does not apply where a complainant or witness has expressly waived his or her right to non-disclosure of a counselling record without leave of the court.”

2.3. Criminal Liability - *Actus non facit reum nisi mens sit rea*.

This subchapter looks at the necessary elements of rape: the actus reus, the mens rea, and no defence. What are the elements needed in a criminal offence to find guilt? This is needed to establish issues present in the current defence available to rapists of honest subjective belief of consent. This thesis highlights a specific problem within the current understanding of mens rea in the Irish legal system, however it is outside of the scope of the paper to delve deep into the concept of mens rea. Therefore, the discussion of mens rea will be for the purposes of analysis of subjective belief of consent only.

Criminal liability consists of a physical and mental element, the actus reus and the mens rea³⁵. To be found guilty of a criminal offence, as a general rule, there must be an actus reus, mens rea and no defence³⁶. Guilt must be proven beyond reasonable doubt³⁷.

The actus reus (act) in rape cases is ‘penetration (however slight) of the anus or mouth by the penis, or... penetration (however slight) of the vagina by any object held or manipulated by another person’³⁸. According to S 63 Offences Against the Person Act 1861 there is no need to prove actual emission of seed, just proof of penetration³⁹. *AG v Dermody* established that very little penetration is actually required to establish actus reus⁴⁰. The act has two parts: the sexual intercourse and the absence of the complainant’s consent⁴¹. However, the absence of the complainant’s consent seems to be irrelevant in practice, it is simply the belief of the rapist in regards to the complainant’s consent.

Generally, in criminal law the mens rea (mental element) can either be intention or recklessness. In certain offences a mental element is not required, these are strict liability and criminal negligence offences⁴². In rape cases, the mens rea is either knowledge of the complainant’s lack of consent or recklessness as to the complainant’s lack of consent. It is not considered reckless if the accused has an honest but unreasonable belief that the complainant was consenting. Recklessness does not substitute for all cases of rape where it was not the intention. ‘Recklessness is the taking of a serious and unjustified

³⁵ Finbarr McAuley and J. Paul McCutcheon, *Criminal Liability* (2nd edn, Round Hall 2022), 209.

³⁶ *ibid.*

³⁷ *ibid.*, 38-40.

³⁸ Criminal Law (Rape) (Amendment) Act 1990 s4.

³⁹ S 63 Offences Against the Person Act 1861

⁴⁰ *The People (AG) v Dermody* (1956) IR 307.

⁴¹ ‘Knowledge or Belief Concerning Consent in Rape Law’ (n 35) 25.

⁴² Finbarr McAuley and J. Paul McCutcheon (n 35), 564.

risk. That does not mean that a reasonable man would be aware that a woman may not be consenting; ascribing to the accused what a reasonable or ordinary person would have perceived. Rather, recklessness is advertent⁴³. As explained by Hardiman J in *Cagney*, in order for someone to be reckless, they must have foreseen the risk that their acts could result in rape but proceeded nevertheless⁴⁴.

Intention is the most culpable type of mens rea though it is not defined in statute. It is understood in its basic everyday meaning, the actor wanted to do something and brought it about⁴⁵. This lack of legal meaning was criticised by the Law Reform Commission in 2008⁴⁶. Intention can be direct or oblique. Direct meaning the simple definition previously explained and oblique meaning where a person commits an act with an intended aim but another very probable consequence (that they did not want) materialises instead⁴⁷.

2.4. Consent

Consent is ongoing under Irish law and can be withdrawn at any time⁴⁸. Consent was defined under legislation in the Criminal Law (Sexual Offences) Act 2017:

“(1) A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.”

Other acts did contain some reference to consent, the aforementioned 1990 and 1885 Acts. Since consent is a key part of this thesis, I will delve into the case law in the area.

Certain sexual acts can never be consented to, as was held in *Brown*⁴⁹ by the House of Lords in a case regarding consensual sado-masochistic acts. This is for the purposes of protecting individuals from a real risk of physical harm. However, in *Wilson*, a husband consensually branding his initials on his wife's buttocks could not be guilty of assault causing harm. The courts distinguished this from *Brown* because the husband in *Wilson* did not have aggressive intent but was rather assisting his wife. This distinction is unconvincing and that in reality the Courts consider kinky heterosexual conduct acceptable but sado-

⁴³ ‘Knowledge or Belief Concerning Consent in Rape Law’ (n 35) 38.

⁴⁴ *The People (Director of Public Prosecutions) v. Cagney* [2007] IESC 46, [2008] 2 I.R. 111 at para. 52

⁴⁵ Finbarr McAuley and J. Paul McCutcheon (n 35), 501-503.

⁴⁶ Law Reform Commission, ‘Homicide: Murder and Involuntary Manslaughter’ (Law Reform Commission 2008) LRC 87-2008 26.

⁴⁷ *Clifford v DPP* [2008] IEHC 322 [10].

⁴⁸ *Kaitamaki* [1984] 2 All ER 435.

⁴⁹ *R v Brown* [1993] UKHL 19, [1994] 1 AC 212.

masochistic homosexual conduct unacceptable. A similar conclusion was reached in the Canadian Courts in *Welch*⁵⁰. The court held ‘consent could not be a defence to a charge of sexual assault arising out of an incident involving violence and bondage’ because consent could not ‘detract from the inherently degrading and dehumanising nature of the conduct’⁵¹. This thought process is logical, but it is then not applied to the law on rape itself in Ireland. We have established that rape and sexual assault is degrading and dehumanising, as outline above in the law, but in the instance where the accused honestly but unreasonably believed that the acts were consent to even though they were not, that person cannot be guilty of rape. The same logic is not used; there is a double standard. The law says that sexual acts that meet a certain degree of violence can never be consented to, and even where all parties claim that they were consenting active participants the law will override that consent. The law will call that rape. But when a survivor claims they were raped, and that there was no consent present, the rapist can claim that they believed the survivor was consenting and they therefore cannot be guilty of rape. It is profoundly illogical.

According to *Malone*⁵², a victim does not have to communicate a lack of consent to the accused. *Mayers*⁵³ held it is rape to have intercourse with a woman who is asleep. *Camplin*⁵⁴, established that the use or threat of force is not an essential element of the offence and that consent cannot be given if intoxication was induced by the accused. *Olugboja*⁵⁵ held consent may be vitiated by fear and *Papadimitropoulos*⁵⁶ found fraud as to the nature of quality of act will vitiate consent. This also appeared in *Williams*⁵⁷ when a singing teacher deceived a 16-year-old, saying that sexual intercourse was a treatment to help with breath control. However, deception in relation to collateral issues will not vitiate consent such as refusal to pay a prostitute⁵⁸. *Clarence*⁵⁹, fraud as to disease does not vitiate consent but in present day this would be interpreted as intentional or reckless assault causing harm if the victim was infected. *Cuerrier*⁶⁰, a Canadian Supreme Court differentiated in cases of HIV positive individuals, establishing that fraud as to HIV status can vitiate consent.

⁵⁰ *R v Welch* (1995) 101 CCC (3d) 216.

⁵¹ *Charleton and others* (n 7) 511.

⁵² *R v Malone* [1998] 2 Cr App R 447.

⁵³ *R v Mayers* [1872] 12 Cox 311.

⁵⁴ *R v Camplin* (1845) 1 Cox CC 220.

⁵⁵ *R v Olugboja* [1982] GB 320.

⁵⁶ *R v Papadimitropoulos* [1957] 98 CLR 249.

⁵⁷ *R v Williams* [1923] 1 KB 340.

⁵⁸ *R v Linekar* [1995] 3 All ER 69.

⁵⁹ *R v Clarence* [1888] 22 GBD 23.

⁶⁰ *R v Cuerrier* [1998] 2 SCR 371.

Murray J explained consent as a ‘*voluntary agreement or acquiescence to sexual intercourse by a person of the age of consent with the requisite mental capacity. Knowledge or understanding of facts material to the act being consented to is necessary for the consent to be voluntary or constitute acquiescence.*’⁶¹

This absence of consent is a part of the actus reus of rape, per Kennedy J, ‘*It is important to focus on the simplicity of this element. Once there is no consent to sexual intercourse the act of intercourse is rape if the accused knew or was reckless as to that absence of consent. Consent to sexual intercourse is something which must be positively given*’⁶².

The mens rea is more complicated. The accused must know the victim does not consent or is reckless to whether they are consenting. This is where the issue around the belief of the accused as to whether there was consent. In *Morgan*⁶³ the husband of the injured party told the accused men that they should stage a break in and have intercourse with his wife, he said she would feign that she was not consenting but that this was all part of it. The accused men said they honestly believed there was consent. In this case the Trial Judge directed the jury that, irrespective of whether the men honestly believed the victim was consenting, the jury should consider whether there were reasonable grounds for that belief. The House of Lords held that where a defendant had sexual intercourse with a woman without her consent and nevertheless genuinely believed that she did consent, he was not to be convicted of rape even though the jury were satisfied that there was no reasonable grounds for their belief. This test is purely subjective.

A defendant is reckless ‘*if he does not believe that the woman is consenting and could not care less whether she is consenting or not but presses on regardless.*’⁶⁴ It must have flashed in the mind of the accused that there was an absence of consent for it to be considered recklessness⁶⁵. If it does not occur in the mind of the accused, then the issue of belief arises that is relevant in this thesis. ‘*The absence of consent to sexual intercourse is an objective fact. The accused's view as to the existence, or non-existence, of this fact is subjective. An honest, though unreasonable, mistake that the woman was consenting is a defence to rape.*’⁶⁶ Charleton J continues in this case to explain that the test of belief is a subjective one

⁶¹ *The People (DPP) v C* [2001] 3 IR 345.

⁶² *DPP v O'Brien* [2022] IECA 306.

⁶³ *DPP v Morgan* [1976] AC 182.

⁶⁴ *R v Taylor* (1985) 80 Cr App R 327.

⁶⁵ *Director of Public Prosecutions v C O'R* [2016] 3 IR 322, IESC 64

⁶⁶ *ibid*, para 45.

but that the state of mind of the person is based on how underlying facts are resolved. He makes the comparison of a theft charge, to explain that a belief in facts is only validly grounded in circumstances with a foundation in reality. The jury must ‘*determine whether a claim of honest though unreasonable belief in consent was held by the accused*’⁶⁷. The jury should examine the facts that support or undermine the claimed belief of the accused. To put it in simple terms, the belief itself is examined subjectively but the jury objectively determine the grounds that the belief is based on⁶⁸.

*‘As s. 2(2) of the Criminal Law (Rape) Act 1981 states: “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.” That means that where the accused believed genuinely, albeit unreasonably, that the woman was consenting, on this statutory definition he must, even though she did not consent, be acquitted. It needs also to be stated by trial judges, however, that no jury is under any obligation to believe an obviously false story. A jury is entitled to accept or reject any prosecution or defence evidence. In these cases, every jury is entrusted, using shrewdness and commonsense, to judge what the accused claims as to his mistaken belief against their view of what an ordinary or reasonable man would have realised in the circumstances. This defence requires genuine belief’.*⁶⁹

It is put in the hands of the jury to determine the mind of the accused at the time of the act, to determine whether the belief of the accused was honestly held.

2.5. The Defence of Genuine Belief

In Ireland, an individual may only be held guilty of rape if it is proven beyond reasonable doubt that they knew the complainant was not consenting or was reckless as to whether the complainant was consenting. Therefore, the accused may be acquitted if they assert that they honestly believed that the complainant was consenting⁷⁰. This is a subjective test, meaning that belief can be entirely unreasonable but still honest. It is described as a ‘defence’ to rape, but it is actually negating the mens rea element rather than admitting to rape and adequately defending it, as would be the case with classical defences to crimes.

⁶⁷ Ibid.

⁶⁸ Ibid, para 64.

⁶⁹ Ibid, para 51.

⁷⁰ ‘Knowledge or Belief Concerning Consent in Rape Law’ (n 35) 32.

The accused is asserting that they did not possess the requisite mens rea and so therefore cannot be guilty of rape.

The Irish Law Reform Commission issued a paper in 2019 recommending reforms around this defence present in criminal law⁷¹. The government subsequently drafted amendments to the law. The amendment was present in the Criminal Law (Sexual Offences and Human Trafficking) Bill 2023⁷² but was later removed, it is not present in the current act, Criminal Law (Sexual Offences and Human Trafficking) Act 2024, and is therefore still a relevant issue.

Irish law follows the House of Lords decision in *Morgan*⁷³. Before *Morgan*, when an accused (mistakenly) claimed they believed the complainant was consenting, this mistake was ‘treated as an ordinary mistake of fact defence’⁷⁴, meaning it would need to be objectively reasonable. *Morgan* established that the test would be changed to a subjective one, meaning that even if there was no reasonable basis for the belief the mens rea could not be met and the accused could not be guilty. *Morgan* was placed on statutory footing in England and Wales⁷⁵, and in Northern Ireland⁷⁶. The law in both of these jurisdictions has since been updated and the test is now primarily objective⁷⁷. Very similar wording of a subjective test was used in the Irish 1981 Act, which reflects the current position in Ireland. This was reaffirmed in *C’OR*⁷⁸ when a man was accused of raping his mother. He claimed that the intercourse had been consensual and his mother, a frail woman in her 60s with restricted mobility, said she hadn’t consented. She claimed that she found herself on the floor and her son was having sexual intercourse with her, and that she said to him ‘leave me alone’. He was found guilty at trial but appealed to the Court of Appeal unsuccessfully and then to the Supreme Court. The Supreme Court ultimately decided on whether Ireland would use a subjective or objective test. The Court referred to other common law jurisdictions, New Zealand, England and Wales, and Northern Ireland, where an objective test is used⁷⁹. The Court nevertheless proceeded to affirm that the test in Ireland is focused on what the accused

⁷¹ *ibid*.

⁷² Criminal Law (Sexual Offences and Human Trafficking) Bill 2023 (Bill 62 of 2023) First Stage, Dáil Éireann, 17 July 2023.

⁷³ *DPP v Morgan* [1975] UKHL 3, [1976] AC 182.

⁷⁴ ‘Knowledge or Belief Concerning Consent in Rape Law’ (n 35) 33.

⁷⁵ Sexual Offences (Amendment) Act 1976, s 1.

⁷⁶ Sexual Offences (Northern Ireland) Order 1978, Art 3.

⁷⁷ Sexual Offences Act 2003 (England and Wales) s 1; The Sexual Offences (Northern Ireland) Order 2008 s 5.

⁷⁸ ‘Knowledge or Belief Concerning Consent in Rape Law’ (n 35).

⁷⁹ *ibid*, para 50.

actually believed, and not what a reasonable man would have believed⁸⁰. The Court additionally confirmed that the same test is applied where recklessness is concerned. ‘Recklessness means the accused man was aware that there was a risk that the woman was not consenting but nonetheless proceeded. If it is proven that he was aware that there was a real risk that the woman was not consenting, but he proceeded to have, or continue, intercourse with her despite this, then recklessness is established’⁸¹.

However, from the outset of *Morgan* the issue of the survivor’s perspective was pointed out by Lord Simon:

‘The policy of the law in this regard could well derive from its concern to hold a fair balance between the victim and accused... A respectable woman who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him.’⁸²

Morgan has been nicknamed the ‘rapists’ charter’⁸³ and England and Wales have since departed from the subjective test to a primarily (but not comprehensively) objective one under the Sexual Offences Act 2003⁸⁴. Ireland continues to use the *Morgan* test. In other words, Ireland continues to use the test nicknamed the ‘rapists’ charter’. *Morgan* was also criticised by The London *Times* as ‘unduly legalistic’ and not aligned with ‘common sense’⁸⁵.

In *CC v Ireland*⁸⁶ the defendant was charged with four counts of unlawful carnal knowledge of a fifteen-year-old girl between July and August of 2001. According to the defendant, she had stated she was fifteen and had initiated the encounters. The defendant was found guilty because of the absolute nature of s. 1(1) of the Criminal Law (Amendment) Act 1935. There was no defence available once intercourse with a girl under fifteen was proven. The defendant could not claim that he had an honest or a reasonable belief that the girl was of age because it was a strict liability offence⁸⁷. In appeal to the Supreme Court, absolute

⁸⁰ ‘Knowledge or Belief Concerning Consent in Rape Law’ (n 35) 38.

⁸¹ ‘Knowledge or Belief Concerning Consent in Rape Law’ (n 35), para 56.

⁸² *DPP v Morgan* [1975] UKHL 3, [1976] AC 182, para 221.

⁸³ Jennifer Temkin, *Rape and the Legal Process* (Oxford University Press 2002) 119
<<https://doi.org/10.1093/acprof:oso/9780198763550.001.0001>> accessed 7 June 2026.

⁸⁴ (n 78) England and Wales.

⁸⁵ Estrich (n 15) 93.; *The Times* (London), May 5, 1975, p. 15.

⁸⁶ *C.C. v Ireland* [2006] IESC33.

⁸⁷ ‘Knowledge or Belief Concerning Consent in Rape Law’ (n 35) 53.

liability in criminal penalties of this nature was unconstitutional because there was no possible defence. This resulted in the Criminal Law (Sexual Offences) Act 2006 codifying this defence⁸⁸.

There is a gap in criminal liability. The accused may simply just assert they honestly believed that there was consent, and they walk free because they lack the requisite mens rea. Homicide is treated differently, but both crimes are very serious. When an accused lacks the requisite mens rea for murder, they may still be charged with manslaughter.

2.6. Criminal Offences with Objective Elements in Irish Criminal Law

It is not unusual to have objective elements in criminal offences, many already make use of objective tests. It is often more favourable to carry out a reasonable man test in criminal cases. It respects the grave nature of certain crimes, especially where death has resulted. Its use in other criminal offences shows how it is possible for it to be used in the offence of rape. However, it should be noted that the position of this thesis is not that the law be amended to only consider an objective test, but also to consider the scope of an objective test in today's world and in today's understanding of what a reasonable man believes consent to be. This would ensure all instances of rape have the possibility of falling within the crime of rape. Simply because someone believed they were not raping someone, does not mean they were not committing a rape.

Examples of criminal offences with objective elements can be found within manslaughter. Manslaughter is committed when the accused causes the death of another while committing a dangerous crime⁸⁹. That 'dangerousness' is judged objectively. Involuntary manslaughter is a subcategory of manslaughter and is committed when a person causes the death of another through gross negligence. That gross negligence is 'circumstances which objectively amount to a very high degree of negligence and which, in the circumstances in question, to any reasonable person the fact that a serious risk was unjustifiably taken with the life of another would be apparent'⁹⁰

Dangerous driving and driving without due care and attention is covered by s 52 Road Traffic Act 1961 and has objective elements. Dangerous driving was explained in *The People (AG) v Quinlan* by Ó Briain J as 'driving in a manner in which a reasonably prudent motorist, having regard to all the circumstances,

⁸⁸ Criminal Law (Sexual Offences) Act 2006

⁸⁹ Criminal Justice Act 1964, s 4.

⁹⁰ *Joel v DPP* [2012] IEHC 295, para 12.

would clearly recognise as involving a direct and serious risk of harm to the public.’⁹¹ Smith and Hogan have explained the justification for negligence in driving offences, when an individual voluntarily assumes responsibility by partaking in dangerous acts, in order to keep a safe environment liability should be imposed when individuals don’t meet the standard expected of them⁹². However, in *DPP v O’Shea*, a road traffic incident occurred after the accused had been temporarily blinded by the sun while driving and collided with a vehicle. A pedestrian was pinned to the vehicle and died. The trial judge directed the jury that careless driving causing death is a strict liability offence. After a series of appeals, the Supreme Court ordered a retrial. The Court explained that blameworthiness is inherent in carelessness, comparing it to another driver who caused an accident but is blameless because they drove with care, ‘a driver may be involved in an accident, and may even have caused that accident, and yet be held blameless if he or she met the standard of the reasonably competent or prudent driver in the circumstances.’⁹³ The court also explained the difference in blame between a careless and a reckless driver, and that this should be reflected in sentencing. This theory can be applied to the law on rape too.

Driving is an activity that is highly regulated which places a high level of responsibility on individuals due to the high level of risk associated. Therefore, criminal liability must cover and deter not only advertently bad driving but also inconsiderate and careless driving, ‘regardless of whether the driver knew [they were] driving dangerously’⁹⁴. In this case, Clarke J concluded that when an individual fails to meet a reasonable standard for a serious offence, liability should be governed by a proportionality test. This judgement shows that objective standards can be acceptable when considered proportionate to the public interest.

2.6.1. True Guilt and Mistaken Belief

Naturally, it is not the intention of the courts to convict individuals for very serious crimes with very serious consequences without a guilty mind. This may be adequate when little harm is done as in the cases below. However, in rape cases of mistaken belief, harm is undoubtedly still caused. The amount of harm does not change simply because of the belief held by the accused.

⁹¹ *The People (AG) v Quinlan* (1963) 97 ILTR 219.

⁹² David C Ormerod and others, *Smith, Hogan and Omerod’s Criminal Law* (15th edition, Oxford University Press 2018) 189.

⁹³ *DPP v O’Shea* (O’Malley J) [2017] IESC 41, [2017] 3 IR 684 [49].

⁹⁴ David Prendergast, “Culpability in Careless Driving and the So-Called ‘Third Category’ of Criminal Offence” (2018) 36(4) Irish Law Times 63, at 63.;(n 37) Law Reform Commission, 98.

Prince was a landmark case in England in regards to mistaken belief⁹⁵. Henry Prince was charged for abducting a 14-year-old girl without her father's permission. He genuinely and reasonably believed the girl was 18 as she had told him she was. The Offences Against the Person Act 1861 was silent as to the mens rea of the offence, so it was for the court to decide whether they are required to read in a mens rea into the statute. If so, whether a defence of reasonable belief was available to Prince. The courts decided that they are not bound into reading a mens rea into a statute that is silent as to it. The courts also decided that the offence in question was strict liability and therefore no mens rea was required. Regardless of Prince's reasonably held belief, it was not a defence.

Parsley later clarified later that where a statute is silent as to mens rea, strict liability will only arise when it was the clear intention of the lawmakers in the creation of the relevant offence to do so⁹⁶. Therefore, the presumption of mens rea would prevail for 'true' crimes.

Tolson is an old English case where a woman remarried after she believed her husband was on a ship that was lost at sea and died⁹⁷. When the first husband returned, Tolson was charged with bigamy under the Offences Against the Person Act 1861. It was held that where a *bona fide* belief and reasonable grounds exist, that is a lawful defence and she was not guilty.

These cases evidence that there is clear precedence to not convict those without a guilty mind, but in certain types of offences there are still other considerations at play that encourage convictions. For example, in *Prince*, the child needed to be protected by the courts despite her having told Prince a lie about her age. Ireland took the alternate route in *CC* as discussed above. The Courts deemed, in my opinion, that the constitutional rights of the accused were of higher importance than the best interests of the child and the interests of survivors of rape.

⁹⁵ *R v Prince* [1875] LR 2 CCR 154.

⁹⁶ *Sweet v Parsley* [1970] AC 132.

⁹⁷ *R v Tolson* [1889] 23 QBD 168.

3. LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

This chapter outlines the law on Article 3 of the European Convention on Human Rights (ECHR or the Convention). I refer to the case law of the ECtHR to explain the Article in application. It is necessary to first establish the parameters of what may fall within the scope of Article 3 first. There is an extensive discussion on the cases of the ECtHR to understand this scope of Article 3. Ireland has codified the Convention into law in the European Convention on Human Rights Act 2003. Ireland is bound by the Convention, in particular Article 3 as it is a non-derogable right. I explain this in this chapter.

Aydin v Turkey was the first case in the ECtHR that regarded acts of sexual violence as torture. The court concluded that ‘rape leaves deep psychological scars on the victims which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally’⁹⁸. This particular case involved the rape of a detainee by a state actor, which was determinative in its finding of rape as torture⁹⁹. It clearly recognises the possibility for rape to result in a breach of Article 3.

Under Article 1 of the ECHR, states are obliged to ‘secure to everyone within their jurisdiction [...] rights and freedoms’¹⁰⁰. Therefore, in this context, there is a *prima facie* obligation to secure to the people of Ireland that they may be free from torture and inhuman, degrading treatment. Under Article 3 of the ECHR ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.¹⁰¹ No derogation from Article 3 is permissible, even in times of war or public emergency¹⁰². This thesis focuses on the ‘inhuman or degrading treatment’ element of Article 3. The question to answer is whether the current practices under Irish rape law and procedure are subjecting survivors of rape to inhuman or degrading treatment under the ECHR. First, I establish the law and understanding of Article 3.

‘Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist

⁹⁸ (n 1) *Aydin v Turkey*, para 83.

⁹⁹ *ibid.*

¹⁰⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended) (ECHR) art 1.

¹⁰¹ *ibid.*, art 3.

¹⁰² Francis Geoffrey Jacobs and others, *The European Convention on Human Rights* (Eighth edition, Oxford University Press 2021) 184 <<https://doi.org/10.1093/he/9780198847137.001.0001>>.

*violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.'*¹⁰³ *The court solidified its position, 'the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3'*¹⁰⁴.

Therefore, it can be argued that when transferring this logic to the context of the right to a fair trial proffered in response to the case of therapy notes, if Article 3 applies it takes primacy. The Gäfgen case once more underlined the absolute nature of Article 3. Gäfgen had kidnapped a child for ransom, he was arrested but had already killed the boy. The police officers did not know the boy was already dead and made violent threats against Gäfgen. The Court reiterated its position that the prohibition applies regardless of the victims conduct. Of course, Article 3 is only absolute if it actually applies in the circumstances.

Article 3 has differing thresholds, each with minimum levels of severity. From most severe to least severe it goes torture, degrading treatment & punishment, and inhuman treatment, & punishment. While this thesis will not seek to answer whether rape law and procedure could amount to torture, it will analyse whether it could be degrading or inhuman. This thesis seeks to look at torture from a different angle, not in the classical sense such as treatment in prisons or detention centres. The ECtHR has not set a definition of torture or inhuman treatment, instead I will look to the case law that has developed the understanding of A3.

Article 3 has three limbs, two substantive and one procedural. The substantive limbs are firstly prohibition of torture, and secondly an obligation for states to protect individuals from torture. The procedural limb is an obligation to carry out effective investigations into allegations of torture.

The Court stated in *Selmouni* that the Convention is a living instrument, and that its interpretation can change with time. Acts once classified as inhuman or degrading treatment could in modern day be classified as torture. As well as that, acts that previously hadn't met the A3 threshold whatsoever could meet it in the future¹⁰⁵.

¹⁰³ *Chahal v UK*, (App, 22414/93), 15 November 1996, (1997) 23 EHRR 413, ECHR 1996-V.

¹⁰⁴ *ibid*.

¹⁰⁵ *Selmouni v France* App no 25803/94 (ECHR, 28 July 1999) 29 EHRR 403, 101.

3.1. Inhuman Treatment

Inhuman treatment has been defined as a deliberate causing of severe mental or physical suffering which in the circumstances is unjustifiable¹⁰⁶. Inhuman treatment has been interpreted together with degrading treatment and separately, therefore I have separated the explanation into two sections. However, in some cases, such as *Ireland v the United Kingdom*¹⁰⁷ or *II v Bulgaria*¹⁰⁸, the two concepts will be understood together.

Natasa Mavronicola explained that ‘the threshold of severity at which treatment or punishment is found to be inhuman and/or degrading is crucial to the lawfulness of state (in)action’¹⁰⁹. It is crucial to identify whether the treatment of survivors (of rape) by state procedures could amount to inhuman and degrading treatment. Therefore, it is necessary to explain what this article is understood to mean.

To fall within the scope of Article 3, the ‘ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3’¹¹⁰. In *Ireland v UK* the court explained that the ‘assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.’¹¹¹. The court has also said that ‘the nature and context of the treatment or punishment, the manner and method of its execution’¹¹² and ‘whether the victim [was] in a vulnerable situation.’¹¹³ As for the context, this may be a reason why the treatment is justified, it could be argued that it is a necessary evil in the course of justice. But there is a clear issue with that argument, it is that very little justice is ever actually served, as is evidenced in the CSO Statistics in the following chapter. Complainants in rape proceedings may be particularly vulnerable in the criminal justice process due to the risks of retraumatisation and secondary victimisation.

¹⁰⁶ *Denmark v Greece; Norway v Greece; Sweden v Greece; Netherlands v Greece* Apps 3321/67, 3322/67, 3323/67, 3344/67 (ECHR, 5 November 1969).

¹⁰⁷ *Ireland v United Kingdom* (1979-80) 2 EHRR 25.

¹⁰⁸ *II v Bulgaria* App no 44082/98 (ECHR, 9 June 2005); *Mayzit v Russia* App no 63378/00 (ECHR, 20 January 2005).

¹⁰⁹ Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (1st edn, Hart Publishing 2021) 88 <<https://doi.org/10.5040/9781509903009>> accessed 21 April 2026.

¹¹⁰ *Ireland v UK* (1979 – 80) 2 EHRR 25, para 162.

¹¹¹ *ibid.*

¹¹² *Garabayev v Russia* (2009) 49 EHRR 12, para 75.

¹¹³ *Khlaifia and others v Italy* App no 16483/12 (ECHR, 15 December 2016), para 160.

In *Yazgöl Yılmaz v Turkey*¹¹⁴, the applicant, a girl ages 16 was sexually harassed while detained by the police. The police performed a gynaecological examination on her to check if her hymen had been broken without her or her guardian's consent. She suffered from post-traumatic stress and depression after her release. The court noted the law in Turkey did not provide necessary safeguards in the circumstances and that additional safeguards were needed. This examination was part of a general practice automatically done to prevent false accusations of sexual assault against police officers and was not in the interests of the women and had no medical justification. The court found a violation of Article 3 in the gynaecological examinations of the applicant and the subsequent inadequate investigation of those responsible. This supports the thesis question of whether poor investigations could amount to a breach of Article 3.

In *B.S v Spain*¹¹⁵ a prostitute was verbally and physically abused by police officers when they stopped her for questioning. The Court found that Spain had not conducted an adequate or effective investigation into the woman's complaints and found a violation of Article 3 under its procedural limb. Once again in *Afet Süreyya Eren v Turkey* the Court found an Article 3 violation of Turkey's procedural obligations when an investigation and the subsequent criminal proceedings were inadequate¹¹⁶. *P.M. v Bulgaria*¹¹⁷ found a violation of Article 3 under its procedural limb, the investigation into the rape of the applicant was ineffective. The Bulgarian authorities took over fifteen years to complete the investigation. Again, a failure to adequately investigate rape in violation of Article 3 was found in *I.G. v the Republic of Moldova*¹¹⁸. States have positive obligations to investigate rape and sexual abuse under Article 3¹¹⁹.

3.1.1. Minimum Level of Severity

The court will not be concerned with a case unless it meets the minimum level of severity requirement. For example, strip searches of prison visitors which were not done under national law did not reach the minimum level of severity in *Wainwright v UK*, but it did still constitute an A8 violation¹²⁰. Conversely, a slap on the face by a police officer while in custody was seen to be particularly humiliating and did reach the minimum level in *Bouyid*¹²¹. The court noted that there was a 'particularly strong link' between

¹¹⁴ *Yazgöl Yılmaz v Turkey* App 36369/06 (ECHR, 1 February 2011).

¹¹⁵ *B.S v Spain* App no 47159/08 (ECHR, 24 July 2012).

¹¹⁶ *Afet Süreyya Eren v Turkey* App no 36617/07 (ECHR, 20 October 2015).

¹¹⁷ *P.M. v Bulgaria* App no 49669/07 (ECHR, 24 January 2012).

¹¹⁸ *I.G. v. Moldova* App no 53519/07 (ECHR, 15 May 2012).

¹¹⁹ *ibid.*

¹²⁰ *Wainwright v United Kingdom* (2007) 44 EHRR 40.

¹²¹ *Bouyid v Belgium* App no 23380/09 GC, (28 September 2015).

degrading treatment and dignity. This dignity element is key. The use of survivors' therapy notes against them in order to defend their rapist could hardly be respecting the dignity of survivors. The Court recognised the context of the relationship between Bouyid and the police as being one of control and superiority¹²². If we apply this to the experience and vulnerability of being in a court room as a survivor of rape, and the judge, barristers, solicitors, and perpetrator has had access to your therapy notes, there is a clear relationship of superiority and power over the survivor. The survivor is stripped of their dignity when their private notes are shared in the court room.

3.2. Administrative Practice and ECHR Article 3

This issue may fall into the category of 'administrative practice'. This was defined in *Ireland v UK* as 'an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system'¹²³. The issues examined may arguably amount to administrative practice because they are procedures and defences available in court. It could be said that the entire practice of rape law in application could be an administrative practice. There is clearly an official tolerance of the conduct¹²⁴ and it is clearly not an isolated incident.

3.3. Degrading Treatment

According to the ECHR guide on Article 3, treatment is degrading when it 'humiliates or debases... showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'¹²⁵. The humiliation is sufficient even if it is only in the victim's eyes, and not the eyes of others¹²⁶. Additionally, it is not necessary that the purpose of the treatment be for humiliation or debasement, an absence of this will not rule out a finding of an Article 3 violation¹²⁷.

¹²² *ibid.*

¹²³ *Ireland v United Kingdom* App no 5310/71 (Revision) (10 October 2018) Dissenting Opinion Judge O'Leary 38.

¹²⁴ *Jacobs and others* (n 103) 187.

¹²⁵ European Court of Human Rights: Guide on Article 3 of the European Convention on Human Rights (2025), 9. https://ks.echr.coe.int/documents/d/echr-ks/guide_art_3_eng accessed 14 June 2026.

¹²⁶ *ibid.*

¹²⁷ *ibid.*

The ECtHR also outlined that in that case of punishment, it may still be degrading just because it has the aim of crime control¹²⁸. While this is applicable to punishments rather than treatment in the context of survivors of a crime rather than perpetrators, the justification can still apply. The treatment of survivors in the course of justice can still be degrading, even if its purpose is crime control.

Degrading treatment may, but does not always, require ‘gross humiliation before others or being driven to act against will or conscience.’¹²⁹ When humiliation is present, that humiliation is required to be severe to meet the Article 3 threshold¹³⁰. The *Smith and Grady* case was about a process of investigating and discharging homosexuals in the armed forces. This case did not meet the threshold of Article 3¹³¹. It is accepted that the experience of rape is degrading and humiliating, and it is established that rape can be a breach of Article 3. Therefore, it suggests that the inadequate criminalisation of rape can reach the minimum level of severity for degrading treatment.

The humiliation is not judged objectively, ‘it may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others’¹³². Additionally, humiliation or debasement to not have to be the purpose of the treatment, it will be taken into account though¹³³.

3.3.1. Examples of Degrading Treatment within ECHR Jurisprudence

The Courts require a minimum level of severity for all Article 3 cases, for example the slap in *Bouyid* reached the minimum level of severity needed for degrading treatment¹³⁴. In *Zherdev v Ukraine* the applicant was stripped and handcuffed for a period of two hours and put in a cell with adult prisoners, the Courts found this was degrading as the applicant was a minor¹³⁵.

The punishment in *Tyrer* was considered degrading treatment, the Courts found that the ‘punishment constituted an assault on the applicant’s dignity and physical integrity, which may have had adverse

¹²⁸ *Tyrer v United Kingdom* App 5856/72 (25 April 1978).

¹²⁹ *Jacobs and others* (n 103) 191.

¹³⁰ *ibid* 192.

¹³¹ *Smith and Grady v United Kingdom* Apps no 33985/96, 33986/96 (ECHR, 27 September 1999).

¹³² European Court of Human Rights: Guide on Article 3 of the European Convention on Human Rights (n 126) 9.

¹³³ *ibid*.

¹³⁴ *Jacobs and others* (n 103) 186.

¹³⁵ *Zherdev v Ukraine*, App no 34015/07 (ECHR, 27 April 2017).

psychological effects and to the anguish of anticipating punishment’¹³⁶. The punishment was the penalty of birching a fifteen-year-old by a police officer. The Court also had regard for the punishments institutionalised violence¹³⁷.

Other examples include extremely poor prison conditions for a disabled woman¹³⁸, a paraplegic prisoner who could not leave his cell or move in the prison independently¹³⁹, failure by the authorities to ensure a minor was taken care of by an adult after the arrest of his parents and informed about the situation¹⁴⁰, promised police protection not provided adequately or in due time to a group of LGBTQ+ activists who were attacked by a mob¹⁴¹, and the delay by health professionals to provide genetic testing to a pregnant woman which resulted in it being too late for her to make an informed decision regarding abortion¹⁴².

3.4. Positive obligations and *O’Keeffe v Ireland*

O’Keeffe v Ireland established positive state duties to protect children from abuse in the education system¹⁴³. The Court found a violation of Article 3 and Article 13 (right to an effective remedy) due to the states failure to protect the child from institutional sexual abuse and the inability to obtain national recognition for the failure. The applicant, Louise O’Keeffe was a pupil at Dunderrow National School which was managed *de facto* by the local priest. The priest had received a complaint in 1971 alleging LH, the school principal, had sexually abused a child. The priest did not act on the complaint; he did not report it to the police or to any authority.

In 1973 O’Keeffe experienced approximately 20 sexual assaults by LH. It was alleged at this point that LH had sexually abused several children, LH resigned and found employment in another school. Twenty years later, O’Keeffe was contacted by the police after they received complaints against LH from another pupil. LH was charged with 386 criminal offences of sexual abuse; there were 21 former pupils involved over 10 years.

¹³⁶ Jacobs and others (n 103) 203.

¹³⁷ *ibid.*

¹³⁸ *Price v United Kingdom*, App no 33394/96 (ECHR 10 July 2001).

¹³⁹ *Vincent v France*, App no 6253/03 (ECHR, 24 October 2006).

¹⁴⁰ *Ioan Pop and Others v. Romania* App no 52924/09 (ECHR, 6 December 2016).

¹⁴¹ *Women’s Initiatives Supporting Group and Others v. Georgia* [2021] ECHR 1097.

¹⁴² *R.R. v. Poland* [2011] ECHR 828.

¹⁴³ *O’Keeffe v Ireland* App no 35810/09 (ECHR, 28 January 2014).

Ireland has a history of institutional sexual abuse within schools, with 2,395 allegations in 308 schools ran by religious orders and 884 abusers¹⁴⁴. Therefore, the ECHR case is of quite high significance. O’Keefe complained to the ECHR, saying that Ireland failed to protect her from sexual abuse by a teacher in a national school and that there was no relevant effective remedy available to her against the State. She complained under Article 3, Article 8, Article 14, and Article 2 of Protocol No. 1¹⁴⁵.

In its assessment the court explained that under Article 1 in conjunction with Article 3, states are required ‘to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals’¹⁴⁶. The positive obligation is not intended to impose an excessive burden on the authorities but ‘the required measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge’¹⁴⁷. This obligation is solidified in the context of primary education in the present case. This case exemplified a clear historical pattern and failure from the Irish state to protect and prevent sexual violence. This case is particularly unfortunate due to the number of children involved.

3.5. M.C. v Bulgaria and Other Cases

The case of *M.C. v Bulgaria*¹⁴⁸ is of significant importance in this thesis as it examined positive obligations on the state in the efficiency of national rape legislation. In the case, a 14-year-old girl claimed she was raped by two men. The child filed a complaint with the police, but the investigation was later terminated because of insufficient evidence of the attack. Moreover, the child apparently did not have enough proof of coercion by resistance even though upon medical examination there was found to have been sexual activity and bruising on her neck. This case went to the ECHR because the girl claimed the restrictive laws on rape in Bulgaria violated her Convention rights. The case against Bulgaria argued that the investigation by the police failed to meet positive obligations of the state to provide adequate

¹⁴⁴Jack White, ‘Abuse report: Full list of 308 schools and case numbers detailed’ *The Irish Times* (Dublin, 3 September 2024)

<https://www.irishtimes.com/ireland/education/2024/09/03/abuse-report-full-list-of-308-schools-and-case-numbers-detailed/> accessed 22 April 2026; Mary O’Toole, Report of the Scoping Inquiry into Historical Sexual Abuse in Day and Boarding Schools Run by Religious Orders: Volume 2, June 2024

¹⁴⁵ (n 144).

¹⁴⁶ *ibid*, para 144.

¹⁴⁷ *ibid*.

¹⁴⁸ (n 1) *M.C. v Bulgaria*.

protection against rape and thereby violated the girls' right to privacy and right to be free from torture and inhuman or degrading treatment. In the case, the court looked at three issues: the adequacy of the definition of rape under the criminal law; effectiveness of the investigation; and prosecutorial practice. The definition of rape under Bulgarian law was significantly narrower than that of Ireland's, it employed a force-based understanding of rape rather than consent based.

The Court upheld the view of the applicant and found a violation of Articles 3 and 8, considering the articles jointly. The Court used a three-step reasoning. Firstly, the Court relied on its own case law to affirm that obligations under Articles 3 and 8 arise in the context of effective protections against rape¹⁴⁹. Its own case law being *A v the United Kingdom*¹⁵⁰, *Z. and others v the United Kingdom*¹⁵¹, *E. and others v the United Kingdom*¹⁵², *August v the United Kingdom*¹⁵³, *X. and Y. v the Netherlands*¹⁵⁴. The Court went further than this, stating that state obligations also arise in providing efficient criminal law provisions and effective investigations¹⁵⁵. Secondly, the Court looked at the compliance with Articles 3 and 8 in the Bulgarian definition of rape in the effective protection against rape by private individuals. The Court however noted that 'States undoubtedly enjoy a wide margin of appreciation'¹⁵⁶, but that the margin of appreciation is limited by the standards within the Convention. The Court took into account three elements: domestic definitions of sexual crimes in other European criminal justice systems; practice within the Council of Europe, with reference to Recommendation Rec (2002) 5 of the Committee of Ministers of the Council of Europe on the protection of women against violence; and lastly it refers to case law of the International Criminal Tribunal for the former Yugoslavia¹⁵⁷. The Court analysed the Bulgarian definition of rape, which is entirely different to that of Ireland's so I will not discuss this element further. I will focus on reasoning and analysis. The third and final step was the 'application of such principles to the actual case before it'¹⁵⁸.

¹⁴⁹ (n 1) *M.C. v Bulgaria*, para 149-150.

¹⁵⁰ *A v the United Kingdom* App no 25599/94 (ECHR, 23 September 1998).

¹⁵¹ *Z. and others v the United Kingdom* App no 33218/9 (GC, 26 November 2002).

¹⁵² *E. and others v the United Kingdom* App no 33218/96 (ECHR, 26 November 2002)

¹⁵³ *August v the United Kingdom* App no 36505/02 (ECHR, 21 January 2003)

¹⁵⁴ *X. and Y. v the Netherlands* App no 8978/80 (ECHR, 26 March 1985)

¹⁵⁵ (n 1) *M.C. v Bulgaria* paras 150-152.

¹⁵⁶ *ibid* para 154.

¹⁵⁷ *ibid* para 163.

¹⁵⁸ Cesare Pitea, 'Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in *M.C. v. Bulgaria*' (2005) 3 *Journal of International Criminal Justice* 447, 451 <<https://doi.org/10.1093/jicj/mqi037>>.

The Court found that the ‘allegation of a restrictive practice’ was founded on reasonable arguments and was not disproven by Bulgaria. As to the second point, the Court found serious shortcomings within the investigation conducted by the Bulgarian authorities and said that the ‘investigation and its conclusions *must* be centred on the issue of non-consent’¹⁵⁹. The investigation was found to have fallen short of positive obligations under requirements ‘to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse’¹⁶⁰. Therefore Article 3 and 8 were found to be in violation.

4. THE PROBLEM

There are loopholes present for rapists in the Irish criminal justice system. This impacts conviction rates as it allows for defences and evidence to be used that arguably should not be, and it acts a deterrence from going to or accessing trial as it makes a conviction more challenging. Perpetrators walk free due to these loopholes; there is a complete lack of accountability in this regard. Both perpetrators and the State should be held accountable. The State has created a system of compliance, of turning a blind eye. The law on rape has historically been decorated with serious issues. The crime of rape was originally regarded as a property crime done by one man against another, the property being the woman¹⁶¹. The notion of consent came much later. In this regard, the law has positively developed significantly. However traditional ideals and stereotypes still impact today’s law and procedure. This thesis looks at two specific legislative issues: the use of therapy notes, and belief of consent. I highlight other issues such as reporting and conviction rates, inaccuracy in data, and culture. I also discuss and highlight guidance from trusted institutions such as the Law Reform Commission and the Rape Crisis Centre.

Historically only a man could rape a woman, and it was recognised as a violation of a man’s property, ‘a crime committed against her body became a crime against the male estate’. This oddly recognises that the act of rape is not about sexual gratification, that it is more about power or control. Of course that was not the intention of these laws whatsoever, and they cannot be seen to be progressive, just by mere accident they recognise this element of rape. Today in Ireland, the law has recognised that it is possible for anyone to be raped and anyone to be a rapist regardless of gender.

¹⁵⁹ (n 1) *M.C. v Bulgaria*, para 181.

¹⁶⁰ *ibid* para 185.

¹⁶¹ Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (1st Ballantine Books ed, Fawcett Columbine 1993) 18.

The core of the issue and the resistance to change I respect of the use of therapy notes is due to the accused's right to a fair trial. As I discuss later in this chapter, this right is swayed towards the defendant, despite it being a right supposedly afforded to both the accused and the complainant. The right is 'a defendant-centric right'¹⁶², such as is exemplified poignantly in William Blackstone's ratio that it is 'better that ten guilty persons escape than that one innocent suffer'¹⁶³. Despite the lack of analysis 'as to whether or why it is true'¹⁶⁴, it is accepted. The right is used as a silver bullet for reforms that have regard for the victims' rights.

4.1. Use of Therapy Notes

At present, all counselling notes and records of rape survivors can be submitted into evidence and used by the defendants in court. Under section 39 of the Criminal Law (Sexual Offences) Act 2017 the prosecution is obliged to notify the defence of the existence of any counselling records, but not the contents of the records¹⁶⁵. The defence can then request access to the contents, this in theory should be done before trial begins, but can be done even after the trial has commenced¹⁶⁶. The survivor will then either give consent or not. If consent is given, the defence may access the notes except any irrelevant information will be redacted from the notes. If consent is not given, the trial judge will make the decision as to whether the notes will be released, a hearing will be scheduled for the judge to examine the notes and decide¹⁶⁷. If the judge decided that there is material of relevance in the records, they will also decide what information is released. The counselling notes are then treated as evidence, and the survivor can then be questioned at trial by the prosecution and defence barristers about material in the counselling records.

Aside from the issue itself of allowing private and personal medical record to be admitted as evidence, another issue arises. The defence may request access essentially at any time leading up to and during the trial, so if a survivor has already made it to court and is already under the stresses of court procedure, it

¹⁶² Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' [2014] 37(3) Melbourne University Law Review 539, 558.

¹⁶³ William Blackstone, *Commentaries on the Laws of England* (vol 4, 1st edn, Clarendon Press 1769) 352.

¹⁶⁴ Fritz Allhoff, 'Wrongful Convictions, Wrongful Acquittals, and Blackstone's Ratio' (2018) 43 Australasian Journal of Legal Philosophy 39, 39.

¹⁶⁵ Criminal Law (Sexual Offences) Act 2017 s 39 (2).

¹⁶⁶ *ibid*, s 39 (3,4).

¹⁶⁷ *ibid*, s 39 (8).

is unlikely they will want to push back their hearing further by not consenting to the admission of the notes and having to wait for a hearing on admission of evidence first. This can very easily be done as a strategy to ensure the notes are admitted, additionally giving very little time for a survivor to reflect on or prepare for the questioning that may follow regarding their counselling records.

Survivors have been advocating for themselves in protests regarding the use of counselling notes for years. One survivor, Paula Doyle, said the experience of having her counselling notes used in evidence left her feeling ‘contaminated and vile’, and resulted in her self-harming¹⁶⁸. She said she was barely surviving during the proceedings of her trial, ‘I couldn’t see tomorrow, never mind six to nine months. So, I said, ‘Oh, it’s okay, take them’, not knowing that they would actually be used in court.’¹⁶⁹ Doyle had nearly four years’ worth of counselling notes, she found it deeply troubling, ‘I was healing, but that just sent me straight back’¹⁷⁰.

The ability to request and submit therapy notes of survivors into court as evidence is apparently justified by the defendants right to a fair trial. However, both parties in criminal trials should have fair trial rights.

‘There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.’¹⁷¹

This understanding of fair trial rights does not seem to transfer to sexual assault trials. In order to adequately protect from rape under the law, the right to a fair trial of victims must also be considered. This should still apply in sexual assault and rape trials. Lord Hope in *R v A*, a case concerning the admissibility of sexual history in rape trials, recognised this issue:

‘The law fails in its purpose if those who commit sexual offences are not brought to trial because the protection which it provides against unnecessary distress and humiliation of witnesses is inadequate. So too if evidence or questions are permitted at the trial which lie so close to the

¹⁶⁸ The Irish Times (No Author), ‘Change to rape trial counselling-notes law patronising, claim campaigners’ *The Irish Times* (Dublin, 22 January 2026). <https://www.irishtimes.com/crime-law/2026/01/22/change-to-rape-trial-counselling-notes-law-patronising-claim-campaigners/> accessed 21 April 2026.

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ *Attorney-General’s Reference* (No 3 of 1999) [2001] 1 All ER 577, 584.

*margin between what is relevant and permissible and what is irrelevant and impermissible as to risk deflecting juries from the true issues in the case.*¹⁷²

4.1.1. Sarah Grace, Solicitor and Survivor

Sarah Grace, who works as a solicitor in Ireland and is a survivor of sexual assault, came forward to discuss the issue after the section to end the practice was removed from the Criminal Law (Sexual Offences and Human Trafficking) Act 2025¹⁷³.

Grace was sexually assaulted in her sleep after a burglar broke into her bedroom in 2019. ‘I was condemned to walk the rest of my existence carrying this enormous, shattering, shameful, dirty little secret. Long after my attack I didn’t know who I was any more’¹⁷⁴.

Grace attended counselling for the attack and found it helped her massively, as she understood it at the time she was speaking safely in confidence with her counsellor. ‘For all survivors of rape and sexual assault, the use of their counselling records in a trial is a second, more traumatising, more hurtful and more unforgivable violation – unforgivable because in contrast to the perpetrator, it comes at the hands of a system designed to protect us and calls itself justice’¹⁷⁵. Grace pointed out that ‘had the attack she experienced not included sexual violence, her attacker’s defence team would not have access to her therapy notes’¹⁷⁶.

In 2021 then Minister for Justice Helen McEntee brought through a ‘Zero Tolerance Strategy’ on sexual and gender-based violence, this included plans to prevent the use of counselling notes in trials¹⁷⁷. Five years on, and McEntee now no longer Minister for Justice, counselling notes can still be used as they were then.

¹⁷² *R v A (No 2)* [2002] 1 AC 45, 82.

¹⁷³ Sorcha Corcoran, ‘Counselling records trial use a ‘second violation’’ *Law Society Gazette* (Dublin, 1 July 2024) <https://www.lawsociety.ie/gazette/top-stories/2024/july/counselling-records-trial-use-a-second-violation/> accessed 22 April 2026.

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

¹⁷⁶ Una Mullally, ‘Victim of sexual violence recommends changes to justice system’ *Irish Times* (Dublin, 30 March 2021) <https://www.irishtimes.com/news/crime-and-law/victim-of-sexual-violence-recommends-changes-to-justice-system-1.4524206> accessed 14 June 2026.

¹⁷⁷ Sorcha Corcoran (n 161).

4.1.2. Psychology Society of Ireland Perspective

The Psychology Society of Ireland (PSI) have released a statement on their position¹⁷⁸. They are the professional body for psychology within Ireland. They said the ‘issue is a matter of health and mental health, and that the legal considerations must follow the ethical foundations of psychological practice’¹⁷⁹. They note the barrier it poses for survivors in getting support, and how it ‘undermines the therapeutic process’¹⁸⁰. They pointed out that the possibility of therapy notes being subpoenaed is a deterrent to reporting incidents to the Gardaí and that the practice should end.

They emphasised the ‘profound psychological consequences of sexual violence’ and how it is associated with ‘PTSD, personality disorders, psychosis, eating disorders, and substance misuse’¹⁸¹. Despite the possible severe impacts of sexual violence, counsellors or psychologists are least likely to be sought out after experiencing sexual violence¹⁸². The PSI said they believe the use of therapy notes in court contributes significantly to the underuse of psychological services¹⁸³.

The PSI also outlined how unaddressed trauma ‘can continue to impact functioning in disproportionate ways, with more long-lasting impacts’¹⁸⁴. They explain how therapy notes are exploratory, and survivors share thoughts they would not share with anyone else.

4.1.3. Choosing Between Therapy and Justice

In order to protect themselves, survivors are often forced into choosing between therapy and justice¹⁸⁵. Therapy may have to be delayed till after trial in order to protect their own privacy, but this is often to the detriment of the mental health of the survivor. Therapists have taken it upon themselves to not take notes or limit the amount of notes taken when speaking with a survivor¹⁸⁶. This draws the question of

¹⁷⁸ The Psychology Society of Ireland, ‘Position Statement on the Use of Therapy Notes in Legal Cases involving Rape and Sexual Assault in Ireland’ (2025). <https://www.psychologicalsociety.ie/source/PSI%20Statement%20-%20Use%20of%20Therapy%20Notes%20in%20Sexual%20Assault%20Cases.pdf> accessed 14 June 2026.

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

¹⁸² *ibid.*

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

¹⁸⁵ Dublin Rape Crisis Centre, ‘Statement re ending use of confidential counselling notes in trials’ *DRCC* (Dublin, 14 November 2025)

<https://www.drcc.ie/news-resources/statement-re-ending-use-of-confidential-counselling-notes-in/> accessed 22 April 2026

¹⁸⁶ RTÉ, ‘Counselling notes read in court ‘retraumatising’ sexual assault victims - therapists’ group’ (24 April 2026)

whether this negatively impacts how effective the therapy may be for the survivor. I will not assess this issue within this thesis as it does not fall within the scope of the research question, but it is a relevant issue.

In a system where already very few survivors report what happened to them to the Gardaí¹⁸⁷, we should be ensuring that any possible barriers to justice be broken down. Survivors have reported that they have had to decide between the two¹⁸⁸, this is a position survivors of rape should never be forced into.

The counselling notes are often sought out in order to undermine the credibility of the survivor¹⁸⁹, comparable to the practice of asking a survivor what they were wearing or how much they had to drink. Not believing survivors is deeply outdated which is rooted in rape myths and thereby in sexism¹⁹⁰.

4.1.4. 2026 Reform Bill

After plans in the previous government to amend the law on counselling notes failed to move forward, Minister for Justice Jim O' Callaghan has put forward new plans. If successful, this will create a statutory presumption of non-disclosure of counselling notes in sexual offence trials. This means the notes would only be disclosed where it is absolutely necessary for the interest of justice, only where there is probative evidence in favour of the accused¹⁹¹. This raises the question of whether third-hand notes from therapy 'could ever reach the threshold of exculpatory evidence' and therefore is this exception at all necessary¹⁹².

The current proposed legislation, which is an amendment to the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025 would require, where counselling notes are requested, that a

<https://www.rte.ie/news/ireland/2026/0424/1569952-assault-counselling-notes/> accessed 14 June 2026.

¹⁸⁷ Central Statistics Office, 'Adult Experience Disclosure – Police' in *Sexual Violence Survey 2022* (CSO, 2023)

<https://www.cso.ie/en/releasesandpublications/ep/p-svsde/sexualviolencesurvey2022disclosureofexperiences/adultexperiencesdisclosure-police/> accessed 14 June 2026.

¹⁸⁸ Ann Murphy 'Sexual assault survivors opting for counselling rather than criminal trial over fear of notes disclosure in court' *Irish Examiner* (5 March 2026) <https://www.irishexaminer.com/news/arid-41804825.html> accessed 14 June 2026.

¹⁸⁹ Victims' Commissioner for England and Wales, 'Third Party Material' (Victims' Commissioner for England and Wales) <https://victimscommissioner.org.uk/our-work/briefings/third-party-material/> accessed 14 June 2026

¹⁹⁰ Chiara Rollero and Stefano Tartaglia, 'The Effect of Sexism and Rape Myths on Victim Blame' (2019) 23 *Sexuality & Culture* 209 <<https://doi.org/10.1007/s12119-018-9549-8>>.

¹⁹¹ Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2026.

¹⁹² Cormac McQuinn, 'Disclosure of rape complainant's counselling notes during trial will be 'an exception' under law change' *The Irish Times* (Dublin, 4 February 2026)

<https://www.irishtimes.com/politics/2026/02/04/disclosure-of-rape-victims-counselling-notes-during-trial-will-be-an-exception-under-law-change/> accessed 22 April 2026

disclosure hearing occurs. As outlined above, survivors can currently waive the right to this hearing. The idea is to ensure no survivor feels pressured into granting access to their notes¹⁹³. There have been protests against this amendment, claiming it ‘doesn’t go nearly far enough’¹⁹⁴, and that the amendment proves how ‘survivors are not protected and respected in Irish law’¹⁹⁵.

There is a clear issue with this amendment in that it takes all power away from the survivor. While it does prevent survivors from being pushed into waiving their right due to time pressure, it also means that every survivor with requested counselling notes from the defence must sit through another hearing, has to relive their experience once more.

The reasoning given as to why a complete ban is not possible is that it is incompatible with Article 38.1 of the Constitution¹⁹⁶: ‘*No person shall be tried on any criminal charge save in due course of law.*’¹⁹⁷ This is the right to a fair trial protection afforded to accused persons, this fails to acknowledge the survivor’s right to a fair trial and access to justice.

4.2. Subjective Reasonable Belief of Consent

As I described in chapter 2, it is an acceptable defence to assert that the perpetrator honestly believed consent was present, even if there was no consent. Can this be conducive to a system that takes a victim-based approach, or listens to survivors of rape? Outside of gang rape cases, there are two individuals involved in a rape: the rapist and the survivor. A survivor of rape is someone who was subjected to sexual intercourse against their will, but a rapist is only considered a rapist if they carried out the act and either knew or were reckless to the fact that this was against the survivors will. They will not be considered a rapist if, regardless of the opinion of the survivor, they believed there was consent.

The motivation of criminal convictions and sentencing is: deterrence from committing crimes; punishment for the perpetrator; and justice for the victim. To not convict and sentence a rapist because

¹⁹³ The Irish Times (n 156).

¹⁹⁴ *ibid.*

¹⁹⁵ *ibid.*

¹⁹⁶ Irish Legal News (No Author), ‘Further restrictions expected on use of counselling notes in rape trials’ *Irish Legal News* (3 February 2026)

<https://www.irishlegal.com/articles/new-restrictions-to-be-placed-on-use-of-counselling-notes-in-rape-trials> accessed 22 April 2026.

¹⁹⁷ Bunreacht na hÉireann (Constitution of Ireland 1937) art 38.1.

they believe they are not a rapist is to completely disregard two of the three purposes: deterrence; and justice. To not convict a rapist because they believe they are not a rapist is to affirm that the perpetrator is correct: that they are not a rapist and that a rape never occurred. This tells the survivor, despite the fact that they did not consent to sexual intercourse, that they were not raped. It tells a survivor that whatever they claim is irrelevant, because the justice system believes the rapist.

4.2.1. Possible Amendments

In 2023 a Bill was going forward to amend the subjective belief test to an objective one. The bill initially proposed to amend section 2 of the 1981 Act by removing ‘(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 substituting it with ‘(b) at that time he does not reasonably believe that she consents to the intercourse’¹⁹⁸. This provision was removed by the Report Stage of Dáil Éireann later that year¹⁹⁹. The reason why it was removed was because it would have only changed the mens rea for rape and not other sexual offences, and that by changing only rape it would ‘remove the commonality’ for all sexual offences²⁰⁰.

In 2025 a General Scheme for a new bill, Criminal Law (Sexual Offences, Domestic Violence and International Instruments) Bill 2025, was put forward. At this stage it includes an amendment to move from a subjective to an objective test for consent with the same wording as the 2023 Bill. While it is a positive move forward and should be embraced, it is still at early stages.

4.3. Case Studies

4.3.1. University College Dublin Student²⁰¹

This case study sheds light on traditional attitudes towards rape and sexual violence that are present today, and how little shame there is in completely ignoring a survivor of rape even in a university setting.

¹⁹⁸ Criminal Law (Sexual Offences and Human Trafficking) Bill 2023, No 62 of 2023.

¹⁹⁹ Criminal Law (Sexual Offences and Human Trafficking) Act 2024; Criminal Law (Sexual Offences and Human Trafficking) Bill 2023, No. 62a of 2023.

²⁰⁰ Department of Justice, *General Scheme of the Criminal Law (Sexual Offences, Domestic Violence and International Instruments) Bill 2025* (October 2025), 6 https://assets.gov.ie/static/documents/d7648adc/Criminal_Law_Sexual_Offences_Domestic_Violence_and_International_Instruments_.pdf accessed 14 June 2026.

²⁰¹ Shauna Bowers, ‘Photo of UCD student ‘nude, bruised and unconscious’ was shared with students and staff, TD tells Dáil’ *The Irish Times* (Dublin, 21 February 2026) <https://www.irishtimes.com/crime-law/2026/02/21/ucd-reviews-its-handling-of-cases-after-intimate-image-of-student-was-circulated/> accessed 22 April 2026; Adam Schmitz and Orla Mahon, ‘UCD medical student who was victim of image-based sexual assault issues statement’ *University Observer* (Dublin, 18

In recent months it came to light that a UCD student was the target of physical and image based sexual abuse, The School of Medicine. The woman was raped, and the student proceeded to take images of her naked, unconscious and bruised. The photo was circulated by the student to the UCD School of Medicine staff via email. The images were accompanied by ‘further rape threats and further threats to use objects to violently rape’ her, abusive language, and said that she should take her own life. The photo was sent anonymously to over 170 UCD staff email accounts. The individual used a Proton Mail account to prevent tracing. The survivor discovered the image existed when the gardaí rang her to inform her.

The survivor herself decided not to report the crime to the gardaí, she thought they would not believe her²⁰². She said in a statement that she felt ‘profoundly alone and unsupported by UCD’. The University claimed to have ‘acted immediately’ by contacting the guards and attempting to send any emails to spam or junk. Even still, the survivor received the image to her own UCD email months later²⁰³.

‘They were continuously [in] my own UCD student email for over a week before I myself just blocked the whole server because it was becoming too difficult.’

The survivor was not contacted by the School of Medicine when the image first circulated in 2025, or when it recirculated in November later that year. The school instead decided to meet with the student representatives of the year group regarding the incident, and not the survivor. The significant steps taken by the perpetrator to remain hidden have made it extremely challenging to identify them. There was no internal investigation initiated by UCD. The survivor also claims UCD did not reach out to her regarding her welfare²⁰⁴.

In addition to the suffering surrounding the rape and image based sexual assault, the survivor also had to pause her studies. After the rape, the survivor had to get an abortion and was then unable to sit her exams.

February 2026) <https://universityobserver.ie/ucd-medical-student-who-was-victim-of-imagebased-sexual-assault-issues-statement/> accessed 22 April 2026.

²⁰² Conor Wilson, ‘Image-based abuse left me ‘shattered,’ UCD medical student says’ *RTÉ (Dublin, 4 March 2026)* <https://www.rte.ie/news/primetime/2026/0303/1561494-image-based-abuse-left-me-shattered-ucd-medical-student-says/> accessed 22 April 2026.

²⁰³ *ibid.*

²⁰⁴ Imasha Costa, ‘I was just a young student who wanted to do a medical degree’: UCD student's life shattered by abuse images’ *Irish Examiner* (Dublin, 5 March 2026) <https://www.irishexaminer.com/news/spotlight/arid-41804594.html> accessed 22 April 2026.

UCD did not allow her to continue her studies or take the exams at a later date, and that she would have to retake the entire year. She took the matter to the High Court but lost the action.

An open letter from 48 doctors in Ireland was written to UCD. They outline how the students need to understand moral codes and ethics as doctors, and that the subsequent sharing of the image along with UCD failing to treat the issue seriously indicates a ‘toxic, misogynistic culture’.

‘Whether this is due to a simple lack of empathy for the victim or a permissive, patriarchal attitude toward such crimes, we feel that the University’s response to this event is unacceptable.’

This case exemplifies that even where there is clear evidence of a rape occurring (photos and threats to do it again), survivors are deterred from reporting the incident. There are many reasons why survivors do not report the crime, fear of not being believed is common for this age group of university students. Survivors believe there is little sense in reporting the issue to the gardaí because they will not be believed. In this instance, it is very clearly a gender-based violence matter that is deeply rooted in misogyny.

The student has been put through months of humiliation and degrading treatment with very little outreach from UCD to her, even though the incident is occurring through UCD related platforms. UCD failed to properly protect the student from image based sexual violence, failed to give her adequate care after being informed of the rape, and subsequently prevented her from continuing her studies. UCD is a public institution, funded by the Irish state though it is mainly independent under the Universities Act 1997. The Higher Education Authority is a public body responsible for governance of regulation of higher education institutions, including UCD.

4.4. CSO Statistics on Sexual Offences

Sexual violence and rape are arguably one of the most traumatic experiences an individual can go through, and ‘is associated with higher rates of posttraumatic stress disorder... than other traumas’²⁰⁵. Though it is a near impossible feat to gain justice as a survivor. At every point of contact with the criminal

²⁰⁵ Emily R Dworkin and others, ‘PTSD in the Year Following Sexual Assault: A Meta-Analysis of Prospective Studies’ (2023) 24 Trauma, Violence, & Abuse 497 <<https://doi.org/10.1177/15248380211032213>>.

justice system, a challenge arises: whether they can tell anyone, whether they report it to the police, whether the police take it seriously, whether the police refer it to the Director of Public Prosecutions (DPP), whether the DPP take on the case, whether there is enough evidence, whether they are able to be put through a trial, whether there is a conviction, and finally whether there is an adequate punishment for the crime given by a judge.

In Ireland, 52% of adult women and 28% of adult men have experienced sexual violence in their lifetime. 21% of women and 5% of men experienced ‘non-consensual sexual intercourse’ in their life. Only about half (47%) of all adults who experienced sexual violence told someone about it.²⁰⁶ There are extremely low levels of reporting to police, an average of 5% of adults reported the violence to An Garda Síochána (the Irish police force). Reasons given for not reporting it include but is not limited to: believing it was not serious enough, shame or embarrassment, blaming themselves for what happened, belief that the police would not help, fear of their families reaction, being under the influence of drugs or alcohol at the time of the incident, or did not want to go to court²⁰⁷.

Once reported to the police, the Gardaí will either mark it as a sexual offence ‘detected’ or not detected. Between 2021 and 2018 only approximately one quarter of reports were marked as a sexual offence detected²⁰⁸. There are records of more recent years, but they may be falsely low as not enough time has passed for it to be an accurate reflection.

Over a ten-year period from 2015-2025, 19,019 sexual offence files were submitted by the Gardaí to the DPP, with only 1/3 (6,365) making it to court. In instances of rape cases, only half led to a conviction²⁰⁹. This starkly contrasts with the high rate of conviction where prosecution occurs in all forms of crime at 94%.

²⁰⁶ CSO, ‘Key Findings’ in *Sexual Violence Survey 2022: Main Results* (n 175) <https://www.cso.ie/en/releasesandpublications/ep/p-svsmr/sexualviolencesurvey2022mainresults/keyfindings/> accessed 14 June 2026.

²⁰⁷ CSO, ‘Adult Experiences Disclosure Police’ in *Sexual Violence Survey 2022: Disclosure of Experiences* (n 175) <https://www.cso.ie/en/releasesandpublications/ep/p-svsde/sexualviolencesurvey2022disclosureofexperiences/adultexperiencesdisclosure-police/> accessed 14 June 2026.

²⁰⁸ Dublin Rape Crisis Centre, ‘Sexual Offending’ <https://www.drcc.ie/news-resources/sexual-violence-information/sexual-offending/> accessed 14 June 2026.

²⁰⁹ Irish Legal News, ‘Just one in three sexual offence cases sent to DPP results in prosecution’ *Irish Legal News* (Dublin, 28 July 2025) <https://www.irishlegal.com/articles/just-one-in-three-sexual-offence-cases-sent-to-dpp-results-in-prosecution> accessed 22 April 2026.

4.5. Low Rates of Reporting

This section deals with rates of reporting, whether that be to a friend or police officer. It is important to establish first how often sexual offences are reported to establish how seriously sexual offences are taken in the criminal justice system as a whole. The significance use of counselling notes in trials and what the law actually recognises as rape can be signalled first by how often rape is actually reported. It is important to note that this is not a comparison between other non-sexual offence reporting rates as it is outside of the scope of the paper. Regardless, low reporting rates of other offences would not necessarily be a justification for low reporting rates of sexual offences.

Approximately half of adults who experienced any form of sexual violence during their adulthood disclosed their experience to another person. Individuals between 18-34 had the highest rate of disclosure at 51% and individuals aged 65 and over had the lowest rate at 27%²¹⁰. The most common reason given for adults not reporting sexual violence was because of the belief that what happened was not serious enough²¹¹.

Reasons given for why someone did report were, for example, because they wanted to get help (29%), because they were afraid the perpetrator may do it again (18% in women and 11% in men), wanted the perpetrator to be punished (9%). There are many reasons why individuals disclose what occurred to them, 49% of disclosures were marked 'other' for reason²¹².

Reasons given for why someone did not report were, for example, believed what happened wasn't serious enough (48%), were under the influence when it happened (20%), felt ashamed or embarrassed (31%), blamed themselves for what happened (13%). There are once again many reasons why

It is common in sexual offences that survivors will report significantly later than victims of other crimes. For example, in 2024 30% of the recorded victims had waited ten years to report the incident.

²¹⁰ CSO, 'Overall Adult Experiences Disclosure' in *Sexual Violence Survey 2022: Disclosure of Experiences* (n 178) <https://www.cso.ie/en/releasesandpublications/ep/p-svsde/sexualviolencesurvey2022disclosureofexperiences/overalladultexperiencesdisclosure/> accessed 14 June 2026/

²¹¹ *ibid.*

²¹² *ibid.*

Only 5% of those who experienced sexual violence as an adult and had disclosed it to someone, disclosed it to police. Police were rarely a first point of contact at only 1%²¹³. With 59% of survivors citing that they did not believe it was serious enough to report.

4.6. Low Rates of Convictions

Now the paper turns to how rates of reporting is translated into convictions. Between the period of 2018 and 2022, approximately a fifth of reported sexual offences led to either a charge or a summons, with 70%-80% of sexual offences reported to the police between a similar period have had no charge or summons issued in connection to the reported crime. To put that into actual numbers, in 2018 3,214 sexual offences were recorded but only 846 were marked as detected. Detected means that it either led to a charge or summons, or it was decided not to prosecute for certain specific reasons such as the perpetrator dies²¹⁴. For the purposes of accuracy I chose to not present a more recent year as there are delays in reporting and in the criminal justice system. It would be challenging to decipher the exact rate in any given year of sexual offences that result in a conviction due to the delays in reporting and in the system. Even if we looked at reporting rates for a given year and prosecution and conviction rates for that same year, it would not be the same group of people.

4.7. Access to Justice

The above statistics evidence a system that rarely convicts rapists. There is a clear problem here, the criminal justice system is not functioning as it should and is allowing those who rape to walk free. For the purposes of highlighting how hard it is to get justice as a survivor of rape, I will provide a highly simplified illustration based off the averages and statistics around sexual violence outlined above.

If we take average statistics over the years provided above and apply it to one single hypothetical rape we are returned with the following estimation:

X is raped by her male friend Y. X has a 50% likelihood of every speaking to anyone about her experience. If X does decide to tell a friend or family member, she then has a 5% likelihood of reporting

²¹³ *ibid.*

²¹⁴ Dublin Rape Crisis Centre, 'Sexual Offending' (DRCC) <https://www.drcc.ie/news-resources/sexual-violence-information/sexual-offending/> accessed 15 June 2026.

it to the police. This translates to a total of 2.5% of rape cases. She decides to tell the police despite being likely to feel shame, embarrassment or self-blame.

X gives a full account of the rape that occurred to the police, which approximately only in 25% of cases will it be marked as 'detected'. This brings the likelihood to 0.625%. X is lucky, the Gardaí mark her rape as detected and pass the case on to the DPP, who will only take approximately 1/3 of cases to court on average. X has a 0.2083% chance of her case making it to court. Even if X has her case heard by a judge, her chances of obtaining a conviction are 50%.

By very rough estimate, based on averages over a five-year period, X would have a 0.104% chance of getting justice by having her rapist be convicted. This highlights quite starkly the need for reform within rape law; it is virtually near impossible to get access to justice as a survivor. I will discuss in the next chapter how the Courts established that lack of adequate criminalisation of rape can breach Article 3 in *M.C. v Bulgaria*²¹⁵. This is the cornerstone judgement of my thesis.

5. IRELAND IN BREACH OF THE ECHR

The purpose of this chapter is to identify whether the current criminal law and procedure amounts to a breach of Article 3, inhuman and degrading treatment. Article 3 of the Convention is an absolute right²¹⁶, therefore if a breach is found then it will further support the argument that the Irish state must change current criminal procedure and legislation to adequately protect the people of Ireland. Positive obligations arise out of Article 3²¹⁷, which will be analysed in this chapter regarding positive obligations required of the Irish state. *M.C. v Bulgaria*²¹⁸ is the key authority in this chapter.

First, I lay out the legal framework of Article 3 briefly and regarding its actual application, regarding positive obligations and due diligence. I then turn to the European Courts approach to sexual violence under Article 3 once again regarding application in the given context with specific reference to case law

²¹⁵ (n 1) *M.C. v Bulgaria*.

²¹⁶ European Court of Human Rights: Guide on Article 3 of the European Convention on Human Rights (n 126); *A and Others v. United Kingdom* App no 3455/05 (GC 19 February 2009); *Mocanu and Others v. Romania* Apps no 10865/09, 45886/07, 32431/08 (GC 17 September 2014); *El-Masri v. the former Yugoslav Republic of Macedonia* App no 39630/09 (13 December 2012); and *Z.A. and Others v. Russia* App no 61411/15 (ECHR, 21 November 2009).

²¹⁷ European Court of Human Rights: Guide on Article 3 of the European Convention on Human Rights (n 126), 6.

²¹⁸ (n 1) *M.C. v Bulgaria*.

established. I then turn to the substantive and procedural elements in question: belief of consent and therapy notes. The chapter ends with my final assessment of whether the facts present a breach of Article 3.

5.1. Legal Framework

As mentioned above, Article 3 is absolute in nature and one of the few non-derogable rights within the Convention. I have detailed the threshold for inhuman and degrading treatment in Chapter 3. Article 3 creates positive obligations on states, the duty to protect from harm, the duty to investigate and prosecute, and the duty to prevent ill-treatment²¹⁹. States are required to carry out their due diligence for the purposes of protecting the people.

I have used case law and the Convention in the above chapters to lay out the law regarding Article 3 and the relevant interpretations regarding rape and sexual violence. I have also set out the relevant provisions of Irish law that are coming under scrutiny in this paper. The relevant legal framework in Ireland has been under review by the Department of Justice, the Law Reform Commission, and relevant campaigners such as the Dublin Rape Council. Legislative changes have already been posited to the Irish government, but the criminal justice system is proceeding as it is.

5.1.1. Due Diligence

Due diligence as a concept ‘has been central to the advancement of the responsibility of states for the acts of non-state actors’²²⁰. Due diligence places ‘obligations on states to prevent acts of violence from occurring, whether committed by state or private actors, as well as to punish perpetrators and compensate victims’²²¹. However, the mere existence of a violence does not automatically mean a state has failed in its due diligence. One the state has taken sufficient measures to prevent the violence, such as enactment of criminal law, it has filled its obligations. There are similarities between the concept of positive

²¹⁹ European Court of Human Rights: Guide on Article 3 of the European Convention on Human Rights (n 126) 6.

²²⁰ Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?* (Martinus Nijhoff Publishers 2011) 200 <<https://doi.org/10.1163/9789004225954>>.

²²¹ *ibid.*

obligations and due diligence, but they are not the same, the ECHR employs the concept of positive and negative obligation. Due diligence can be interpreted under the ECHR logic of positive obligations²²².

Due diligence obligations can also be understood as ‘indirect state responsibilities’ or ‘state responsibility for the acts of private actors’²²³. When applying this to rape in this context, the behaviour of Ireland is seen as the violation of international law, and not the private actor. The ‘behaviour’ of Ireland is the current legislation and procedural aspects of a rape trial. Under due diligence obligations, the state can be responsible for an entirely private act, with entirely private actors, ‘if it fails to prevent or punish the act concerned’²²⁴.

The UN Committee against Torture discussed due diligence in General Comment No. 2 which affirms that non-intervention ‘encourages and enhances the danger of privately inflicted harm’²²⁵ and ‘the States indifference or inaction provides a form of encouragement and/or *de facto* permission’²²⁶. In applying this to Irish rape law, Irish State indifference and inaction towards rape is essentially permission to rape. When we look at the current state of the law regarding the honest belief defence, this is undoubtedly permission to rape. The Irish government permits individuals to rape if the rapist thinks it is not rape, regardless of objective factors or otherwise.

Under the ECHR, *Marckx* found in relation to state responsibility that there is ‘no room to distinguish between acts and omissions’²²⁷. The *Young, James and Webster* decision held that when legislation allows acts that violate human rights can find state responsible. Accordingly, ‘under Article 1 of the Convention, each contracting State ‘shall secure to everyone within its jurisdiction the right and freedoms defined in [...] [the] Convention’, thus of a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged’²²⁸.

²²² B Hofstotter, ‘European Court of Human Rights: Positive Obligations in *E. and Others v. United Kingdom*’ (2004) 2 International Journal of Constitutional Law 525, 531 <<https://doi.org/10.1093/icon/2.3.525>>; Eriksson (n 212) 202.

²²³ Eriksson (n 209) 202.

²²⁴ *ibid* 204.

²²⁵ UN Committee Against Torture, ‘General Comment No. 2: Implementation of Article 2 by State Parties’ (24 January 2008) para 15.

²²⁶ *ibid*, para 18.

²²⁷ *Marckx v Belgium* App no 6833/74 (ECHR, 15 June 1979).

²²⁸ *Young James and Webster v United Kingdom* Apps No 7601/76; 7806/77, (ECHR, 13 August 1981).

State responsibility under due diligence entails prevention, punishment, adequate investigation, and provision of remedies²²⁹. Prevention when understood from a criminal justice perspective requires an adequate penal code²³⁰. This means the full and proper criminalisation of rape. Adequate criminalisation of an offence acts as a deterrent: the fear, shame or embarrassment of being found to be a rapist should to an extent prevent rape. Accordingly, the culture and attitudes towards rape in Ireland (and elsewhere) permits rape. The failure to penalise rapists permits rape, ‘providing remedies through enacting and effectively applying criminal law as a response to sexual violence has been considered to be the most appropriate avenue of deterrence’²³¹. However, this is not to suggest that it is on Ireland’s shoulders to eliminate all instances of rape and sexual violence. This paper is focused on the issues within Irish rape law as forms of inhuman and degrading treatment and is limited to the elimination of those two issues. Elimination of those two issues may then in turn lessen the number of rapes that occur as it will reflect a state that has much a stricter penal code and thus individuals will be deterred. Rapists will not be able to rely on the fallacies of the hysterical woman by accessing their therapy notes, and individuals will have to ensure consent understood by a ‘Yes means Yes’ law rather than using the honest belief defence. It would be unreasonable to suggest that all cases of rape would be at the fault of the state. Preventative measures implemented by the state need to be ‘reasonable and appropriate’, and that is determined on a case-by-case basis²³².

5.2. ECtHR Approach to Sexual Violence under Article 3

5.2.1. Three Limb Test of M.C. v Bulgaria

As discussed in Chapter 3, the Courts looked at three elements in the M.C. case: the adequacy of the definition of rape under the criminal law; effectiveness of the investigation; and prosecutorial practice. We can use this standard and apply it to the Irish context. The definition of rape for the most part follows the ‘Yes means Yes’ model as it is based around free and voluntary consent²³³ but is caveated with the defence of honest belief. It falls short of criminalising even individuals who hold an honest belief but entirely unreasonably. While this is quite different to requirements of proof of physical resistance, it still stands as a narrowed definition of rape which prevents individuals from accessing justice. The

²²⁹ Eriksson (n 209) 223.

²³⁰ *ibid.*

²³¹ *ibid.*

²³² *Plattform ‘Ärzte für Leben’ v Austria* App no 10126/62 (ECHR 21 June 1988).

²³³ Criminal law (Sexual Offences) Act 2017.

effectiveness of the investigation can be transferred onto the practice of requesting and the use of therapy notes as evidence. This element of the investigative and evidentiary process in Ireland is a complete ignorance of the realities of counselling and the need for privacy in therapy. It acts as a deterrence from justice, survivors are made decide between therapy and justice. Finally, the prosecutorial practice, this may apply to this context in the sense that the aggregation of the defence of honest belief, the use of therapy notes, and the attitudes to rape (as discussed in chapter 4) results in poor prosecutorial practice. Too many rapes are allowed pass by without accountability, which seriously calls into question the adequacy of the criminal justice system.

5.2.2. Margin of Appreciation Doctrine

As mentioned above in *M.C. v Bulgaria*, the Court employed the margin of appreciation doctrine in respect to states' duties under positive obligations to effectively protect against rape. This is the first time this doctrine has been applied to Article 3²³⁴. An in-depth discussion on this doctrine is outside of the scope of this thesis, however its significance in relation to rape law and Article 3 in this context should be acknowledged. The reasoning in *M.C. v Bulgaria* suggests that positive obligations allow States a margin of appreciation, but how can a margin of appreciation be allowed under a non-derogable right? Does this suggest that there is a margin where inhuman and degrading treatment is acceptable under positive obligations? If a margin of appreciation test were to be applied and allowed in this context, even though there was found to be inhuman and degrading treatment, then that would render Article 3 derogable.

5.3. Substantive Irish Criminal Law (Belief of Consent)

This section seeks to answer whether, based on the research conducted in this thesis, Ireland is obliged under Article 3 of the ECHR to remove the defence of belief of consent in rape trials. If we look outside of the purview of the ECHR and instead to the Inter-American Commission on Human Rights (IACHR) at *Maria da Penha Maia Fernandes v. Brazil*²³⁵, we will see jurisprudence regarding state negligence in law. Da Penha's case concerned domestic violence by her husband, and her attempted murder twice by him. In the case the IACHR found the Brazilian legislation to be insufficient and that Brazil failed in its

²³⁴ Pitea (n 232) 458.

²³⁵ *Maria da Penha Maia Fernandes v Brazil* Case 12.051, Report No 54/01, Inter-American Commission on Human Rights (16 April 2001)

due diligence obligations. The Commission stated that ‘discriminatory judicial ineffectiveness creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of society, to take effective action to sanction such acts’²³⁶. There was found to be a ‘direct connection between state inaction and the perpetuation of private acts of violence’²³⁷, the passivity of the state aided and encouraged domestic violence.

If we apply this theory to Irish rape law in the context of belief of consent, in allowing this as a defence, the passivity of the Irish state is aiding and encouraging rape through its lack of effective criminalisation. This way of looking at rape is strange, what other criminal offences completely disregard the view of the victim or survivor? If we take homicide for example, and this is why the mens rea discussion is important, it is clear that the actus reus has occurred because someone has died. What is not clear, until it is proven so, is the mens rea and therefore whether it was murder, voluntary manslaughter, or involuntary manslaughter.

A homicide will not be considered a murder under Irish criminal law unless the perpetrator ‘intended to kill or cause serious injury’²³⁸. Manslaughter can vary drastically depending on the case, ‘it may come very near to murder or amount to little more than inadvertence’²³⁹. The option to convict a perpetrator of manslaughter is open to juries in murder cases²⁴⁰. Manslaughter can be involuntary or voluntary, voluntary meaning when a murder conviction is brought down to manslaughter due to mitigating circumstances such as a provocation defence²⁴¹, excessive force in self-defence²⁴² or diminished responsibility²⁴³. Involuntary manslaughter is then separated into two subcategories: unlawful and dangerous act manslaughter, and gross negligence manslaughter²⁴⁴. Additionally, there is the offence of dangerous driving causing death under the Road Traffic Act²⁴⁵. I focus on the concept of gross negligence manslaughter as I later explore the concept of gross negligence rape, however I do not ultimately

²³⁶ *ibid.*

²³⁷ Eriksson (n 209) 230.

²³⁸ Criminal Justice Act 1964, s 4(1).

²³⁹ *Gray v Barr* [1971] 2 QB 554 (CA).

²⁴⁰ *Charleton and others* (n 7) para 10.02.

²⁴¹ Law Reform Commission, ‘Homicide: Murder and Involuntary Manslaughter’ (Law Reform Commission 2008) LRC 87-2008 76.

²⁴² *The People (AG) v Dwyer* [1972] IR 416; *The People (DPP) v Nally* [2006] IECCA 128.

²⁴³ Criminal Law (Insanity) Act 2006 s 6.

²⁴⁴ ‘Homicide: Murder and Involuntary Manslaughter’ (n 246) 76.

²⁴⁵ Road Traffic Act 1961 s 53.

recommend this in my proposed reforms in Chapter 6. This paper will not further discuss the other forms of homicide as it is outside of the ambit of the paper.

The mental element of the forms of homicide is significantly clearer and easier to satisfy. The addition of intention to cause serious injury and the possibility to convict with manslaughter allows for justice to be served in more cases. The gravity of homicide is reflected in the law, you cannot intentionally kill someone, and you cannot negligently kill someone and get away with it.

5.3.1. Criminal Negligence

Negligence is ‘a failure to take ordinary precautions in circumstances where there is a duty of care’²⁴⁶. In criminal negligence manslaughter, an omission to think or to check has found liability²⁴⁷. Negligence can be understood as a failure to behave in a manner expected of a reasonable person, meaning it is judged on an objective standard²⁴⁸. Your intention is entirely irrelevant, for example, your intention to drive well does not matter if you were driving poorly and killed someone. Dangerous and criminally negligent driving is ‘driving in a manner which a reasonably prudent man, having regard to all the circumstances, would clearly recognise as involving a direct and serious harm to the public’.²⁴⁹ The standard in criminal negligence is higher than that of negligence in tort law.

The comparison between dangerous driving and the honest belief defence is quite significant. Particularly if we look at bad drivers:

*‘In order to justify a conviction there must be, not only a situation which, viewed objectively, was dangerous, but there must also have been some fault on the part of the driver, causing that situation...there is fault if an inexperienced or a naturally poor driver, while straining every nerve to do the right thing, falls below the standard of a competent and careful driver’.*²⁵⁰

This model is not applied to the law on rape. You can be found criminally liable for bad driving if you lack the capacity to drive properly, you will not be found criminally liable for rape if you lack the capacity

²⁴⁶ Charleton and others (n 7) para 10.95.

²⁴⁷ *ibid.*

²⁴⁸ Charleton and others (n 7) para 10.95.

²⁴⁹ *People v Quinlan* (1963) 97 ILT & SJ 219; *People (DPP) V Connaughton* (unreported, CCA, 2001).

²⁵⁰ *R v Gosney* [1971] 2 QB 674.

to recognise the absence of consent. The law excuses poor behaviour and allows people to act without proper due diligence. Say we apply the reasoning used in rape law to a learner driver: he takes it upon himself to drive his car, by himself, onto a motorway at rush hour. Said learner has no actual driving experience but simply believes he is an excellent driver because he is very interested in Formula 1. The learner unintentionally causes a car crash and kills another driver. It would be completely irrational to allow that driver to rely on the defence of sincerely believing he was a good driver. It may have been a complete accident on the part of the learner driver, but that individual still has a high degree of responsibility the moment he steps behind the wheel of the car. For some reason, despite the serious and sometimes lifelong psychological and physical impacts of rape²⁵¹, an individual can be too senseless to be found guilty rape.

It is ‘an intention to do the act which causes death or, where there is a special duty to act, an omission to do something which would prevent death from occurring’²⁵². *Cullagh* was a case involving a chairplane death²⁵³. The chairplane had been kept outside for three years in a field, in the rain, and had rusted. Cullagh argued that he was not aware of the rust on the inside of the chairplane that caused the death. Cullagh owned and ran the entertainment equipment despite the deplorable condition it was in.

*‘Nobody is suggesting that Mr Cullagh was conscious of the fact that rust was eating away at this particular bolt...what the jury was asked to consider was having regard to all of the facts...had Mr Cullagh so failed in the duty which he owed to Ms Egan as to be criminally responsible for her death’*²⁵⁴

There was ample evidence in the case to leave the charge to the jury for criminal negligence. A similar application of legal principles has been theorised to be made available in the case of rape. The Irish government received recommendations regarding this in 2019 from the Law Reform Commission in which the Commission explored this model but ultimately advised against a hierarchical system. The State is now continuing to uphold a criminal justice system that does not adequately criminalise rape and

²⁵¹ (n 1) *M.C. v Bulgaria*; Rape Crisis England & Wales, ‘Impacts of Sexual Violence and Abuse’ <https://rapecrisis.org.uk/get-informed/about-sexual-violence/impacts-of-sexual-violence-and-abuse/> accessed 14 June 2026; Kathleen C Basile and others, ‘Chronic Diseases, Health Conditions, and Other Impacts Associated With Rape Victimization of U.S. Women’ (2021) 36 *Journal of Interpersonal Violence* NP12504 <<https://doi.org/10.1177/0886260519900335>>.

²⁵² ‘Homicide: Murder and Involuntary Manslaughter’ (n 246) 84.

²⁵³ *The People (DPP) v Cullagh* [1999] IECCA 15.

²⁵⁴ *Joel v DPP and Others* 2012 IEHC 295, [12].

therefore, following the logic of *M.C. v Bulgaria*²⁵⁵, this points towards a breach of Article 3 of the Convention.

5.3.2. Compatibility with Article 3: Application of M.C.

It is evident that there is inadequate criminalisation of rape, particularly the subjective elements of the crime. Even a move to an objective analysis of the belief would create a system that more adequately criminalises rape. The definition of rape under Irish law is limited, even when compared to its common law counterpart of England and Wales. The Irish system parted ways from England and Wales on this issue, where that jurisdiction uses an objective test concerning belief of consent. Furthermore, as I discuss in detail in the following chapter on reforms, a supplementary crime was proposed to the Irish government regarding an objective test and Ireland has thus far failed to implement it. Putting the significant challenge of getting a rape conviction as per the statistics aside, it has been made accessible for perpetrators to simply state that they believed the individual was consenting and the entire issue will be disregarded, the accusation will be successfully defended, so long as the jury deem that belief to be honestly held.

5.4. Therapy Notes

This section seeks to answer whether, based on the research conducted in this thesis, Ireland has a responsibility under Article 3 of the ECHR to ban the use of therapy notes in rape trials. The Greek case defined inhuman treatment as deliberately causing severe suffering, be that mental or physical, which is unjustifiable in the particular case²⁵⁶. Treatment is degrading if it is grossly humiliating according to that same case²⁵⁷. Thus, the question this section seeks to answer, based on the information so far found, is whether the use of therapy notes deliberately causes unjustifiable mental suffering to survivors of rape or whether the use of therapy notes grossly humiliates survivors of rape.

The examination of therapy notes in a court room to dispute the survivor's reliability is extremely poor practice. One survivor described it as 'more traumatising' than the rape itself, and that 'dealing with the

²⁵⁵ (n 1) *M.C. v Bulgaria*.

²⁵⁶ *The Greek Case* (n 107).

²⁵⁷ *ibid*.

legal system was worse than the rape'²⁵⁸. Sarah Grace, a survivor who had her therapy notes used in court, explained being put in this position, 'my body had been violated and then a court ordered the violation of my mind. I'm still not over that'²⁵⁹.

5.4.1. The Use of Therapy Notes in Rape Trials: Hearsay Rules

Without diverging excessively from the central question of this thesis, evidentiary rules only allow for hearsay under certain conditions.

Briefly on hearsay, the preference for *viva voce*:

Hearsay is defined in *Cullen v Clarke* 'there is no general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule, subject to many exceptions, that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert ... This is the rule known as the rule against hearsay. If the fact that the words were spoken rather than their truth is what it is sought to prove, a statement is admissible'²⁶⁰. It operates to potentially disallow 'informal oral remarks, formal written statement and sworn testimony in previous proceedings...' ²⁶¹ etc. The reasoning is so as to prevent evidence being submitted by the individual who has made the statement without the ability to cross examine them or observe their demeanour and credibility²⁶². However, if the hearsay rule is applied rigorously without exception, it would be capable of allowing for serious injustices²⁶³. In respect of medical information such as counselling notes, it would fall under section 4 (f)(v) of the Criminal Procedure Act 1967 which includes 'a record by a registered medical practitioner of an examination of a living or dead person'.

²⁵⁸ Jane Matthews, 'Dealing with the legal system was worse than the rape': Victims of male violence demand change' *The Journal* (Dublin, 18 February 2025)

<https://www.thejournal.ie/international-womens-day-natasha-obrien-6626293-Feb2025/> accessed 15 June 2026.

²⁵⁹ Tabitha Monahan, 'My body had been violated and then a court ordered the violation of my mind. I'm still not over that' *Irish Independent* (6 May 2025) <https://www.independent.ie/irish-news/politics/my-body-had-been-violated-and-then-a-court-ordered-the-violation-of-my-mind.-im-still-not-over-that/a/132259634.html> accessed 14 June 2026.

²⁶⁰ *Cullen v Clarke* [1963] IR 368, 378.

²⁶¹ Caroline Fennell, *The Law of Evidence in Ireland* (Fourth edition, Bloomsbury Professional 2020) para 6.02.

²⁶² *ibid.*

²⁶³ *People (DPP) v McGinley* [1998] 2 IR 408 at 413, [1998] 2 ILRM 233 at 237.

Counselling notes from the therapists of survivors are regarded as hearsay but are allowed to be submitted into evidence as an exception to the rule. But why draw the therapist's notes into evidence, why not request that the therapist themselves testify? Without the therapist present in court to explain the process of therapy in the particular case to the judge and jury, the words on the page are available to the defence to scrutinise and reframe, to cast doubt in the eyes of the jury regarding the credibility of the survivor. The current bill proceeding at the time of writing this paper, the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2026, does not include a mandatory judicial warning to the jury²⁶⁴. A judicial warning in this case would be to explain to the jury that the evidence from the counselling notes should not be treated as statements of fact, it would tell the jury the appropriate weight that is to be given to the evidence and its limitations²⁶⁵.

The hearsay rule is purposefully bypassed for the case of therapy notes, even though they are third-party accounts of statements made by the survivor. The information targeted by the defence is the words of the survivor, their purpose is to find a weakness in the survivor's perspective told in confidence to their therapist. It is not targeted for the purpose of finding some medical fact. Their use is a deterrence; it forces a choice upon the survivor: therapy or justice.

5.4.2. The Use of Therapy Notes in Rape Trials: Models of Application

Survivors need a safe space to be free to process this traumatic event in their life. They may have been raped by a friend, a loved one, a family member, or simply someone they had trusted. This is undoubtedly something that would need to be talked through in therapy, survivors may not even realise yet or accept yet that what happened to them was rape. I have already enumerated the perspective of the PSI on the use of therapy notes.

Irish law has navigated around safety requirements such as the hearsay rule, privacy rights, client patient confidentiality to allow these notes into trials. Only in very rare and severe cases should confidentiality be breached. New South Wales introduced the Evidence Amendment (Confidential Communications)

²⁶⁴Rape Crisis Ireland, 'RCI Warns Key Protections for Survivors Still Missing' (21 May 2026) <https://www.rapecrisisireland.ie/rci-warns-key-protections-for-survivors-still-missing/> accessed 14 June 2026.

²⁶⁵ *ibid.*

Act 1997, making it the first Australian state to protect counselling records of survivors²⁶⁶. The threshold required to obtain access to therapy notes is ‘substantial probative value taking into account the public interest in preserving confidentiality’²⁶⁷. This protection has been successful, in its first twenty years of operation there were approximately twenty appeals and none of which resulted in the overturning of a conviction, meaning the fair trial rights were still upheld for the defendants²⁶⁸. Around the world, jurisdictions have created absolute protections such as Tasmania in Australia and Kentucky in the United States²⁶⁹.

5.4.3. Assessment under ECtHR Standard

In regard to assessing the use of therapy notes as evidence under ECtHR standards, we turn to the second limb of the M.C. test: effectiveness of the investigation. This requires a broadened scope of the understanding of investigation as, instead of it being simply the investigation by the authorities, it is widened to include all evidence practices. Possibly this step would need to be renamed as ‘effectiveness of criminal procedure’. The reasoning for this step still stands an effective investigation into rape needs to be conducted in order for adequate criminalisation to be upheld. An investigation can hardly be said to be effective if it includes evidence retrieved from private counselling notes that may be treated as gospel, and the rule against hearsay cannot protect against this. Advocates and campaigners fighting for change in Ireland have proposed amendments to the law and engaged with the Department of Justice regarding the issue²⁷⁰.

The use of therapy notes, according to the voices of survivors, no doubt undermines effective protection as they have been put into a position that makes them choose between therapy and justice. In reality there is no decision to be made when an individual has suffered such a traumatic event. Therapy is the natural

²⁶⁶ *Evidence Amendment (Confidential Communications) Act 1997* (NSW) No 122
<https://legislation.nsw.gov.au/view/pdf/asmade/act-1997-122>. Accessed 14 June 2026.

²⁶⁷ *ibid*; End Violence Against Women Coalition, *Keep Counselling Confidential: The Problems and Solutions with the Disclosure of Counselling Notes* (May 2023) <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/2023/05/Keep-Counselling-Confidential-FINAL-10th-May-23.pdf> accessed 14 June 2026

²⁶⁸ *ibid* (End Violence Against Women Coalition).

²⁶⁹ *ibid*.

²⁷⁰ Rape Crisis Ireland, ‘sexual Violence Victims’ Counselling Notes and Proposed legislative Amendments’ (19 January 2026) <https://www.rapecrisisireland.ie/sexual-violence-victims-counselling-notes-and-proposed-legislative-amendments/> accessed 15 June 2026; National Women’s Council, ‘NWC Welcomes Survivor Focused Recommendations in Sexual Offence Trials and Sex for Rent Exploitation’ (13 November 2025) https://www.nwci.ie/learn/article/nwc_welcomes_survivor_focused_recommendations_in_sexual_offence_trials_and accessed 15 June 2026

course of action, considering how unlikely it is to get a conviction in the first place. Some survivors will decide to avoid counselling and instead try to get justice, such as Susan Lynch who feared counselling notes would be used against her²⁷¹. This is the decision that current procedure of the Irish state forces survivors to make. Lynch said she regretted not having had any counselling, she said the trial was humiliating, that she had gone to Accident & Emergency for panic attacks, that she now has alopecia, and that she cannot sleep because she was raped repeatedly in her bed²⁷². The current procedure tells women like Susan Lynch that they must face that alone, without the help of a therapist, or else their private counselling will be told in court.

Since the Irish state has been made aware of the impossible choice being forced upon survivors, actively retaining this practice in law must be interpreted as a deliberate causation of suffering. The State would likely argue, based on its current answer for why it will not proceed with a ban, that the suffering is justifiable under the right to a fair trial. I would argue that the mental suffering is not justifiable.

5.5. Overall Assessment

Ireland is required to prohibit and prevent torture, inhuman and degrading treatment under the Convention. Considering the gravity and consequences of rape, the ECtHR *M.C. v Bulgaria* judgment, and the practices in Ireland despite the awareness of the Irish state of the issue, these all point towards a breach of Article 3, inhuman and degrading treatment. Inadequate criminalisation of rape, and procedures therein, can create a breach of Article 3 of the Convention. Statistics show the serious challenge it is to gain access to justice as a survivor, with the addition of a forced choice between therapy and justice, this all points towards a criminal justice system that is willing to let rape slide. A criminal justice system that does not adequately criminalise rape, is one that effectively encourages rape. These practices cannot be said to be respectful of the needs of survivors, or conducive to a system that ensures, to the best of its ability, access to justice. What is evidenced in this chapter is that there are significant insurmountable barriers that prevent access to justice, and this is entirely unacceptable. Moving forward Ireland needs to ensure an adequate and proper ‘Yes means Yes’ model. The following chapter will detail possible reforms available to Ireland.

²⁷¹ Niamh O’Donoghue, ‘Woman who was raped by former partner avoided counselling in fear notes could be used against her’ *The Journal* (Dublin, 17 January 2025) <https://www.thejournal.ie/woman-who-was-raped-by-former-partner-avoided-counselling-in-fear-notes-could-be-used-against-her-6596752-Jan2025/> accessed 14 June 2026.

²⁷² *ibid.*

6. REFORM POSSIBILITIES

This chapter aims to submit the possible reforms available to the Irish state and to the wider treatment of rape in criminal justice systems. Reforming the law can only be seen as a stepping stone within a wide path towards protection against rape. Law reform alone will not end rape, ‘Whether [rape] law reform is to be counted upon is one question; the second is whether law reform will even be the beginning of the answer’²⁷³. However, it is the answer within the context of a breach of Article 3.

The bulk of this will come directly from guidance of the Law Reform Commission 2019 report on the matter of consent²⁷⁴. The matter of therapy notes will be guided by relevant stakeholders such as the Dublin Rape Crisis Centre, the National Women’s Council of Ireland, and the stories of survivors. Then the paper will turn to my own submissions of what may be practicable in Ireland to ensure the balancing of the rights of survivors alongside the rights of the accused.

The two issues at hand of belief of consent and therapy notes are highly topical, there are many perspectives regarding the issue and multiple avenues of legal reasoning that this paper could delve into in terms of reform. However, this paper is not centred around reform. It is the aim of this chapter to provide a rounded perspective on the issue and provide some semblance of hope on the issue. There are significant limitations inherent in this chapter, but its aim is to identify and propose workable solutions to the issues clearly identified. The proposed changes are founded on the issues identified, with a focus on victim centred justice. The paper refers to previous recommendations, guidance and the laws in other jurisdictions as a roadmap to reform. As reform is not the central thesis question at hand, this chapter is brief and not dense with theory and explanations. It is suggestions of alternatives that may be possible. It would be outside of the scope of this paper to analyse issues that may arise with these suggestions.

²⁷³ Aj George and others, ‘Fields of Power in Rape Trial Reform: Hegemony, “habitus” and Heretics’ (2025) 48 University of New South Wales law journal 431, 431 <<https://doi.org/10.53637/IIAA7980>>.

²⁷⁴ ‘Knowledge or Belief Concerning Consent in Rape Law’ (n 35).

6.1. Guidance

The below sections have detailed the selected guidance regarding possible reforms available. I have summarised the guidance from the Law Reform Commission, the Dublin Rape Crisis Centre and other relevant stakeholders, both are used as inspiration for Chapter 6.2. My Suggestions for Reform.

6.1.1. Belief of Consent: Law Reform Commission Guidance

In 2019, the Law Reform Commission issued its most recent paper on rape law reform in Ireland. The 2019 report had many recommendations, but this paper will focus solely on what is relevant in its context: subjective honest belief of consent. The paper highlights the key issues within rape law and proceeds to enumerate specific law reforms. The paper recommended that the current law on honest belief of consent needed to be amended²⁷⁵.

The Commission recommended a set of reforms to Irish law, as this paper is a significant basis for this paper and the recommendations are highly relevant, I will enumerate them here: that the mens rea elements in section 2 of the 1981 Act be retained and that the elements needed to move towards an objective test should be additions to the section²⁷⁶. It also recommended that the Act should include that the accused did not reasonably believe that there was consent. The Commission also recommended a set of jury related issues concerning the recommended amendments. The Commission did not recommend that an offence of gross negligence rape be enacted.

The Commission's paper reasoned that to introduce a lesser offence of gross negligence rape would fail to represent that the effect of rape on survivors is the same regardless of the mens rea of the accused²⁷⁷. Additionally, it could risk further reducing convictions of rape as a lesser offence would be easier to prosecute, which would in turn affect the deterrence element of rape. The Commission made reference to the Gillen Review *Report into the law and procedures in serious sexual offences in Northern Ireland*²⁷⁸, which opposed the introduction of a hierarchy in rape law due to the heinous nature of the crime because it would diminish the gravity of rape. But where does that leave survivors of rape where

²⁷⁵ *ibid*, 95.

²⁷⁶ *ibid*, 95.

²⁷⁷ *ibid*, 91.

²⁷⁸ Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (Northern Ireland Department of Justice 2019).

their perpetrator honestly believed that the survivor was consenting? The refusal to create a ‘hierarchy’ in rape law has the effect of calling everything that is not a clear rape an entirely consensual and acceptable act.

The issue is that it still ignores women who were raped, it does not protect them. If this is what a ‘yes means yes’ model is, then it is really what the reasonable man believes a yes is. While it would be of interest to discuss what the reasonable man is, that question of morality is beyond the scope of this paper. The yes in the ‘yes means yes’ model does not stem from the woman; it stems instead from the perspective of the man. Granted this is the nature of most criminal laws, and it would be naïve to suggest strict liability in these cases. However, it does beg the question of the operability of the criminal justice system for rape cases. This is the crux of the issue, rape is a wholly different criminal offence. Inferences are much harder to be made in rape cases than say murder, it is much easier to infer intent of a stabbing in the chest. Death was the natural and probable consequence. Rape does not operate this way though. It does not necessarily follow that we should throw the baby out with the bathwater, but there may be a better way of ensuring access to justice for all survivors.

6.1.2. Rape Crisis Ireland

Rape Crisis Ireland (RCI) has called for amendments and have campaigned on this issue for years. Recently, the RCI called for key amendments to the bill I have discussed, the Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025. The RCI have advocated for ‘complete protection or privileged status of counselling notes in cases of sexual violence’²⁷⁹. Their position is that survivors must have a guarantee that ‘deeply personal information will not be used in ways that compromise their privacy’²⁸⁰. The RCI have recognised the constitutional concerns raised around the right to a fair trial, and have suggested these interim measures that respect both survivors’ privacy and fair trial rights.

The proposals are a presumption of non-disclosure and a raising of the threshold for disclosure. In order for these amendments to succeed, the RCI has also suggested ‘Supporting Measures’ which are adequate legal aid and transparency and oversight in decision making. This would include a review mechanism.

²⁷⁹ Rape Crisis Ireland, ‘Sexual Violence Victims’ Counselling Notes and Proposed Legislative Amendments’ (19 January 2026) <https://www.rapecrisisireland.ie/sexual-violence-victims-counselling-notes-and-proposed-legislative-amendments/> accessed 15 June 2026.

²⁸⁰ *ibid.*

The RCI maintained that these interim measures ‘do not address the impact of the disclosure of counselling notes’ and what that impact has on the counselling relationship and the deterrent effect. The interim measures aim to allow the use of therapy notes in very rare instances. The proposals aim to do this by creating a default position that therapy notes are not to be disclosed unless there is ‘clear, demonstrable, and specific relevance to the case’²⁸¹. This will reduce the amount of therapy notes disclosed as it would no longer be so frequently allowed into the book of evidence unless relevance has been demonstrated. Additionally the RCI suggested that disclosure should only occur when that disclosure is essential in preventing ‘a real risk of an unfair trial’²⁸².

These suggestions significantly raise the bar in terms of disclosure practices, and in my view are very reasonable interim recommendations.

6.2. My suggestions for reform

The following are the reforms that I propose are suitable solutions to the problem at hand, this involves amending the law and introducing new provisions to expand protection of survivors. The purpose of this is to change the perspective of the criminal law on rape to a survivor led criminal code, rather than focused primarily on the perspective of the accused.

6.2.1. Belief of Consent

I firstly agree with the Law Reform Commission’s recommendation to move the test from a subjective to an objective one. This would widen the scope of what may be criminalised, and more accurately reflect the purpose of the criminal justice system: justice. This would mean that the reasonable man test would be required to test against the belief of the accused. Would a reasonable man have believed this woman was consenting at the time of the sexual intercourse, if yes then that man is not guilty of rape, if not then that man should be found guilty. I welcome the proposed Bill that will hopefully change the test from subjective to objective.

²⁸¹ *ibid.*

²⁸² *ibid.*

Secondly, I agree with the Law Reform Commissions recommendation to not create a hierarchy in rape, and then it would be more favourable to instead move to an objective test. However, there is still a gap that would still need to be addressed if Ireland moved to an objective test. As the perspective of this thesis is deeply ingrained in access to justice and the perspective of survivors, it would not be right to allow cases where individuals honestly and reasonably believed the woman was consenting, but in reality, was not. From the perspective of the woman, she was raped. This is where a challenge arises and goes beyond the scope of this paper. While I am not in a position to suggest a strict liability offence in these cases of rape, I will suggest that change is still needed. However, that change may need to come from society's understanding of consent rather than the letter of the law. A reasonable man fifty years ago could be considered entirely unreasonable today, as society has a general understanding of consent. I would hope therefore that tomorrow's reasonable man will become more reasonable. There will be less 'grey areas' with consent, consent should always be understood as clear and informed. The law is only one cog in the machine, and while it can influence change, it does not act alone.

There are feminist arguments in favour of a system that focuses on the intent of the man, for example Susan Estrich in her book *Real Rape* identifies three problems. Firstly, that the trial would focus on the woman entirely, 'and since her state of mind is key, her sexual history may be considered relevant'²⁸³. However, the introduction of sexual history evidence has long been criticised by the common law courts themselves²⁸⁴. In *R v A*, a case from 2002, Lord Slynn said 'in recent years it has become plain that women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences. To allow such harassment is very unjust to the woman; it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape'.²⁸⁵ The admission of sexual history evidence follows similar restrictions as therapy notes, it is allowed only by permission from the trial judge and if it would be unfair to the accused if it were not allowed into evidence²⁸⁶. The issue of sexual history evidence, though an important element of rape law, is outside of the scope of this paper so I will not discuss this issue extensively, but it is an important element of the reform suggestions. Estrich suggests that considering consent from his perspective

²⁸³ Estrich (n 15) 96.

²⁸⁴ *R. v. A.* [2002] 1 A.C. 45, 48.

²⁸⁵ *R. v. A.* [2002] 1 A.C. 45

²⁸⁶ Criminal Law (Rape) Act 1981, s 3(2)(b); *The People (Director of Public Prosecutions) v G.K.* [2007] 2 IR 92.

undermines the relevance of her sexual history²⁸⁷, but this is clearly not true. In Ireland, sexual history is still used as evidence while consent is considered from his perspective.

Her second argument is that the relevant issue is whether the woman was raped rather than whether the man is a rapist²⁸⁸, which is a point we agree on. This is precisely why I believe it is important to focus on the place the perspective of the woman over the man. The current system will not conclude a rape occurred if the man believes it did not regardless of what the woman believes happened, the logic does not follow that Estrich suggests. The third argument was about substituting intent for resistance or vice versa²⁸⁹, which is not relevant for the purposes of my discussion as there is no requirement for resistance in Irish rape law.

6.2.2. Therapy Notes

*We do not subpoena someone's confession to a priest or demand to see the notes of a TD's therapist, but a rape survivor, apparently her words, feelings and her mind are available for dissection if it helps get someone off the hook. We tell women to report and to trust the system, and then we betray that trust in the most personal, invasive way possible.*²⁹⁰

TD stands for Teachta Dála, who are elected members of Dáil Éireann (Irish Parliament).

A ban of the use of therapy notes has been proposed previously in Irish government but has failed to move forward. Former Minister for Justice Helen McEntee had announced a plan to ban therapy notes in June of 2024, but the new Minister for Justice Jim O'Callaghan has rowed back on this stating concerns over the right to a fair trial and alignment with the constitution²⁹¹. However, in a recent Select Committee discussing the issue, TD Ruth Coppinger explained what needs to happen quite plainly. The purpose of a Select Committee is to discuss and scrutinise Bills.

²⁸⁷ Estrich (n 15) 96.

²⁸⁸ *ibid.*

²⁸⁹ *ibid.*

²⁹⁰ Gary Gannon, 'Criminal Law (Prohibition of the Disclosure of Counselling Records) Bill 2025: Second Stage [Private Members]' Dáil Deb 12 June 2025, vol 1068/6, col 342.

²⁹¹ Jane Matthews, 'Justice Minister clarifies he is 'not opposed' to ban outright counselling notes in rape cases' *The Journal* (Dublin, 26 February 2025) <https://www.thejournal.ie/counselling-notes-gender-based-violence-6633808-Feb2025/> accessed 14 June 2026

'It is the survivors, the therapists, the United Nations, the Psychological Society of Ireland, all of the professional bodies, such as the Group of Experts on Action against Violence against Women and Domestic Violence, GREVIO, and the National Women's Council of Ireland that want a ban... I believe that there are competing rights and that part of the problem we are up against is the staidness of the legal profession. Legal professionals work off of past rulings that judges have handed down, and they are very boxed in for that reason.

*If the Minister genuinely believes that there is no way that this can be done under the Constitution, then we need to talk about a referendum because this is actually damaging survivors of gender-based violence.'*²⁹²

A complete ban on the use of therapy notes in rape and sexual violence cases is needed. Current practices force survivors to make a decision between therapy and justice. This is not a criminal justice system that facilitates access to justice or respects survivors of sexual violence. This is a criminal justice system that silences survivors and refuses to hold rapists to account, which considering the evidence gathered is a violation of Article 3 of the Convention, inhuman and degrading treatment.

In that same Select Committee, Minister O'Callaghan ironically in his discussion regarding the use of therapy notes, privacy rights and fair trial rights, made the claim that 'no right is absolute'²⁹³. Which of course is not true, freedom from torture, inhuman and degrading treatment is an absolute right. There is no justification, the right to a fair trial or otherwise, for a breach of Article 3 of the Convention. Therefore, I agree with Coppinger's comments about needing a referendum if it would be unconstitutional to, at present, implement a ban.

²⁹² Ruth Coppinger, 'Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2026: Committee Stage' Dáil Deb 19 May 2026, col 190.

²⁹³ Jim O'Callaghan, 'Select Committee on Justice, Home Affairs and Migration' Dáil Deb 19 May 2026, col 170.

7. Concluding Remarks

There have been significant developments over the last century in the definition and criminalisation of rape, but it has not come far enough yet. Not all rapes are regarded as rape under the criminal justice system. Rape myths are not yet eradicated. The criminal justice system may be able to criminalise stranger rape, the rapist who jumps from the bushes or hides in alleyways, where the question of consent is not an issue in the court room, ‘the man who jumps from the bushes could hardly be expected to persuade anyone that he thought the woman was consenting’²⁹⁴. The criminal justice system will take pity for the survivors of stranger rape, but it will question and doubt rape by someone known to the survivor. The reality is that rapists come from all backgrounds, all demographics, it does not discriminate based on socioeconomic background like other crimes might, ‘instead the man is a neighbor, an acquaintance, or a date [...] he is a respected bachelor, a student, a businessman, or a professional. He may have offered a ride home or invited in. He does not have a weapon. He acted alone’²⁹⁵.

The belief of consent defence and the use of therapy notes point to an inherent distrust in survivors, who are for the large part women. The use of therapy notes is justified because there might be a hidden truth lying in the counselling notes, that she was consenting. It is the ‘distrust of vindictive, lying woman who might use a rape charge as a weapon’²⁹⁶.

Rape is inherently degrading and humiliating for its survivors, arguably the current state of the criminal justice system does not adequately reflect this ‘inherently debasing character of rape’²⁹⁷. The current practices do not adequately criminalise rape, and there are very clearly low levels of convictions compared to the number of rapes. This points to a very serious problem in the Irish criminal justice system of whether it is adequately protecting from and preventing rape. As established in *M.C. v Bulgaria*, inadequate criminalisation of rape can result in a finding of a violation of Article 3, as it essentially encourages rape. Rape law does not adequately deter rape in Ireland, and it does not adequately provide access to justice. Justice is blocked by the choice essentially forced on survivors between therapy and justice. Additionally, the belief of the accused is prioritised over the belief of the

²⁹⁴ Estrich (n 15) 94.

²⁹⁵ *ibid* 8.

²⁹⁶ *ibid* 72.

²⁹⁷ *SW v United Kingdom* 1996 21 EHRR 363, para 44.

survivor. It is not a crime to rape someone if you did not believe you were raping them, this is quite clearly inadequate criminalisation of rape.

‘Deciding to report a simple rape is a step most victims never take. If they do, it is only the first step. The road to conviction and sentencing is long’²⁹⁸. The Irish State have made it so the process of finding justice for rape is nearly impossible, it has been made so unlikely and so emotionally gruelling to attain. The Irish State is aware of these problems yet proceeds to operate the system in this way. This paper finds that the current law and procedure of Irish rape law is so poor that it is in violation of Article 3 of the ECHR, inhuman and degrading treatment.

There are alternative methods that could help provide justice for survivors. It is possible to maintain a survivor friendly criminal justice system, one that welcomes complaints and seeks justice rather than deters people from reporting. Survivors should be able to process and heal from rape with the help of a qualified therapist without the fear of their words being used against them in court. The practice of routinely allowing therapy notes to be introduced is indicative of a system that sees complainants not as survivors but as liars. There is the possibility of reform, to create a system that criminalises and deters rape properly, that shames the rapist rather than the survivor.

²⁹⁸ Estrich (n 15) 15.

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