

CRITICAL LEGAL STUDIES AND THE POTENTIAL FOR THE REFORM OF IRISH RAPE LAW

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I. INTRODUCTION

Ireland has witnessed a dramatic change over the past twenty years in the reform of rape law. The amendment of the Criminal Law Rape Act¹ in 1990 brought Ireland in line with the legal reforms which were spurred by the worldwide feminist movement. 2001 saw the introduction of the Sex Offenders Act,² which promised to revolutionise the treatment of women during court proceedings. However, in 2004, an EU conference on violence against women reported that Ireland has the worst record in Europe for bringing rapists to justice.³ The Garda Siochana Annual Report, 2003 statistics showed that 370 cases of rape were reported.⁴ The Central Criminal Court dealt with 52 new rape cases that year.⁵ The Limerick Rape Crisis Centre alone reported that their centre saw 230 new clients in 2003; 48% were survivors of rape.⁶

These figures are not easily reconciled with the innovations manifest in the reform of rape law. From a Critical Legal Studies (CLS) perspective, this article examines frailties within the legal system which may legitimise the suppression of women. Moreover, it endeavours to demonstrate links between these frailties and the elements of rape law, while shedding light on injustices inherent in the system.

CLS explores gaps between “law in the books” and “law in action.” This insight can be used to explore problematic issues in the Irish legal system, particularly with

¹ Criminal Law (Rape) (Amendment) Act, 1990

² Sex Offenders Act, 2001

³ “Irish Record of Convictions for Rape Criticized,” *The Irish Times*, 25 May 2004.

⁴ Garda Siochana Annual Report, 2003, available at www.garda.ie.

⁵ Court Service Annual Report, 2003.

⁶ “Limerick Under-Reporting of Rapes Deplored,” *The Irish Times*, 26 November 2004.

respect to the use of corroboration warnings in rape cases. CLS questions whether these warnings are used in the interests of justice or whether they stem from a deeper rooted patriarchal suspicion of women. CLS views the law's function as maintaining the status quo, which may be built on past injustices. In gauging the proportionality element in sentencing, judges weigh up the severity of the rape and the circumstances of the offender. CLS challenges how the judiciary determines what constitutes a "serious assault." This becomes especially complicated in cases of so-called non-violent rape. CLS sees legal doctrine as failing to address real problems in the legal system. In the Irish context, the examination of a witness's past sexual history in court deflects from the real issue of the actual rape itself. CLS questions the realities of the adversarial system. Is the law independent or does it serve certain classes over others? CLS explores whether the consent element of the rape, approached from the subjective male viewpoint, serves the male, rather than the female, experience of the rape. This work seeks to tackle some of the problems surrounding the law of rape in Ireland using a CLS methodology.

II. CRITICAL LEGAL STUDIES

Critical Legal Studies has its origins in the first Conference on Critical Legal Studies at the University of Wisconsin at Madison in 1977. Legal scholars, practitioners and students sought a critique of law capable of understanding and changing the legal system and the society of which it was a part.⁷ The task of CLS was to dissect or debunk accepted intellectual categories and examine the fundamental contradictions on which they rested. These pioneers felt that "neutral" legal doctrine operated to mystify and

⁷ Whitehead, "From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies Through A Reexamination of Frankfurt School Critical Theory," 26 *Florida State University Law Review* 701 at 702 (1999).

legitimate existing patterns of domination and subordination in society.⁸ Legal discourse is, therefore, viewed as a form of political domination and a barrier to social change. By understanding the contradictions of liberal legality, social and political action can then be encouraged to both oppose and transcend the liberal organization of economy and society.

CLS critique encompasses the indeterminacy thesis and the ideology thesis. The indeterminacy thesis claims that law is internally and externally inconsistent. The ideology thesis claims that law is ideological and partisan rather than neutral and independent.⁹ These theses serve to demystify the law and pave the way for radical change.

A. The Indeterminacy Thesis

The indeterminacy thesis holds that law is both internally and externally inconsistent. Traditional legal reasoning is not viewed to be a “distinct” method for arriving at particular legal results. In contrast to the present legal ideology that attempts to justify laws with myths of neutrality and objectivity, CLS writers seek to demystify law by showing that law is merely politics by other means. Kennedy highlights unquestioned hierarchies of power. “Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate, whether based on birth into a particular

⁸ Johnson, “Critical Legal Studies Symposium: Do You Sincerely Want To Be Radical?” 36 *Stanford Law Review* 247 at 248 (1984).

⁹ Whitehead, “From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies Through a Reexamination of Frankfurt School Critical Theory,” 26 *Florida State University Law Review* 701 at 706 (1998-1999).

social class or on the accident of genetic endowment.”¹⁰ CLS scholars examine these hierarchies through “rights” and “neutrality” in the law.

CLS scholars are concerned with the existence and status of individual rights. They are carriers of “possessive individualism” ideology, which legitimates an exploitative market economy.¹¹ However, Johnson criticizes CLS for taking refuge in an endorsement of equality. He points out that everybody can support “equality” as it can be given a broad interpretation. But there can be conflict between the public/private divide in trying to establish rights. Regarding the status of women in society, there is deliberate legislation to promote equality in the workplace, etc. In the private domain of the family, there is no state regulation.

Law is not neutral; rather it is oriented in favour of groups or classes with the power to bend the legal order to their advantage.¹² Law legitimates the status quo. Johnson notes that once the smokescreen of liberalism is lifted, the underlying oppression in society will be realized and new forms of human association, which do not involve domination or hierarchy, will emerge.¹³ Stick criticizes the CLS movement for presuming that the injustices in society are easy to discern and as needing little discussion.¹⁴ However, feminists have used “consciousness-raising” as a technique for unearthing some rather disturbing social realities in social practices that appear normal.

¹⁰ Johnson, “Critical Legal Studies Symposium: Do You Sincerely Want To Be Radical?,” 36 *Stanford Law Review* 247 at 253 (1984) citing Kennedy, “The Structure of Blackstone’s Commentaries,” 28 *Buffalo Law Review* 205 (1979).

¹¹ Quinn, “The Nature and Significance of Critical Legal Studies” (1989) 7 *Irish Law Times* 282.

¹² Naffine, *Gender and Justice* (London, 2002) at p. 123.

¹³ Johnson, “Critical Legal Studies Symposium: Do You Sincerely Want to Be Radical?,” 36 *Stanford Law Review* 256 (1984).

¹⁴ Stick, “Book Review: Charting the Development of Critical Legal Studies: A Guide to Critical Legal Studies by Mark Kelman,” 88 *Columbia Law Review* 407, 430 (1988).

The law will only become “neutral” when male hegemony, which permeates the legal process, is addressed.

B. The Ideology Thesis

CLS writers see law as having an ideological nature that reflects and supports many aspects of the dominant culture.¹⁵ Therefore, CLS focuses on “legal non-determinism.” Law is seen as autonomous from society, with no functional connection between the socio-economic organisation of society and the form and substance of legal rules.¹⁶ CLS scholars examine the gap between “law in the books” and the “law in action.” When Trubeck called for a “New Realism,” he suggested that these “gaps” had to be analysed through normative enquiry. The legal structure must be transcended, as its function is to perpetuate these gaps.¹⁷ The gap between “law in books” and “law in action” can be perpetuated by judges, who manipulate the public(state)/private(civil society) divide.

Olsen developed the CLS “gap” from theorists such as Freidman and Trubeck when she wrote of the family/market dichotomy. There remains subordination of women to men in society. Legal reforms, no matter how well-intentioned, are limited by “unexamined assumptions.”¹⁸ In the family/market dichotomy, the family is seen as separate from the market. Here, male domination is unregulated due to the public/private divide. It is protected from state intervention. Inequalities, untouched at private level, are

¹⁵ Whitehead, “From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies Through a Reexamination of Frankfurt School Critical Theory” 26 *Florida State University Law Review* 701 at 711 (1998-1999).

¹⁶ *Ibid.*

¹⁷ White, “From Realism to Critical Legal Studies – A Truncated Intellectual History,” 40 *Southwestern Law Journal* 819 at 834 (1986-1987).

¹⁸ Olsen, “The Family and the Market: A Study of Ideology and Legal Reform” 96 *Harvard Law Review* 1497 at 1498 (1982-1983).

legislated for at public level, giving the appearance of equality.

Olsen notes that inequality between men and women is the status quo, treated as neutral and not the responsibility of the State.¹⁹ However, “neutral principles” articulated in statutory interpretation cannot be truly neutral. These principles are shaped by ideological norms stemming from the private divide. According to Whitehead, law is both influenced by and autonomous of economics, politics and culture.²⁰ Process jurisprudence theorists claimed that judges should build on these “neutral principles.”²¹ A CLS critique would advocate the deconstruction of these “neutral principles.”

CLS scholars note that legal ideals play a prominent part in the ideology of law. Dworkin saw these ideals as emanating from legal doctrine.²² Liberal legalism is the blinding ideology. Kennedy criticises CLS, noting that the structures against which CLS rebel are necessarily within as well as outside of us.²³ However, CLS scholars see these ideals as arising from outside the law. Ideals are linked to ideology, which is rooted in politics. Johnson again criticizes CLS theorists for relying on legal jargon and methods of analysis, while rarely recommending Marxist remedies. Moreover, contemporary capitalist society is less oppressive and hierarchical than other societies that have ever existed.²⁴ While this is undoubtedly true, one should not accept oppression merely because her society is less oppressive than others. Taking a neo-Marxist approach, changes in the law are seen as arising from changes in the structure of the economic base.

¹⁹ *Ibid.* at 1527.

²⁰ Whitehead, “From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies Through a Reexamination of Frankfurt School Critical Theory,” 26 *Florida State University Law Review* 701 at 738 (1998-1999).

²¹ White, “From Realism to Critical Legal Studies – A Truncated Intellectual History” 40 *Southwestern Law Journal* 819 at 828 (1986-1987).

²² Quinn, “The Nature and Significance of Critical Legal Studies” (1989) 7 *Irish Law Times* 282.

²³ Johnson, “Critical Legal Studies Symposium: Do You Sincerely Want To Be Radical?,” 36 *Stanford Law Review* 247 at 253 (1984).

III. IRISH RAPE LAW

The Offences Against the Person Act, 1861 specified that rape was a felony. The Criminal Law (Rape) Act, 1981 brought attempted rape and aiding and abetting, counseling and procuring rape or attempted rape under the offence. Section 4 of the Criminal Law (Rape) (Amendment) Act, 1990 included incitement to rape and rape under the offence of rape.

Although rape law in Ireland is straightforward on the books, it is left open to exploitation by the legal system. There are social norms and deep-rooted attitudes about women and a stigma attached to rape regarding “false allegations.” Judges in the process of rape trials manipulate laws which appear to be fair on paper. Male hegemony, which pervades civil society, also seeps into the courtroom. This can be examined in relation to the most hotly contested aspects of rape law, e.g., corroboration warnings, sentencing, sexual history evidence and consent.

A. Corroboration Warnings

The Criminal Law (Rape) (Amendment) Act 1990 provides that there “be a requirement that the jury be given a warning about the danger of convicting the person on the uncorroborated evidence of that other person, it shall be for the judge to decide in his discretion, having regard to all the evidence given, whether the jury should be given the warning.”

Historically, the legal system has been male orientated and almost exclusively shaped by male perspectives. There had been a distrust of women in relation to rape allegations. This distrust, built into the structure of today’s rape law, is seen in the use of corroboration warnings administered by judges. Although the warnings are now

²⁴ *Ibid.* at 260 (1984).

discretionary, their existence undermines the value of a woman's testimony in court.

In *R v Makenjuola*,²⁵ the defense counsel argued that the reason for corroboration warnings was that “complainants about sexual offences may fantasise for unascertainable reasons or no reason at all. That rationale it was argued cannot evaporate overnight, so traditional warnings to juries should continue.” This is also true of Irish law. Although there was ample opportunity for this mechanism to be removed permanently, the Law Reform Commission expressed the view that, on its abolition, a warning may still be necessary.²⁶

This use of “discretion” has the appearance of being fair. However, the very existence of a corroboration warning is rooted in the historical suspicion of women from a patriarchal point of view. The NWCJ Working Group on the Legal and Judicial Process, 1996 has called for these discretionary warnings to be abolished, deeming them “unnecessary and as seriously undermining to the respect due to a complainant in the cases of rape and sexual assault.”

It is the premise of disbelief and distrust of the complainant which hinders women from reporting attacks to the Gardaí.²⁷ There is a prevailing attitude that, unless there is serious violence orchestrated, the assault is not serious and may have been embellished or even falsified by the purported victim. This sentiment denies the severity of rape and lies at the heart of under-reporting. Clair Glasman, a spokeswoman for the charity, Women Against Rape, pointed out that the Soham murderer, Ian Huntley, had been reported nine

²⁵ *R v. Makenjuola* [1995] 3 All E.R. 730.

²⁶ Charleton, McDermott and Bolger, *Criminal Law* (Dublin, 1999) at p. 639.

²⁷ “Limerick Under-reporting of rapes deplored,” *The Irish Times*, 26 November 2004.

times for sex crimes, including rape, one of them involving an eleven year old girl.²⁸

None of them resulted in a conviction.

B. Sentencing

There are no comprehensive criminal justice statistics in Ireland. Therefore, one must rely on the annual reports of prisons and places of detention and newspaper reports on sentencing decisions.²⁹ There is also no publicly available report on suspended sentences. The maximum sentence for rape is life imprisonment. In *Tiernan*,³⁰ a sentence of 17 years was regarded as reasonably being the upper limit for a very serious “isolated” rape.³¹ However, tables from St Patrick’s Institution indicate that from 1986 to 1992 two-thirds of those imprisoned for rape were sentenced to five years or more and one-third to more than ten years.³² In 1992, there were only 70 offenders in custody for rape, although 344 rapes were reported and proceedings instituted in 159 cases. These high attrition rates need to be addressed.

In Ireland, there is no benchmark sentence for rape. The sentence must be proportionate to the gravity of the offence and the personal circumstances of the offender.³³ Denham J. has said that the court should concentrate on the gravity of the crime and choose a commensurate level of punishment.³⁴ An admission of guilt can be a mitigating factor. According to O’Malley, for a “less serious” assault, the court may decide that the appropriate sentence should be reduced from five to three years. These “less serious” assaults underpin the whole problem with low rape convictions. A

²⁸ “Drink, Drugs and Rape,” *The Sunday Times*, 27 February 2005.

²⁹ O’Malley, *Sexual Offences, Law, Policy and Punishment* (Dublin, 1996) at p. 360.

³⁰ *People (DPP) v. Tiernan* [1988] I.R. 250.

³¹ O’Malley, *Sentencing, Law and Practice* (Dublin, 2000) at p. 410.

³² O’Malley, *Sexual Offences, Law, Policy and Punishment* (Dublin, 1996) at p. 364.

³³ *Ibid.*

³⁴ *Ibid.* at p. 318.

perception prevails that, in cases of non-violent rape, an offender who “lacked premeditation” is less of a threat to society. However, the act of rape is by its nature a violent act.

Newspaper reports of light sentences for the convicted rapist reflect the empathy of the court towards aggressive male sexual norms. In *The People (DPP) v Ward*,³⁵ the defendant appealing his sentence was a stranger to the victim, had followed her late at night and then violently raped her. Although his appeal failed, his initial sentence was quite lenient. In a similar vein, a Cork rapist received a four-year sentence after he violently raped a young woman.³⁶ He left a bruised imprint of his hands around her neck where he tried to restrain her. The judge commented on the young woman’s drinking and being out late. In Limerick, Carney J. allowed bail (for a five week period) before sentencing a Brazilian man who raped a young Limerick girl.³⁷ He fled. This is a representative, albeit somewhat anecdotal, sampling of sentences imposed for violent “real” rapes.

Liberal attitudes of the male orientated judiciary are reflected in rape cases. The resistance requirement has been written out of the law by the Criminal Law Rape Amendment Act, 1990 – consent is now the key issue. A silent issue of “contributory rape” seems also to have been inserted into rape law. The judge in the Cork rape case commented on the victims “drinking and socializing.” There is a perception of justice at a public level in the courts. This is thwarted by individual male perceptions in the judiciary. Sentencing does not reflect the severity of the crime. There are irreconcilable

³⁵ *The People (DPP) v. Ward*, Court of Criminal Appeal, unreported, 2003.

³⁶ “Cork man gets 4 years for Rape and Assault,” *The Irish Times*, 28 January 2005.

³⁷ “Fugitive Rapist,” *Irish Examiner*, 8 March 2005.

differences between male and female views on the severity of the violence in rape cases. Although the victim's rights may have been enforced if her attacker is found guilty, light sentencing in cases of nonviolent rape does little to rectify the wrong.

C. Sexual History Evidence

Since s. 3 of the Criminal Law (Rape) Act, 1981, as amended by the 1990 Act, the issue of prior sexual history can only be raised with the leave of the trial judge. In this respect, Alder notes that women occupy a “unique” position in the legal system, which treats them with “unequalled suspicion.”³⁸ The State endorses the suppression of women by failing to legislate against the sexual history evidence allowed in the courtroom. Women must publicly use words to describe the sexual advances made to them. This is a humiliating and embarrassing experience and not what “decent” women are “supposed to do.”³⁹

In the SLC Consultative Memorandum No. 46, MacPhaill interviewed a number of defense lawyers.⁴⁰ They admitted that they would do what they could to suggest that a woman was of “easy virtue” precisely because they believed that juries were swayed by it. Cultural stereotypes prevail. The mythical “good woman” does not cavort in bars and does not walk alone late at night. Women who do not fit this description are perceived as “easy.” This is an age-old male stereotype of woman. Male ideology shapes the belief that a woman's sexual history needs to be examined to determine whether she is a woman of low moral character.

The judiciary, by allowing this line of questioning, perpetuates this double

³⁸ Brown, Burma and Jamieson, *Sex Crimes on Trial – The Use of Sexual Evidence* (Edinburgh, 1993) at p. 17.

³⁹ *Ibid.* at p. 18.

⁴⁰ *Ibid.* at p. 36.

standard. In ordinary cases of contract law, there is an offer made to the offeror and then consideration before there can be acceptance.⁴¹ By allowing sexual history evidence, the law implicitly concludes that past consent to a sexual act is consideration enough for the present case. This would never be allowed in contract law; why then is such an unfair standard allowed in cases of rape?

An attempt was made to pacify radical advocates of rape reform from the Crisis Centres. A new mechanism was introduced to preserve the rights of women in the courtroom. First introduced in Denmark, the idea of personal legal representation in sexual history evidence has also been introduced recently in Ireland.⁴² For this part of the examination of evidence, there are now to be two representatives for the woman in court: one for the prosecution and the other a lawyer working solely on behalf of the victim.⁴³

Again the judiciary and legal reformers have neatly sidestepped the fundamental problem. Past sexual history is irrelevant if justice is to be administered on the actual facts of the actual event. Introducing new legal representatives serves only to add more chaos and confusion to an already very disturbing experience for the victim. Ultimately, the process will be shrouded with more legal jargon and will mystify an already alien process for the woman further. A legal representative can only explain to the victim the unchanged law and the male orientated process to her. Adding layers to the process does not deconstruct the established norms, it only accentuates them. Women become more confused, still trapped in an environment of state suppression through male ideology.

⁴¹ *Ibid.* at p. 206.

⁴² Charleton, McDermott and Bolger, *Criminal Law* (Dublin, 1999) at p. 645.

⁴³ Sexual Offenders Act, 2001.

IV. CONSENT

Section 9 of the Criminal Law (Rape) (Amendment) Act 1990 provides that “in relation to an offence that consists of or includes the doing of an act to a person without the consent of that person any failure or omission by that person to offer resistance to the act does not of itself constitute consent to the act.”⁴⁴

Although rape law has evolved from a resistance standard, the issue of consent, which has replaced this, is not a developed one. The absence of consent to sexual intercourse is an objective fact. However, the accused’s view of this fact is subjective. It is still judged from patriarchal standards. The woman’s experience of the violation of her body is disqualified in the courtroom as the issue revolves around the male subjective point of view.⁴⁵ Smart points out that, in this way, the law continues to shape social order and conceals male domination in society, making it appear normal and natural.⁴⁶

The woman’s understanding of force and consent is disregarded. The courts are more likely to find proof of non-consent in cases of “real” or violent rape. However, the courts are more suspicious when there is no “tangible” evidence.⁴⁷ The woman’s credibility will immediately be doubted as a result. If she knows her attacker, she can expect negative inferences about her “moral character.”⁴⁸

The male belief, that women do not know what they really want, is seen in the consent issue. The male characteristics of aggression (traits opposite to woman’s desire to nurture) are taken to be the standard from which women are judged.⁴⁹ This was

⁴⁴ Criminal Law (Rape) (Amendment) Act, 1990.

⁴⁵ Brown, Burma and Jamieson, *Sex Crimes on Trial – The Use of Sexual Evidence* (Edinburgh, 1993) at p. 17.

⁴⁶ Matoesian, *Reproducing Rape* (London, 1993) at p.15.

⁴⁷ McGlynn, *Legal Feminisms: Theory and Practice* (Dartmouth, 1998) at p. 94.

⁴⁸ Jennifer Tempkin, *Rape and the Legal Process* (Oxford, 2nd Ed., 2002) at p. 150.

⁴⁹ “An Irishman’s Diary,” *The Irish Times*, 18 March 2005.

especially seen to be the case in *Olugboja*.⁵⁰ There, the court outlined that consent “covers a wide range of states of mind...ranging from actual desire on one hand to reluctant acquiescence on the other.” This attitude rewards men for aggressively pursuing their sexual needs.

Glanville Williams portrays women to be unsure regarding consent. They put up what he describes as a “token resistance” to the “masterful” male advances which they “still welcome.”⁵¹ Man is seen as autonomous. Woman is heteronomous. She does not know her own desires. She needs man, who is masterful, to instigate the deed. She will be aroused if man “persuades a little harder.”⁵² However, as it is the male who instigates the whole act, it is he who is first aroused. It is he who first loses his sense of reason, in the “heat of the moment.” Woman answers the consent question; the male, aggressive with passion, disregards her wishes.

V. CLS AND THE LAW OF RAPE

A. *CLS and Corroboration Warnings*

The CLS writers identify a gap between “law on the books” and “law in action.” This “gap” is reflected in the use of corroboration warnings. On the books, a corroboration warning can be seen as a fair tool if there are inadequacies in a witness’s statement. However, the continued use of the corroboration warning is stunting rape law reforms as its use promotes inequality between the sexes by approaching the victim’s evidence with distrust. This in turn leads to distrust by women of justice system.

One can look to the “gap” in rape law to examine why the law is not performing

⁵⁰ *R v. Olugboja* [1981] 3 All E.R. 433.

⁵¹ Naffine, *Gender and Justice* (London, 2002) at p. 133.

⁵² *Ibid.*

adequately and why there are low rape conviction rates. Male standards of judging a woman's true motives for rape allegations lie deep in this gap.⁵³ Three centuries ago Lord Chief Justice Hale warned that rape is "a charge easily to be made and hard to be proved and harder to be defended by the party accused, tho never so innocent."⁵⁴ The *Stanford Law Review* published an article opining that "although a woman may desire sexual intercourse, it is customary for her to say 'no, no, no' (although meaning 'yes, yes, yes) and to expect the male to be the aggressor."⁵⁵ On a similar line, the *Yale Law Journal* published an article positing that a "woman's need for sexual satisfaction may lead to the unconscious desire for forceful penetration."⁵⁶ These manifestly sexist attitudes perceive women as manipulative and unsure of what they want. This general distrust is stitched into the fabric of legal ideology.

Despite the reality that the darker problem circulating the rape crisis is the actual under-reporting of the crime, the legal system still points the finger of the law at women who do come forward, beginning the proceedings with subconscious distrust. In *Criminal Law*, Charlton, McDermott and Bolger speak of the "wicked action" of false reporting in the area of rape, deeming it to be "usually motivated by extreme emotion."⁵⁷ They cite only one case. The Law Reform Commission claimed that this warning was still necessary in cases where the parties knew each other, where the circumstances of the offence were private and where there were no bodily signs on the alleged victim.⁵⁸ The

⁵³ Matoesian, *Reproducing Rape* (London, 1993) at p. 19.

⁵⁴ Estrich, *Real Rape* (Cambridge, 1987) at p. 28.

⁵⁵ Dworkin, "The Resistance Standard in Rape Legislation," 18 *Stanford Law Review* 680 at 682 (1965-1966) citing Slovenko, *A Panoramic Overview: Sexual Behaviour and the Law in Sexual Behaviours and the Law* (1965) at pp. 5, 51.

⁵⁶ Rothman, "Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard" 62 *Yale Law Journal* 55 at 67 (1952-1953).

⁵⁷ Charleton, McDermott and Bolger, *Criminal Law* (Dublin, 1999) at p. 636.

⁵⁸ Law Reform Commission, *Report on Rape* (1988) at para. 30-31.

continued use of the corroboration warning in cases of “simple” non-violent rape acts as a deterrent to women to report the crime and continue with proceedings. The Criminal Law (Rape) (Amendment) Act, 1990 should be further amended to remove permanently the corroboration warning.

B. CLS and Sentencing

Law is seen to legitimate the status quo according to CLS writers like Olsen.⁵⁹ Inequalities stemming from the private divide are not the concern of the State and are, therefore, not legislated for. Women are vulnerable to sexual discrimination. This is seen in the roles women play. There is no provision for equal division of labor within the household structure. The security that a woman may feel about her role in the workplace does not transcend the divide. In the domestic sphere, this equality is quashed and the boundaries, devoid of legal right, become less clear.

There is a similar lack of clarity and unease about the status and definition of rape. Rape is divided. If a woman is violently raped by an unknown attacker, it’s defined as “real” rape.⁶⁰ If she is raped by a man she knows and he is not violent towards her, this is seen to be “simple” rape.⁶¹ Given this definition, in many “simple rape” cases, women are simply unsure if they have been raped. The inequality is plain.

This inequality is further reflected in the legal system. A violent “real” rape is seen to be more traumatic and the victim a more plausible witness than the victim of simple rape. These are male perceptions of the female experience of rape. Bruising and cuts are seen to be proof of the utmost resistance and non-consent.

⁵⁹ Olsen, “The Family and the Market: A Study of Ideology and Legal Reform” 96 *Harvard Law Review* 1497 at 1552 (1982-1983).

⁶⁰ Estrich, *Real Rape* (Cambridge, 1987) at p. 19.

⁶¹ *Ibid.*

The “simple” rape coined by Estrich lies in more hazy territory. Here, the victim knows her assailant. She may have even socialised with him prior to the rape. This rape is seen to be less severe than real rape due to the lack of violence and the familiarity of the attacker. From a female perspective, however, the “simple” rape is equally horrific.⁶² A person who she once trusted has compromised that trust and violated her in the most invasive, intimate way. The perception emerges that she was somehow “looking for it” and must have instigated the act in some way. Her rape is seen to be less legitimate than the violent one.⁶³

This double standard is shaped only by perceptions about women in society. It is not written into the letter of the law. This is also reflected in sentencing practices with violent rapes receiving adequate sentences, but “simple” rapes receiving sentences of four years and below.⁶⁴ Therefore, although women have these “rights,” they have, in fact, been built on an inherently unjust social order. Women are subjected to the brutalities of unregulated private power.⁶⁵

C. CLS and Sexual History Evidence

CLS notes legal doctrine’s inability to address real problems and rights and serving paradoxically to empower the state, not the citizenry. Instead of announcing their ideological preferences, judges “cloak” their decisions in a garb of orthodox legal reasoning.⁶⁶ This can be particularly seen when sexual history evidence is imposed on the victim during the case.⁶⁷ Mechanisms such as these sway women in their decisions

⁶² Tempkin, *Rape and the Legal Process* (Oxford, 2nd Ed., 2002) at p. 155.

⁶³ McGlynn, *Legal Feminisms; Theory and Practice* (Dartmouth, 1998) at p. 89.

⁶⁴ See, e.g., *People (DPP) v. McCurdy*, reported in *The Irish Times*, 26 May 1995.

⁶⁵ Quinn, “The Nature and Significance of Critical Legal Studies” (1989) 7 *Irish Law Times* 282.

⁶⁶ *Ibid.*

⁶⁷ Criminal Law (Rape) (Amendment) Act, 1990.

not to bring assailants to court. This has the domino effect of spreading woman's distrust in the system. Women, as a result, become more locked into their preconceived mythical roles of what is a "good" woman. She retains her role within the family/market dichotomy and the male hierarchical order is maintained.

The judiciary shrouds their decisions in scrambled legal reasoning. This is especially true with regard to the admission of sexual history evidence. Apparently, these problems, suffered by women, are part of the "routine workings of the court."⁶⁸ It is argued that victims of crime are treated the same in a system of public prosecution. However, in cases of ordinary assault, the victim is neither degraded in the courtroom nor subject to inferences that he is of low moral character and really saying "no, no, no" (don't attack) when he really means "yes, yes, yes." This line of enquiry would not be justified or tolerated in other cases.

In rape law, previous sexual history evidence of the complainant is examined.⁶⁹ The myth of the "good and decent" women is manifest in the rape trial.⁷⁰ Any woman not living up to this male-constructed ideal is seen to be a "loose" woman. In this way, rape trials are denaturalized by male ideological assumptions. The "perfect woman" myth filtrates from the assumptions made in civil society and leaked into the public realm. Although justice is supposed to be served on an individual basis, women are initially distrusted at court solely because of their gender.

It is clear the legal system is "cloaking" a distrust of women by allowing such sexual history evidence in the courtroom. Starting from the premise of male orientated

⁶⁸ Brown, Burma and Jamieson, *Sex Crimes on Trial – The Use of Sexual Evidence* (Edinburgh, 1993) at p. 18.

⁶⁹ Criminal Law (Rape) (Amendment) Act, 1990.

⁷⁰ Brown, Burma and Jamieson, *Sex Crimes on Trial – The Use of Sexual Evidence* (Edinburgh, 1993) at p.

norms, women who do not live up to the “perfect woman” myth do not deserve justice. All women are not equal in the eyes of the law. Only the “perfect” woman has the right to be judged at the same level as males before the law.

Hutchins suggests that once we learn how the judicial system actually works and how it affects the community, the system “may be altered to attain more readily the objects for which it has been developed.”⁷¹ In order for justice to be served, the legal order needs to be completely deconstructed and rebuilt from complementary male and female perspectives. This mandates a reexamination of the Criminal Law (Rape) Acts. Reforms in the area of sexual history evidence were inadequate. Patriarchal attitudes can still prevail in allowing this line of enquiry, which would certainly deter women from coming forward to report and proceed with “simple” rape allegations.

D. CLS and Consent

Under the ideology thesis, CLS scholars take a neo-Marist approach in examining the dominant culture. In the late 1970s and early 1980s, protests by feminists resulted in pressures being applied to the economic base of society. Women infiltrated the economic structure and demanded that the law, for example, provide for equal labor rights.⁷²

In order to appreciate the dramatic changes that have taken place, one must analyse the stages of market and the corresponding stages in the development of rape law. The first stage in the market was feudalism.⁷³ Hierarchy was the natural order. The law regulated the hierarchy. Family life in feudal society was also highly

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⁷¹ White, “From Realism to Critical Legal Studies – A Truncated Intellectual History,” 40 *Southwestern Law Journal* 819, 823 (1986-1987) quoting Schlegel, “American Legal Realism and Empirical Social Science from the Yale Experience,” 28 *Buffalo Law Review* 459 at 493 (1979).

⁷² Olsen, “The Family and the Market: A Study of Ideology and Legal Reform,” 96 *Harvard Law Review* 1497 at 1518 (1982-1983).

regulated.⁷⁴ The Church played a prominent role in establishing rules, which were in turn acknowledged by law. Male hegemony was the norm and alteration of the hierarchy was considered disgraceful. Rape law was harsh; the woman had to prove her resistance. All women were treated with suspicion and as second-class citizens.

The second stage saw the rise of the free market.⁷⁵ The state stood in opposition to civil society. Protection of the rights of man was seen to be the primary role of law. Women were seen to be different from men, not inferior. The liberalisation of the family saw the state withdrawing from any interference with the family. At this stage, a woman still had to prove that she had resisted the rape to her utmost.⁷⁶ Otherwise, it was deemed to be consent.

The third stage in the market development was the welfare state.⁷⁷ This is characterised by state regulation of market activity.⁷⁸ The state enacts legislation that accounts for each individual's economic situations. Society is regulated to promote equality. The family is also regulated. Legislation protects the vulnerable. Rape law at this stage has advanced. The resistance requirement has been removed and proof of rape hinges on the issue of consent. But again, this is approached from a masculine, subjective point of view.

There is a recent theory that the development of the family lags behind the development of the market. It could be true that reform in rape law similarly lags behind

⁷³ *Ibid.* at 1513.

⁷⁴ *Ibid.* at 1516.

⁷⁵ *Ibid.* at 1502.

⁷⁶ Charleton, McDermott and Bolger, *Criminal Law* (Dublin, 1999) at p. 621.

⁷⁷ Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," 96 *Harvard Law Review* 1497 at 1515 (1982-1983).

⁷⁸ *Ibid.* at 1516.

family development.⁷⁹ These developments stem from a Neo-Marxist type change at the material base of society. It is logical that there are changes in the market first. The law easily regulates these changes. The state is reluctant to interfere with the development of the family, so changes will be less dynamic and happen at a slower level. For radical change to take place in rape law, these changes must be first realized in the family spectrum. Only when there is equality at a private level can change happen in the law of rape. In a welfare state, the state legislates for minority groups in order to promote equality in the system.⁸⁰ Women are already deemed to be equal from the liberalization of the family stage. Therefore, only slow advances, which lag behind the market and the family, and not the necessary radical changes, can occur.

Feminist philosopher Lois Pineau suggests that sexual intercourse should be a communicative experience.⁸¹ She points out that it is unreasonable for a woman to consent to an aggressive man. Acquiescence under such conditions should not count as consent. Other suggestions include the concept that sex outside the constraints of procreation, emotional intimacy and physical pleasure should render a woman's consent invalid.⁸²

Although these are interesting points, they too skirt around the fundamental problem of male dominance in the legal system. Intercourse is a communicative act.⁸³ A lot of women say "no," but are ignored. If a woman's "no" was not treated with suspicion and interpreted to mean "yes," there would be no need for legal reform in this

⁷⁹ *Ibid.* at 1513.

⁸⁰ *Ibid.* at 1518.

⁸¹ Schulhofer, *Unwanted Sex, The Culture of Intimidation and the Failure of Law* (Cambridge, 1998) at p. 85.

⁸² *Ibid.* at p. 86.

area.⁸⁴ Even though the law has changed to adopt consent as the pivotal issue, the irony is that the feudal position of resistance is more likely to result in a successful outcome for the victim. Accordingly, rape law reform still lags behind other development in areas of family and market.

The consent issue was introduced into Irish law in 1981.⁸⁵ The subjective question is asked whether the accused really believed that the woman was consenting. Reform in this area should consider changing this standard to an objective test. Would the reasonable person believe that there was consent?

VI. CONCLUSION

CLS seeks to examine contradictions in the law. Traditional legal reasoning and hierarchical structures of power in society are questioned in pursuit of radical reforms. Individual rights such as “equality” are analysed insofar as they mask an unjust social order. It can be argued persuasively that the function of law is to legitimate the status quo. Meanwhile, inequalities between men and women in the private divide remain unexamined and transcend the divide affecting perceptions about women in rape cases.

There is a problem in Ireland with the under-reporting and low conviction rate in rape cases. Mass multimedia advertising and public awareness campaigns could be directed at encouraging victims of rape to report the crime to police. This should be government-sponsored. Education of the public through “equality programmes” from national school level could promote mutual respect between the sexes. Mandatory equality studies should be on the curriculum for all students wishing to enter the legal profession.

⁸⁴ Matoesian, *Reproducing Rape* (London, 1993) at p. 22.

⁸⁵ Criminal Law (Rape) Act, 1981.

It is unlikely that CLS will impact on the reform of rape law in Ireland. An EU Conference in 2004 reported that Ireland has the worst record in Europe for bringing rapists to justice. Research into this area is currently being carried out at the National University of Ireland, Galway. This is a step in the right direction. However, this project is operating on what has been described as a “shoestring budget” and with a “limited” team.⁸⁶ This is indicative of a minimalist response to the problem, which indicates that more serious reform and perhaps a CLS “debunking” of the area are needed ultimately.

CLS exposes gaps in the law. These gaps include corroboration warnings used in rape cases which undermine the value of a woman’s testimony in court. Along with the discomfort of discussing sexual history evidence, this results in a reluctance of many women to pursue their fight for justice.

Regarding information relating to sentencing, a CLS analysis reveals that there should be a coherent system established to collect this information. However, this finding is unlikely to affect the harsh realities of the system in which women who suffer nonviolent rape are less likely to find justice in Irish courts. This partly stems from a deep-rooted suspicion of the motives of women in reporting rape. CLS exposes this reality. However, because CLS highlights preconceived perceptions and assumptions in the legal system rather than presenting complementary hard and fast solutions, it will probably remain irrelevant to the present debate. Relying on newspaper reports, Garda statistics and prison reports is not sufficient to examine this area properly, particularly in light of EU criticism. A separate “rape journal” should be set up to document all cases involving rape from the lower courts.

⁸⁶ “Event Celebrates Work of Rape Crisis Centre,” *Galway Advertiser*, 2 March 2006.

Irish women should unite and free themselves of the apathy which only serves to ensure that they remain locked into their preconceived “good woman” roles. When women really believe that they are worthy of justice, there will be a quiet revolution in the legal system. The norm of equality will be carried through the subconscious of the courtroom and eventually engender reform in the law of rape. In the meantime, CLS provides us with an alternative prism through which to view the problems in this area of law. The solutions will ultimately depend on what we will allow ourselves to see.