REASONABLE BELIEF AND UNLAWFUL CARNAL KNOWLEDGE: A HISTORICAL PERSPECTIVE

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I

The Criminal Law Amendment Act 1935 (the "1935 Act") was, until relatively recently, deemed to be a Church-State initiative, and equated primarily with the proscription on the import and sale of artificial contraception.[1] But this tells only part of the story. The full title of the Act was to "make further and better provision for the protection of young girls and the suppression of brothels and prostitution, and for those and other purposes to amend the law relating to sexual offences". As Henchy J. pointed out in the constitutional case *McGee v Attorney General*,[2] the "Act of 1935, as its long title shows, is not aimed at population control but at the suppression of vice and the amendment of the law relating to

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1. For historical writing pertaining to the 1935 Act, see Dermot Keogh, *The Vatican, the Bishops and Irish Politics* (Cambridge: Cambridge University Press, 1986); Sandra L. McAvoy, "The Regulation of Sexuality in the Irish Free State, 1929–1935" in Greta Jones and Elizabeth McAvoy (eds), *Medicine, Disease and the State in Ireland, 1650–1940* (Cork: Cork University Press, 1999); Finola Kennedy, "The Suppression of the Carrigan Report: A Historical Perspective on Child Sexual Abuse" (2000) 89 *Studies* 354; Mark Finnane, "The Carrigan Committee and the 'Moral Condition' of the Saorstát" (2001) 32 *Irish Historical Studies* 519; Eoin O'Sullivan, "'This otherwise delicate subject': Child Sexual Abuse in Early Twentieth Century Ireland" in Paul O'Mahony (ed.), *Criminal Justice in Ireland* (Dublin: Institute of Public Administration, 2002), pp.176–202; James M. Smith, "The politics of sexual knowledge: The origins of Ireland's containment culture and The Carrigan Report" (2004) 13 *Journal of the History of Sexuality* 208; James M. Smith, *Ireland's Magdalen Laundries and the Nation's Architecture of Containment* (Indiana: University of Notre Dame Press, 2007); Maria Luddy, *Prostitution and Irish Society, 1800–1940* (Cambridge: Cambridge University Press, 2007); Lindsey Earner-Byrne, *Mother and Child: Maternity and Child Welfare in Dublin, 1922–60* (Manchester: Manchester University Press, 2007); Moira J. Maguire, "The Carrigan Committee and Child Sexual Abuse in Twentieth-century Ireland" (2007) 11 *New Hibernia Review* 79; Sandra McAvoy, "Sexual Crime and Irish Women's Campaign for a Criminal Law Amendment Act 1912–35" in Maryann Gialanella Valiulis (ed.), *Gender and Power in Irish History* (Dublin: Irish Academic Press, 2008), pp.84–100; Diarmaid Ferriter, *Occasions of Sin: Sex and Society in Modern Ireland* (London: Profile Books, 2009); Moira Maguire, *Precarious Childhood in Post-Independence Ireland* (Manchester: Manchester University Press, 2009).
2. [1974] I.R. 284.
3. [1974] I.R. 284 at 324.

sexual offences".[3] This view was supported by Griffin J., who said that the importance of the 1935 Act lay primarily in regulating public, not private morality:

> "In my view, in any ordered society the protection of morals through the deterrence of fornication and promiscuity is a legitimate legislative aim and a matter not of private but of public morality."[4]

Indeed, the endeavours of a variety of lobby groups to persuade the legislature to introduce legal measures to control public manifestations of prostitution in the early years of the State have been impressively encapsulated by Maria Luddy in her painstaking account, *Prostitution in Ireland 1860–1940*[5]; but it would be misleading to claim that the 1935 Act was created solely "in response to something of a moral panic about the prevalence of prostitution".[6] There is, however, little doubt that the Act was an "attempt by the state and [Roman Catholic] Church to curtail sexual autonomy", particularly that of girls and young women.[7] It was not just Church and State, of course, but in this respect, the paternalistic philosophy underlying ss.1 and 2 of the Act was captured perfectly by the Supreme Court in *Attorney General (Shaughnessy) v Ryan*.[8] Maguire C.J., with whom the other judges concurred, held that these sections of the 1935 Act and their legislative antecedents "were designed to protect young girls, not alone against lustful men, but against themselves".[9]

But no matter what view one might take of the paternalistic philosophy as reflected in ss.1 and 2 of the 1935 Act, it does not give grounds for some of the challenges that have been raised against both the legislation and the legislature. Moira Maguire claimed that the political system was "indifferent to the vulnerability of children to sexual assaults",[10] and that Parliament "put the protection of male sexual licence above the protection of children from sexually predatory men".[11] The same author also inferred that the overwhelmingly male legislature ensured that legislative initiatives in relation to sexual morality in this period did not compel men to be "more accountable for their own sexual behavior".[12] This article contends that such observations are emphatically belied by ss.1 and 2 of the 1935 Act, and that to truly understand the strict liability provisions of

4. [1974] I.R. 284 at 336.
5. Luddy, fn.1 above, pp.194–237.
6. Thomas O'Malley, "Should there be strict criminal liability for adults who have sex with children?", *Irish Times*, May 5, 2008.
7. Luddy, fn.1 above, p.237.
8. [1960] I.R. 181.
9. [1960] I.R. 181 at 183.
10. Maguire (2009), fn.1 above, p.173. Further research is necessary to test Maguire's contention that the criminal justice system was also indifferent to the vulnerability of children to sexual assaults.
11. Maguire (2009), fn.1 above, pp.173–174.
12. Maguire (2007), fn.1 above, p.85.

the statute it is necessary, as Fennelly J. put it in the landmark Supreme Court judgment in *CC v Ireland*,[13] to explore "its history, including the history going back to the Act of 1885 and beyond".[14] Thus, while acknowledging that aspects of the Act of 1935 were discriminatory towards women and young girls, it is argued that, far from being the apotheosis of anti-female legislation in the inter-war years, the Act of 1935 was, in the context of laws protecting young girls from sexual intercourse, discriminatory against young males in the particular protection it afforded young females.

II

The legal regime ushered in by the Offences Against the Persons Act 1861 (the "1861 Act")[15] was effectively re-created by the Criminal Law Amendment Act 1885 (the "1885 Act") but the protective policy was extended. The Act of 1885 repealed s.50 of its legislative antecedent but created a comparable felony offence, except that it increased the age of consent from 10 to 13.[16] The 1885 Act also repealed s.51 of the 1861 Act and created a misdemeanour similar in scope, save that the revised section applied where the girl was aged between 14 and 16.[17] Consent on the part of the female offered no defence to a charge under ss.4 and 5 of the 1885 Act, but in particular circumstances an honest belief based on reasonable grounds that the girl was aged at least 16 years was a defence to the misdemeanour charge.[18] The proviso was expressed in the following terms:

> "Provided that it shall be sufficient defence to any charge under sub-section one of this section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years."[19]

Thus, in such circumstances, if the girl had consented to intercourse, the accused would have been free from criminal liability, but if the girl did not in

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13. [2006] 4 I.R. 1.
14. [2006] 4 I.R.1 at 151.
15. See 1861 c.100.
16. 48 & 49 Vict. c. 69 s.4.
17. 48 & 49 Vict. c. 69 s.5.
18. Cambridge Department of Criminal Science, *Sexual Offences* (London: MacMillan, 1957), p.330. This enquiry was initiated in 1950 and carried out in fourteen districts of England and Wales, which were felt to be representative of both agricultural and industrial communities. The emphasis was, however, laid upon the great urban areas, especially London.
19. 48 & 49 Vict. c. 69 s.5. The Offences Against the Persons Act 1875 had made it a misdemeanour, for the first time, to have unlawful carnal knowledge of a girl between the ages of 12 and 13. See 38 & 39 Vict. c. 94 s.4.

fact consent, the crime was then rape and the belief as to her age would have been completely irrelevant.[20] It was affirmed, however, in *R. v Banks*[21] that, for this defence to be availed of, the accused must have reasonable cause to believe, and must in fact believe, that the girl was at least 16 years of age.[22] It is evident, therefore, that the British legislature, cognisant of the effect of the judgment in *R. v Prince*,[23] was not intending to provide a defence of mistake as to age in respect of the offence of unlawfully and carnally knowing a girl under the age of 13 years and that this proviso was only applicable to an offence committed against a girl between the ages of 13 and 16 years. Crucially, there was never statutory provision for a defence of mistake as to age on a charge of the felony offence: neither when the age was under 10 from 1861 nor when under 13 from 1885.

After a series of legislative attempts to revise the Act of 1885 were thwarted, the English joint select committees of 1918 and 1920 examined the issue of protecting young girls from sexual exploitation, receiving a substantial body of conflicting evidence from judges, magistrates, feminist and purity groups, probation officers and police officials. Many of these witnesses contended that the question of the retention or abolition of the reasonable belief defence was inextricable from the question of age. One body of opinion agitated for the retention of both the age of 16 and the general defence of reasonable belief, while another element advised the select committees to increase the age of consent to 17 or 18 and to completely abolish the defence.[24] There was, however, a more moderate body of opinion, reflected in the views of Sir Ernley Blackwell of the Home Office, whose preference was to retain the age of 16 coupled with the complete repeal of the reasonable belief defence:

> "This question is one on which very strong views are held on both sides. Whilst there is undoubtedly much to be said for affording protection to girls seventeen or even older, there are obvious objections to making it a criminal offence for a lad of eighteen to have carnal knowledge with a girl of seventeen ... and especially so if the defence of reasonable belief that she was over the age is to be abolished. The view of the Home Office

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20. Cambridge Dept., fn.18 above, p.330. If there was an absence of consent on the part of the female in question and if the male was either aware that she did not consent, or was reckless in that regard, he was guilty of rape. See Thomas O'Malley, *Sexual Offences: Law, Policy and Punishment* (Dublin: Round Hall, 1996), pp.33–76.
21. [1916] 2 K.B. 621; 12 Cr. App. R. 74.
22. Cambridge Dept., fn.18 above, p.331.
23. In the case of the unlawful carnal knowledge offences, the position at common law was that a man who mistakenly believed, even on reasonable grounds, that the girl was over the relevant age, had no defence. This decision was generally applied in practice to all sexual and kindred offences where the age of the complainant was a factor and was most influential with regard to the development of the law in relation to sexual offences. The effect of the judgment in *Prince* was that the male was now strictly liable when the female was under the age of consent. See (1875) L.R. 2 C.C.R. 154.
24. Cambridge Dept., fn.18 above, p.418.

> is that more is to be done for the protection of young girls by repealing the proviso and leaving the age where it is than by raising the age to seventeen and retaining the proviso."[25]

In his evidence to the 1920 Committee, Blackwell also drew attention to the reluctance of exclusively male juries to convict, but not on the basis that they felt that the defendant reasonably believed that the girl was overage.[26] He stated that when "that defence is raised it allows the jury to return a verdict of not guilty, not perhaps because they believed that defence, but because they formed a general opinion that in this case at any rate the girl was as much to blame as the man". Blackwell later conceded that the Home Secretary, with misgivings, would be inclined to abolish the proviso even if the age were raised to seventeen.[27]

The agitation in this respect culminated in the law on this point being altered with the passing of the Criminal Law Amendment Act in 1922.[28] The defence, in general, was said to be a "dishonest" one, the implication being that it was successfully raised by men who did not really entertain the belief that the girl was over the age of consent.[29] The comments of Mr Wignall in the second reading debate in the House of Commons demonstrate the disdain for the defence among certain parliamentarians:

> "Have we not seen and heard of a man pleading this defence and saying 'She had her hair bobbed, she had long skirts on, she looked in every way as if she was 16'? And the man was probably a person of 40. If I had my way in the law I would have a clause in that he ought to be taken out and horse-whipped, in addition to the penalty that the law provides, for even setting up or taking advantage of such a defence."[30]

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25. *Report by the Joint Select Committee of the House of Lords and the House of Commons on the Criminal Law Amendment Bill and the Sexual Offences Bill [H.L.] together with Proceedings of the Committee, Minutes of Evidence, and Appendices*, p.313, H.C. 1918 (142) iii, 68 (hereafter cited as Joint Select Committee, *Minutes of Evidence 1918*), pp.116–117; Cambridge Dept., fn.18, p.418.
26. *Report by the Joint Select Committee of the House of Lords and the House of Commons on the Criminal Law Amendment Bill [H.L.], the Criminal Law Amendment (No. 2) Bill [H.L.] and the Sexual Offences Bill [H.L] together with Proceedings of the Committee, Minutes of Evidence, and Appendices*, p.851, H.C. 1920 (222) vi, 68 (hereafter cited as "Joint Select Committee, *Minutes of Evidence 1920*"), p.4.
27. Joint Select Committee, *Minutes of Evidence 1920*, p.5. Other contributors, such as Mr Howell Lang-Coath, were also firmly of the opinion that there should be a clear cut offence of carnal knowledge of a girl under 16 with no defence of reasonable belief. Although accepting "that it is difficult in these days to tell the age of a girl", he averred that "any man who will go so far as to molest a girl of such tender years ought not to have such a defence available to him, but ought to take the consequences of his act"
28. Section 2 of the 1922 statute repealed the general mistake of belief that the girl was over 16.
29. Rupert Cross, "Centenary Reflections on Prince's Case" (1975) 91 *Law Quarterly Review* 540 at 548.
30. See fn.29 above at 549.

As Cross observed, the argument advocating the retention of the proviso was captured less bluntly but just as cogently by Lord Sumner in a House of Lords' debate on an earlier bill sponsored by the Bishop of London:

> "It is not unfair to the right reverend prelate to say that in a case where the sinner (I call him a sinner) did honestly believe that the girl was over 16, and had reasonable cause to believe it, and where the jury, if they had seen the girl, would have believed it, and where he had not the slightest intention of violating the law of man, although no doubt he was intending to violate the law of God, then it is the intention of those who take the same line as the right reverend prelate that that man should be convicted of a crime, although, in fact, all he had done was to sin."[31]

A compromise was agreed at the committee stage of the 1922 Bill in the Commons under which the law on this point was amended. The Bill was introduced ultimately in a form which left the age of consent untouched at 16 years, but under which the defence of reasonable belief that the girl was 16 or over was to remain a defence for men of 23 or under who had not previously been charged with a similar offence.[32]

The wholly unsatisfactory nature of the "young man's defence" has been well documented.[33] The 1957 study of sexual offences conducted by Sir Leon Radzinowicz and the Cambridge Institute of Criminology noted that the proviso was unsatisfactorily worded and referred to "an offence under this section", which was futile as the section was an "amending one which created no offence".[34] It pointed out that the "opening words of the section referred to a charge under sections 5 and 6 of the Act of 1885 and the proviso was applied in practice to charges, under section 5(1) of the Act of 1885, of carnal knowledge of a girl between thirteen and sixteen". This, the Cambridge Study

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31. See fn.29 above at 549.
32. Under the Criminal Law Amendment Act 1922 s.2 provided that: "Reasonable cause to believe that a girl was of or above the age of sixteen years shall not be a defence to a charge under sections 5 and 6 of the ... principal Act ... provided that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen shall be a valid defence on the first occasion on which he is charged with an offence under this section."
33. Law Reform Commission, *Report on Child Sexual Abuse* (Dublin: Stationery Office, 1990), p.40; Cambridge Dept., fn.18 above, pp.418–426; Jennifer Temkin, *Rape and the Legal Process* (Cambridge: Cambridge University Press, 1987), pp.140–141. The 1926 Report of the Departmental Committee on Sexual Offences Against Children and Young Persons in Scotland also stated that although it heard a "great deal of criticism of the provision", it concluded that as "this was the subject of full discussion in Parliament as recently as 1922", it was not prepared to make any recommendation. See Departmental Committee on Sexual Offences Against Children and Young Persons in Scotland, *Report of the committee appointed by the Secretary for Scotland*, 1926 [Cmd 2592], para.35.
34. Cambridge Dept., fn.18 above, p.421.

continued, was obviously the intention of the legislature in amending the section, but the Court of Criminal Appeal commented that it was only by a "benevolent construction" that any effect could be given to the proviso.[35] Section 2 was thus accepted in practice as meaning that, on a charge of carnal knowledge of a girl between 13 and 16, the defence that the accused had a reasonable ground for believing, and did in fact believe, that a girl was over 16 was open to a person who was aged 23 or under, which was judicially interpreted in *R v Chapman*[36] as meaning "has not yet attained his twenty-fourth birthday" and had not previously been charged with the offence of carnal knowledge of a girl under 16. According to the Cambridge Study,[37] the existence or not of reasonable grounds for believing the girl to be over 16 and the question of whether the accused did in fact so believe was a "question of fact for the jury[38] and they must be satisfied that the accused did direct his mind to the question".[39]

The decisions in the cases *R v Forde*[40] and *R v Chapman*[41] indicate clearly the unsatisfactory nature of the compromise between reformers and what came to be referred to as the "vice lobby",[42] and the extreme difficulties associated with the creation of an arbitrary age band between victim and offender. A man over the age of 23, for instance, could not avail himself of the defence of reasonable belief as to the girl's age in any circumstances irrespective of the fact he believed, even on reasonable grounds, that the girl was over the age of consent.[43] Nor was it a defence to a younger man who had been previously charged with a like offence, and "so had his attention drawn to the law on the point". Furthermore, a youth who was "entirely ignorant of the criminal law on this point and who did not see any moral difference between intercourse with a girl of fifteen years and eleven months and with one of sixteen years and one month, had in law no defence if he did not apply his mind to the question of her age at all".[44] Yet conversely, a youth who was aware that it was a crime to have intercourse with a girl under 16 and who accordingly applied his mind to the point of age, asked the girl how old she was, and had reasonable grounds for accepting her answer that she was over 16, had a complete defence to the charge.[45]

The 1925 *Report of the Committee on Sexual Offences against Young Persons* criticised s.2 of the 1922 Act on a number of grounds. First, the report stated that witnesses of authority expressed "great dissatisfaction" over its general unintelligibility and recommended that it required redrafting so that it

35. Cambridge Dept., fn.18 above, p.422; see *R v Forde* [1923] 2 K.B. 400.
36. [1931] 2 K.B. 606.
37. Cambridge Dept., fn.18 above, p.422.
38. *R v Forde* [1923] 2 K.B. 400.
39. *R v Banks* [1916] 2 K.B. 621.
40. [1923] 2 K.B. 400.
41. [1931] 2 K.B. 606.
42. Temkin, fn.33 above, p.140.
43. Cambridge Dept., fn.18 above, p.422.
44. Cambridge Dept., fn.18 above, p.422.
45. Cambridge Dept., fn.18 above, p.422.

be "reduced to an intelligible form so that its meaning might be made clear".[46] The proviso was also criticised on the basis that:

> "It is difficult to know at what stage of the trial the defence of reasonable belief is to be put forward. If before verdict the prosecution seek, on the main issue, to prove that the man has been charged before with a similar offence, the man's defence to the main issue may, by this knowledge, be seriously prejudiced with the jury."[47]

The Cambridge Study contended that this criticism was inspired by a passage from a judgment of the Court of Criminal Appeal in *R v Forde*.[48] It noted that Mr Justice Avory envisaged "difficulties in the practical application of the proviso", and among them was the effect on the jury of the knowledge, before verdict, that the accused had been charged with the offence before it was subsequently dismissed. The 1957 Study stated, however, that if the accused raised the defence provided by the section, he made "the question of whether he has previously been charged or not a relevant one". It maintained that if he was "so ill-advised" as to take the defence when there was an existing record of a previous charge, he surely had only himself to blame if the jury were "acquainted of this fact before considering their verdict".[49]

The 1925 Report also criticised the fact that a man was to be "deprived of his defence if he has previously been *charged* not previously *convicted*, although he may have been properly acquitted of the previous charge by proving a complete alibi".[50] This critique, as the Cambridge Study pointed out, was undoubtedly influenced by a passage in the *Law Times* on July 29, 1922:

> "Sir George Hamilton moved, that in the case of a man of twenty-three or under, the presence of reasonable belief that the girl was over sixteen should be a valid defence on the first occasion on which he was charged with an offence. It was accepted by Mr Shortt 'because he desired to carry out the pledge which was given in Committee on behalf of the Government' and so this extraordinary amendment was carried by 99 to 65. It is certainly a matter for regret that this defence of 'reasonable cause' had been retained in any form as far as girls under sixteen are concerned. The cases of boys misled by precocious girls, and of blackmail, are few and far between, and can be dealt with by the Bench in awarding punishment. But the defence should be retained in its entirety, or abolished once and for all. Under the amendment a youth of

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46. *Report of the Departmental Committee on Sexual Offences against Young Persons*, p.905 [Cmd 2561], H.C. 1924–25, xv, 22–23 (hereafter cited as Departmental Committee, *Minutes of Evidence 1925*), p.24.
47. Departmental Committee, *Minutes of Evidence 1925*, p.24.
48. [1923] 2 K.B. 400.
49. Cambridge Dept., fn.18 above, p.423.
50. Departmental Committee, *Minutes of Evidence 1925*, p.24.

> 17 charged and acquitted on the ground of a complete alibi has no defence of 'reasonable cause' if another charge is brought before he attains the age of 23."[51]

This criticism was not accepted, however, by the 1957 Cambridge Study, which maintained that the "intention of the amending section was, presumably, to preserve the defence of reasonable belief that the girl is of the age of sixteen in the case of a young man who has not been previously acquainted, beyond all possibility of doubt, with the law as to intercourse with girls under 16". It stated that if the young man had been previously charged with the offence it would have "forcibly been brought home to him that it is a criminal offence to have intercourse with a girl under sixteen". These proceedings, it asserted, should have "emphatically put him on enquiry in his future relations with girls" and, if he is charged at a later date, he could not be heard to plead that he thought the girl was over 16.[52] The fact that he was "previously acquitted in circumstances which completely exonerated him" was immaterial according to the Cambridge Study—the law had "endowed him with the knowledge and experience, which, by statutory magic, others achieve on their twenty-fourth birthdays".[53]

The 1925 Departmental Report also referred to the preposterousness of the fact that the section permitted the defence of reasonable belief that the girl was of the age of 16 on the charge of carnal knowledge, but "denied it to a man charged with the lesser offence of indecent assault even where the facts in support of this charge were merely those establishing the carnal knowledge".[54] The 1925 Committee noted that:

> "... the Criminal Law Amendment Act, 1922, assumed it would appear that those who introduced it desired to do away with consent in all cases where girls were under 16, and that, by some sort of last moment compromise, the proviso to section 2 was introduced without its being observed how inconsistent it was to allow a valid defence as to belief of age in the crime of carnal knowledge of a girl between 13 and 16, by which serious harm might be done to the girl, and to refuse the valid defence as to belief of age in the case of the lesser offence of indecent assault".[55]

This criticism was also, in fact, made repeatedly from the judicial bench.[56] In *R v Keech*,[57] in 1929, Lord Hewart C.J., who referred to earlier criticisms by

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51. Cambridge Dept., fn.18 above, p.426.
52. Cambridge Dept., fn.18 above, p.423.
53. Cambridge Dept., fn.18 above, pp.423–424.
54. Departmental Committee, *Minutes of Evidence 1925*, p.25; Cambridge Dept., fn.18 above, p.424.
55. Departmental Committee, *Minutes of Evidence 1925*, p.25.
56. Cambridge Dept., fn.18 above, p.426.
57. (1929) 21 Cr. App. R. 125.

Avory J., stated that "there is nothing to be subtracted from the criticisms that are there offered upon this amazing legislation". The 1957 Study also pointed out that in *R v Lawes*,[58] decided in 1929, Avory J. said, "some day, I hope, somebody will have the sense to remedy this state of things", and that Lord Hewart declared that, "it is indeed a grotesque state of affairs that the law offers a defence upon the major charge, but excludes that defence if the minor charge is preferred".[59] In addition, it also mentioned that in *R v Maughan*,[60] Avory J. referred back to his own judgment in 1929, avowing that, "it was hoped at the time when that judgment was delivered that the legislature would take notice of the apparent absurdity resulting from this state of legislation and that it would be amended".[61] These judicial statements were reinforced by the following extract from the dissenting memorandum of Mr T.W. Fry and Sir Guy Stephenson to the Report of the 1925 Committee:

> "In our view, section 2 of the Act of 1922 should be amended by striking out the words 'on the first occasion on which he is charged with an offence under this section', and by getting rid of the anomaly, to which attention was called in the judgment of the Court of Criminal Appeal in *Rex v. Forde*, that a man under 24 years of age who is charged with carnal knowledge of a girl under 16 has a good defence to that charge, whereas he has no defence to a charge of indecent assault upon such a girl, which is involved in the graver charge. It appears to us to be both illogical and unfair to the accused that the defence of reasonable cause if available to the accused on a charge under section 2, should not be so available on a charge under section 1 of that Statute, and in our opinion it should be restored in the case of indecent assault."[62]

The Departmental Committee of 1925 was, however, divided on the wider issue of whether the defence should be retained in any form. Seven of its members advocated a complete repeal of the proviso, accepting the opinion that "as by law it is an offence to have carnal knowledge of a girl between 13 and 16, every offender should be as responsible if he breaks this law, as he is if he breaks any other, more especially as the offence is coupled with the possibility of serious consequences to a girl so young as 15 or under".[63] There were also delegates who, conversely, were in favour of retaining the defence, albeit with certain amendments. In their dissenting memorandum, Fry and Stephenson favoured the retention of the defence and its extension by the deletion of the words "on the first occasion on which he is charged with an offence under this

58. (1929) 21 Cr. App. R. 45.
59. Cambridge Dept., fn.18 above, p.426.
60. (1934) 24 Cr. App. R. 130.
61. Cambridge Dept., fn.18 above, p.427.
62. Departmental Committee, *Minutes of Evidence 1925*, p.94.
63. Departmental Committee, *Minutes of Evidence 1925*, p.25; Cambridge Dept., fn.18 above, p.424.

section".[64] They also recommended its extension to charges of indecent assault and alluded to the immunity of the female from prosecution and the danger of imposing criminal sanctions for sexual acts, the immorality and impropriety of which may have been the subject of widely divergent opinions:

> "In 1922 Parliament ... has withdrawn the protection ... afforded to men of maturer years charged with indecent assault upon, or carnal knowledge of, girls under sixteen, whilst expressly re-enacting the proviso ... for the protection of boys and younger men. We are entirely in favour of this course ... and accept the existing statutory age of twenty-four ... we cannot recommend the complete repeal of this proviso. Such a repeal would, in our opinion, deprive a young man, who may be tempted rather than the tempter, of a legitimate defence, it would in effect nullify the distinction which should properly be drawn between immorality and crime, and would not, in our judgement, further the ends of justice."[65]

The 1925 Departmental Committee did note, however, that mistake as to age could have been taken into consideration at the sentencing stage. The Report recommended that adequate allowance could be made for "extenuating circumstances such as the youth of the offender, strong temptation and the precocity or loose conduct of the girl" and noted that "these matters were taken into account by juries in their verdicts" and "by the Judges in passing sentence".[66] They proposed that probation, not acquittal, would meet the case, as such a conviction would clearly affect the young man's future prospects. The report also counselled that a Court of Assize should be permitted to make a Probation Order without proceeding to a conviction, as was then the case in courts of summary jurisdiction.[67]

The Committee also appeared to accept the view, attributed to many of their witnesses, that prosecutorial discretion and flexible sentencing avoided the grosser injustices that the law could produce and that extenuating circumstances such as those indicated above, were "taken into account by juries in their verdict".[68] The Cambridge Study was again extremely critical of this recommendation and argued that these circumstances should not have been matters for the jury at all. They contended that if the jury were satisfied that the girl was under 16 and that the accused effected penetration then, subject to the defence which the Committee would abolish, there was only one verdict open to them—"guilty"—and that the jury should have been directed accordingly by the trial judge. The 1957 Study also stated that it was difficult to see what the

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64. Departmental Committee, *Minutes of Evidence 1925*, p.94; Cambridge Dept., fn.18 above, p.425.
65. Departmental Committee, *Minutes of Evidence 1925*, p.94; Cambridge Dept., fn.18 above, p.425.
66. Departmental Committee, *Minutes of Evidence 1925*, p.25.
67. Departmental Committee, *Minutes of Evidence 1925*, p.26.
68. Departmental Committee, *Minutes of Evidence 1925*, p.25.

1925 Committee had in mind other than the "possibility of improper verdicts by juries", which itself, they argued, was "alarming as justification for the abolition of a statutory defence".[69]

Furthermore, the Cambridge Study contended that the dissenting opinion of T.W. Fry and Sir Guy Richardson in 1925 deserved serious consideration in two respects. First, they argued that it held the balance against those who too frequently saw only the "need for protecting the young girl" and ignored the "problems of the adolescent male". Secondly, they stated that the dissenting memorandum correctly stressed the "distinction between crime and immorality".[70] It concluded that, "a healthy, vigorous boy of seventeen might, perhaps, be forgiven a certain bewilderment on discovering that he had committed a crime of absolute liability in satisfying not only his own natural instincts but those of a well-developed and mature girl of fifteen and a half, who had encouraged him in the act".[71] The final recommendations of the 1925 Departmental Committee had, in many respects, embraced the views of a number of witnesses heard before the Joint Select Committees of 1918 and 1920. It recommended that the age of consent should be increased to 17, that the defence of reasonable belief that the girl was 16 or over should be abolished and that 12 months should be the time limit for taking proceedings under s.5(1) of the Act of 1885.[72] The points discussed therein were as relevant in the Irish Free State as they were in England during this period.

III

The legal reforms for which interest groups and women's organisations began to agitate in the Irish Free State in the early 1920s were predictably similar to those sought by their English counterparts. Sexual crime in the formative years of the self-governing Irish State remained governed by nineteenth-century British legislation and the ink was scarcely dry on the 1922 Constitution before moves were afoot to lobby the Government for the vital changes in the criminal law that both English and Irish reformers had been agitating for since 1885.[73] The principal concerns of these heterogeneous interest groups encompassed, inter alia, a proposal to increase the age of consent to 18, the repeal of the

69. Cambridge Dept., fn.18 above, p.425.
70. Cambridge Dept., fn.18 above, p.425.
71. Cambridge Dept., fn.18 above, p.426.
72. The age of consent for indecent assault was extended in England to 16 in 1922.
73. For the pre-Independence period, see McAvoy, fn.1, pp.84–100 and Louise Ryan, *Irish Feminism and the Vote: An Anthology of the Irish Citizen Newspaper 1912–1920* (Dublin: Folens, 1996), pp.51–74. For an English perspective, see Sheila Jeffreys, *The Spinster and her Enemies: Feminism and Sexuality, 1880–1930* (London: Pandora Press, 1985); Louise A. Jackson, *Child Sexual Abuse in Victorian England* (London: Routledge, 2000); Carol Smart, "Reconsidering the Recent History of Child Sexual Abuse, 1910–1960" (2000) 29 *Journal of Social Policy* 55; Frank Mort, *Dangerous Sexualities: Medico-moral politics in England since 1830* (London: Routledge, 2000).

reasonable belief defence, an extension of the time limit on prosecution in unlawful carnal knowledge proceedings, strengthening the law safeguarding young persons from sexual acts falling short of intercourse, and rectifying the apparent imperfections in the law relating to soliciting and brothel-keeping. In 1928, the *Report of the Commission on the Relief of the Sick and Destitute Poor* made almost indistinguishable exhortations, including an advocation of the necessity to repeal the reasonable belief defence. This recommendation was based on the premise that the question of consent should be extraneous to the defilement of girls under the legal age:

> "From the point of view of prevention, we see no reason for allowing the man to plead reasonable belief that the girl was of legal age to give consent. We believe that the act of bringing a girl to shame either with or without her consent is one that should not be condoned on the ground of a belief of her being of legal age to give consent".[74]

In 1929, the Minister for Justice established a committee to "examine the proposals which had been repeatedly put forward by various societies and organisations for changes in the law relating to sexual offences, the most important being the raising of the age of consent".[75] The Criminal Law Amendment Committee (Carrigan Committee) was to look upon it as their duty to collect sufficient information from "authentic sources" to enable it to determine whether the "standard of social morality is at present exposed to evils, which the existing laws of the Saorstát [Irish Free State], for the suppression and prevention of public vice, are inadequate to check" and to "consider how best they can be made effectual".[76] The Committee convened 18 times, in camera, between June 20, 1930 and February 5, 1931.[77] It interviewed 29 people, 11 men and 18 women from a motley variety of relevant professions and competent interest groups who were considered "specially qualified by their professions, duties or experience to testify authoritatively on the subject".[78] These witnesses comprised clergy from Dublin and certain provincial dioceses and a substantial body of evidence derived from representatives who had been deputed by organisations engaged in social welfare work embracing "the

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74. *Report of the Commission on the Relief of the Sick and Destitute Poor, Including Insane Poor* (Dublin: Stationery Office, 1928), p.72.
75. Department of Justice Memorandum, October 27, 1932, National Archives, Ireland (NAI), DJUS. 90/4/4, 1, cited in Maguire (2007), fn.1 at 86; See also Constitution of the Criminal Law Amendment Committee, June 20, 1930, NAI, D.J.U.S. 90/4/2.
76. *Report of the Committee on the Criminal Law Amendment Acts (1880-85) and Juvenile Prostitution* (Dublin: Stationery Office, 1931), p.4.
77. Minutes of Evidence of the Criminal Law Amendment Committee, June 20, 1930, NAI, DJUS. 90/4/3. The Committee did not meet in August or September 1930. For the suppression of the Carrigan Report see, in particular, Finnane, see fn.1 above at 211–238, and Kennedy, see fn.1 above at 354–363.
78. Fn.76 above, p.6.

protection of women, girls and children, provision for unmarried mothers and their offspring, the treatment of sexual disease, the care and reformation of offenders and kindred charitable aims". There appeared to be considerable accord and consensus among the contributory witnesses:

> "... [n]o witness appearing before us has dissented from the view expressed by nearly every witness that the moral condition of the country has become gravely menaced by modern abuses, widespread and pernicious in their consequences, which cannot be counteracted unless the laws of the State are revised and consistently enforced so as to combat them."[79]

Witnesses before the Carrigan Committee were commensurately resolute in petitioning that a reasonable belief proviso should not be enacted in new or amended legislation in the Irish Free State. The Irish Women's Citizen and Local Government Association (IWCLGA), one of the chief proponents of child protection legislation in the early years of the Irish State, affirmed that the reasonable belief defence allowed males who have sexual intercourse with young girls to be careless about ascertaining their age and that even in circumstances of uncertainty, were not satisfying themselves of the age of the young female before engaging in intercourse. Isobel Dodd, joint secretary of the association's standing committee on children's care and a witness before the Carrigan Committee, surmised that "Evilly disposed men would pause in the absence of such proviso" as the "girl might look older or even make up older than her actual age". Miss Dodd also stated that in unlawful carnal knowledge proceedings where the appearance of the girl was pertinent, the young female often became an exhibit as well as a deponent during trial. The psychological effect of the assault, she claimed, caused "the injured girl" to look "older than her years owing to her horrible experience" and that "this older appearance actually lends support to the accused man's plea of reasonable belief".[80] This view was shared by the Irish Women Doctors' Committee, who also perceived that a "girl's physical development was frequently at the expense of her moral and mental development" and that such a girl required a raised age of consent bereft of any such proviso.[81] The various women's organisations were clearly eager to ensure that teenage females were not deprived of the protection of the law due to their advanced physical maturity.

The legislative process leading to the 1935 Act and the statute itself have, as noted above, been situated within a conventional Church-State historical hypothesis. That the Catholic hierarchy exerted their influence on certain sections of the 1935 Act is beyond dispute, but consigning the Act exclusively within a Church-State paradigm fails to take into consideration that much of the

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79. Fn.76 above, p.6, cited in Finnane, fn.1 above at 523.
80. Minutes of Evidence to the Criminal Law Amendment Committee, July 18, 1930, NAI, DJUS 90/4/3.
81. Minutes of Evidence to the Criminal Law Amendment Committee, November 20, 1930, NAI, DJUS 90/4/3.

momentum for reform came from prominent women's organisations and other influential individuals who were as vociferous as the Catholic hierarchy in persuading those holding power of the need to amend the law governing sexual offences. Such an approach also disguises the fact that there were conflicting voices within the Catholic Church on various aspects of the prevailing criminal law, including the proposed repeal of the reasonable belief defence. The Reverend Michael Browne, for instance, was not merely in favour of the retention of the defence, but questioned, somewhat bizarrely, whether legal provision could also be made for a "defence of 'provocation'".[82] An Episcopal delegation to the Minister for Justice in 1932 also, by contrast, proffered the view that "something could be said for discriminating in favour of youthful male criminals" but that the proviso in the 1922 English statute was "too liberal" and that "21 years might advantageously be substituted for 23".[83]

Clerical contributors also held conflicting opinions. The Reverend John Flanagan, in his deposition to the Carrigan Committee in December 1930, contended that a similar proviso to the "young man's defence" should not be incorporated in any new or revised legislation and that he was not conscious of "any case in which a boy had been seduced by a girl or woman",[84] while the Reverend J. Canavan, on the other hand, was utterly in support of making the defilement of young girls a crime of strict liability. At common law, mistake as to facts generally results in an acquittal, but Canavan asserted that ignorance as to the age of the girl should not "necessarily excuse" the male offender from criminal liability.[85] He insisted that the social importance of protecting young girls from sexual exploitation and the seriousness of the offence justified the requirement that a man "should not be allowed to plead ignorance of fact, since he should not have run the risk of defiling a girl who might be under age". "Where there is the risk of committing a grave crime", he continued, the male should be "certain of the facts before he acts" and that even if the age of consent was left unchanged, the plea of reasonable belief should be revoked for the reason that it is "rarely if ever urged".[86]

Perhaps the most astute observer of the deficiencies in child protection law was Jesuit social worker, Richard Devane.[87] Devane, as Maria Luddy has

82. Letter from the Rev. M.J. Browne to the Minister for Justice, November 13, 1932, NAI, DJUS H 247/41B, 1. For biographical information see Anne Dolan, "Browne, Michael John (1895–1980)", *Dictionary of Irish Biography* (Cambridge; Cambridge University Press, 2009), available at: *http://dib.cambridge.org* [Last Accessed January 10, 2012].
83. Rough notes made by the Minister for Justice after interview between the Bishop of Limerick, the Bishop of Ossory, the Bishop of Thasos and the Minister, NAI, DJUS 90/4/4, December 1, 1932, p.5.
84. Minutes of Evidence to the Criminal Law Amendment Committee, December 11, 1930, NAI, DJUS 90/4/3.
85. Letter from Rev. J. Canavan, S.J. to the Minister for Justice, undated, NAI, DJUS 90/4/4, p.2.
86. See fn.85 above, p.4.
87. For biographical details see Maurice Cronin, "Devane, Richard (1876–1951)", *Dictionary of Irish Biography* (Cambridge: Cambridge University Press, 2009), available at: *http://dib.cambridge.org* [Last Accessed January 10, 2012].

written,[88] was deeply averse to the dual standard of morality in the Irish State and considered that the reasonable belief proviso "seriously crippled the usefulness" of the 1885 Act.[89] In his 1931 *Irish Ecclesiastical Record* article, the "Legal Protection of Young Girls", Devane cited the Chief Magistrate of London, Sir John Dickenson, who declared that the proviso led to "many miscarriages of justice". The commentary also included a quote from the Assistant Commissioner of the London Police, who stated that, "as a rule, it was a dishonest defence, and was generally suggested to the man, *post factum*, by the lawyer's asking did he not think the girl looked over 16".[90] The evidence provided by the Chief Magistrate and the Assistant Police Commissioner to the English Committee between 1924 and 1925 regarding the contentious proviso was remarkably similar to the depositions submitted by the Irish law and order witnesses to the Carrigan Committee. In a 1930 memorandum, the Garda Commissioner, Eoin O'Duffy, remonstrated that the reasonable belief clause was "the invariable defence put up when the main facts cannot be denied", that it encouraged "perjury", and similar to the opinion of District Court Judge, Dermot F. Gleeson, posited that it was frequently successful in causing "serious miscarriages of justice".[91] Interestingly, evidence furnished to the Committee also suggested that the accused persons who relied on this proviso in their defence were themselves ignorant of the "saving clause but on the advice of their solicitors they had put it forward in defence".[92]

Various witnesses before the Carrigan Committee, as previously mentioned, complained that the reasonable belief defence in s.5(1) of the 1885 statute was based on physical appearance and, akin to many of the female witnesses, Devane held that the provision diminished the protection afforded to the more physically mature complainant. He propounded that this was particularly discriminatory against pregnant young girls:

> "It would appear that a grave wrong is done to a prematurely developed child when in an advanced state of pregnancy, and, as a consequence of her condition, looking much older than her years, the only question to be decided by the court or jury is: 'Does this girl look to be over 16 years?'"[93]

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88. Luddy, fn.1 above, p.228.
89. R.S. Devane, "The legal protection of girls", *Irish Ecclesiastical Record*, Vol.37, January 1931, pp.21–40. The pagination cited in this article corresponds with the copy submitted to the Carrigan Committee, NAI, DJUS 90/4/13.
90. See fn.89 above, p.22.
91. Memorandum from Eoin O'Duffy to the Criminal Law Amendment Committee, October 30, 1930, NAI, DJUS H 247/41A, 6; Supplementary Memorandum submitted by Dermot F. Gleeson to the Criminal Law Amendment Committee, January 24, 1931, NAI, DJUS 90/4/21, p.5.
92. Minutes of Evidence to the Criminal Law Amendment Committee, July 18, 1930, NAI, DJUS 90/4/3.
93. Fn.89 above, p.22.

Devane also contended that the application of the defence, where the girl was very young and the man was significantly older, was unduly unjust. The clause, he stated, permitted the man who seduced the young female by "every wile, and who may be thirty or forty years her senior, and even married" to escape criminal liability.[94] Similar evidence was also presented to the Committee by a representative of *Saor an Leanbh* who averred that it "frequently happens that young girls going out on domestic service overstated their ages so as to have a better chance of securing employment" and that this enabled the "evilly disposed young men who seduced them to avail of this proviso".[95]

The problem of a "young fellow set upon by a forward, brazen girl" also received attention from Devane, as it did from the English Committee on Sexual Offences against Young Persons 1924–25.[96] The English Committee strongly recommended the complete repeal of the proviso, but propounded that provision should be made where the young female was the initiator. Devane also averred that sympathy could be proffered for the young man, intimating that a line of reasoning existed for retaining the defence on the grounds that the law was unfairly discriminatory against young males. This argument rested on the assumption that it was unjust that the young girl remained unencumbered by criminal liability in instances where the girl was the instigator or where young persons of the same age simply consented to sexual intercourse with each other. Devane, however, was also mindful that the 1885 Act only offered protection to young girls from men and proposed that young boys should also be safeguarded. He did not go so far as to suggest that an elder female who had sexual intercourse with a boy under 16 should be convicted of such an offence, but asserted that the "case of a boy who has been led away by the attentions forced upon him by some forward girl of about 18 or 19" should be considered, particularly if it could be revealed that she has been in the "habit of frequenting the company of men or boys indiscriminately".[97] Devane advocated that probation, not acquittal, as recommended by the English Committee, would meet the case, and that the boy should be protected in such circumstances by increasing the age of criminal responsibility to 18.[98] The "fact that a young man knows he may have to pay the penalty will be a deterrent and shield against the girl who is the aggressor", he observed.[99]

Little comparable sympathy was apparent, however, in the debates on the reasonable belief defence in the Northern Irish Parliament. The Government spokesman, Sir Dawson Bates, contended that:

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94. Fn.89 above, pp.22–23.
95. Minutes of Evidence to the Criminal Law Amendment Committee, November 27, 1930, NAI, DJUS 90/4/3.
96. Fn.89 above, p.28.
97. R.S. Devane, "The unmarried mother and the poor law commission", *Irish Ecclesiastical Record*, Vol.31, June 1928, p.12.
98. See fn.97 above, p.12.
99. Fn.89 above, p.29.

> "... [i]f innocent people choose to take this method of sowing their wild oats they may take the risk. Far better they should get into trouble and be convicted than that young girls ... who leave their mothers' homes and perhaps enter into a business career should be debauched and ruined by these young fellows sowing their wild oats. If young fellows knew the risk they run of becoming criminals I think they will act more cautiously towards the other sex, particularly the young."[100]

Devane, by contrast, questioned the arbitrary age limit fixed in the English legislative compromise of 1922 and submitted that it was particularly difficult to justify considering that many "young blackguards under 23 roam the streets and frequent dance-halls for the purpose of seducing young girls and do so with relative impunity". The immunity of the young female from prosecution was viewed by him as a form of sagacious discrimination which acknowledged the likelihood that the boy may deem the sexual act to be "incidental and negligible", but to the girl "it may mean loss of character and entail life-long consequences". Devane wrote that the gender-biased nature of the crime was justified on the principle that the male should satisfy himself entirely of the age of the female before engaging in sexual intercourse and that it was the young girl who would have to endure the consequences of the pregnancy:

> "... the only hardship placed on the young fellow is to *make him take care that before he seduces a young girl he should make reasonably sure that she is of legal age*. It is far better that a young man should suffer, even in prison, than that a girl should be ruined for life."[101]

Such statements, at least in this context, may necessitate a reappraisal of the contention that invariably "girls and women rather than boys and men were seen as sexual deviants" in twentieth-century Ireland.[102]

IV

The *Report of the Committee on the Criminal Law Amendment Acts (1880–85) and Juvenile Prostitution* (Carrigan Report) was presented to the Minister for Justice in August 1931. The Report was 54 pages in length including a two-page summary which contained 21 key recommendations. The commentary revealed considerable levels of sexual transgression and pronounced that the newly independent Irish State was not yet ready, as O'Malley averred, to "reclaim its ancient title to sanctity and scholarship".[103]

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100. The Stormont Papers, Vol.3, Col.74, March 13, 1923.
101. Fn.89 above, p.29.
102. Ferriter, fn.1 above, pp.7–8.
103. O'Malley, fn.20 above, p.6.

> "The cogency and unanimity of the evidence laid before us leave no doubt that gross offences are rife throughout the country of a nature from which it could formerly claim a degree of immunity that may perhaps have lulled it into a state of false security. Frank recognition of this fact will, we believe, create a state of healthy public opinion helpful to the Government in purging the State from these evils."[104]

The 1931 Report espoused the consensus view that the law in the Irish Free State was unduly lenient and out of step with the law in the English and Northern Irish jurisdictions. The Report claimed that the reasonable belief defence was predisposed to frequent criticism that it betokened "a low standard of morality to tolerate so shameless a plea in answer to a charge of committing a sexual offence that *prima facie* is a felony or misdemeanour". The annotations also affirmed that the draftsmanship of the 1922 English proviso had "provoked uncomplimentary judicial criticism of its incoherency and obscurity" and that its retention on the statute book provided protection for "young reprobates" under the age of 24 to the detriment of the protection of girls under 16.[105] The Report thus recommended that the reasonable belief proviso in s.5(1) of the Act of 1885 should be repealed.

A 1932 Department of Justice memorandum was, however, extremely critical of the recommendations furnished in the Carrigan Report. The memo was disparaging about the commentary in the Report which propounded that the reasonable belief proviso conferred protection on "young reprobates" at the expense of young girls. It protested that the wording of the remark cast "doubt on the judicial temper of the authors" as the exponents of the proviso could equally advocate that the defence confers "a measure of protection on unsophisticated young men against the wiles of designing hussies". The architect of the document wrote that these comments were "vituperation and unhelpful" and that the Report should have been more impartial to the dissenting views on whether the defence should be abolished. "The parties may be 'reprobates' or 'hussies' or both", the author tactfully observed, "but it is certain that the blame is not invariably on the one side".[106]

The memorandum continued by conveying that there were valid pragmatic reasons for implementing a "young man's defence" analogous to the 1922 English provision. The correspondent contended that "any wide disparity in age" was a relevant factor and suggested that many people would empathise with the creation of an arbitrary age band between victim and accused. It stated that the drafting of the 1922 English legislative compromise was "loose and ambiguous", but noted that the purpose of the proviso was evidently to differentiate between young people close in age and cases where there was a significant age disparity between the under-age female and the older male. The

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104. Fn.76 above, p.15, cited in Maguire (2007), fn.1 above at 92.
105. Fn.76 above, p.18.
106. Department of Justice Memorandum, October 27, 1932, NAI, DJUS 90/4/4, 4, cited in Kennedy, fn.1 above, 357.

memorandum also asserted that the reasonable belief defence did not appear to be presenting any particular anomalies in practice and that information received by the Department of Justice was "to the effect that the defence is very rarely pleaded and that its abolition or retention would make little difference".[107] It did, however, criticise the fact that the committee failed to provide "any particulars of the abuses which followed from this defence" and that no statistics were presented in relation to the "proportion of prosecutions dismissed as a result of it".[108]

Furthermore, the memorandum noted that if the age of consent was increased to 18 as recommended by the Carrigan Committee, that the argument for repealing the reasonable belief defence lost some of its force. It stated that it was "by no means certain that the existence or non-existence of this defence would continue to be unimportant if the age were raised to 18 years" and denounced the fact that the justification for revoking the proviso in the report rested completely on the fact that it had been rescinded in the Northern Irish jurisdiction "apparently without ill-effects". Here, the defence was eliminated by the Criminal Law Amendment Act (Northern Ireland) 1923 and the memorandum thus stated that the Committee was culpable of relating "this result to what would be an entirely different set of circumstances, namely, a country with the age of consent at 18 years". The author opined that, if the age of consent was fixed at 18, the reasons for eliminating the reasonable belief defence were less compelling and that there was a qualitative difference between an offence which consists of a man having carnal knowledge with a girl under 16 and an offence with a girl just short of her 18th birthday:

> "There is a vast difference between a school-girl of under 16 years and a young woman who has nearly reached 18. There is probably a good reason for the fact that the defence of 'reasonable cause to believe' is rarely pleaded in this country. The accused may feel that the jury would take up the attitude; whether he thought the girl was over 16 or not, she is obviously very young and he should not have interfered with her. It is not so clear that a jury would react in the same way if the age were raised."[109]

More generally, the proposal to render the male strictly liable where the female was below the age of consent was of concern to the author of the memorandum. The proposition of the Carrigan Committee effectively entailed that an offence could be committed by a person who lacked the requisite mens rea. The Department of Justice communication was deeply perturbed about the proposed use of strict liability to impose criminal responsibility in unlawful carnal knowledge cases and considered that the male "should not be punished criminally for actions which he believed, with good reasons, not to be against

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107. Department of Justice Memorandum, October 27, 1932, NAI, DJUS 90/4/4, p.5.
108. See fn.107 above, p.5.
109. See fn.107 above, p.5.

the law". The writer perceived that it was "not a case of ignorance of the law being no excuse", but "a case of ignorance of the facts which is another matter".[110]

Whatever the emphases, the Minister for Justice, James Geoghegan, put a Memorandum for Government to the recently established Fianna Fáil–Labour coalition on October 27, 1932. Each Minister in the Executive Council was issued a copy of the 1931 Carrigan Report, a duplicate of the Department of Justice Memorandum and a draft Heads for a Criminal Law Amendment Bill.[111] The Suggested Heads for a Bill, contrary to the Carrigan Report, advocated the retention of the reasonable belief proviso but stipulated that the clause was to be "operative only in cases in which the girl was actually over the age of 16 at the date of the offence".[112] The issue was discussed thereafter at the second meeting of the Geoghegan Committee on December 13, 1932.[113] This interparty committee had been established after the Minister for Justice wrote to the leader of Cumann na nGaedheal party, William Cosgrave, on November 26, 1932, about the possibility of instituting a "non-party" committee comprising members of the Dáil, a judge, "a barrister with large experience in criminal cases" and a member of the medical profession.[114] The confidential character of the prospective committee proceedings was revealed:

> "The committee to be so representative as to be likely fully to criticise the Report and to advance any further suggestions which might be helpful to the Oireachtas, with a view to avoiding as far as possible public discussion of a necessarily unsavoury nature. Personally I think a committee of this kind could adequately discuss the Bill and that its various stages in the House might well be formal but as others may take the view that it would not be feasible to pass the Bill without public discussion in the Dail it may not be possible to confine the discussion to this committee."[115]

Cosgrave assented to the establishment of the committee, but only on the precondition that its composition was restricted to members of the Dáil.[116] It was also stipulated that Committee members were obligated by majority decisions and compelled not to articulate dissenting views at "committee stage or elsewhere".[117] Given the clandestine nature of the proceedings, it is unsurprising

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110. See fn.107 above, p.6.
111. Agenda of Meeting of the Executive Council, October 28, 1932, NAI, DJUS 90/4/4.
112. Suggested Heads for a Bill to amend the Criminal Law (Amendments) Acts 1880–1885, undated, NAI, DJUS, 90/4/4, p.1.
113. Minutes of the Committee on the Criminal Law Amendments Act, December 13, 1932, NAI, DJUS 90/4/4, p.1.
114. Letter from the Minister for Justice to the Leader of Cumann na nGaedheal, W.T. Cosgrave, November 26, 1932, NAI, DJUS H247/41B, cited in Finnane, fn.1 above, at 528.
115. See fn.114 above.
116. See fn.114 above.
117. Letter from the Minister for Justice to the Leader of Cumann na nGaedheal, W.T.

that the documentary evidence is not particularly informative about the intricacies of the deliberations but the minutes of the meeting illustrate that the Committee adhered to the recommendation of the 1931 Report and proposed that the proviso should be repealed—a proposition that was embodied in the ensuing Heads for a Criminal Law Amendment Bill in 1933.[118]

The repeal of the reasonable belief defence was also briefly, and explicitly, alluded to during the second stage of the Bill in the Dáil. The Attorney General, Conor Maguire, outlined the legal rationale for revoking the proviso in his introduction to the principles of the Bill:

> "The defence formerly available, that the accused had reasonable cause to believe that the girl was over the age of consent, is to be abolished. This defence is very seldom made in this country. Many lawyers of considerable experience have never encountered a single instance of this defence—I have only known of one case in which such a defence was made."[119]

Thus, as the aforementioned quotation reveals, the intention of the Oireachtas was incontrovertible. With knowledge of the decision in *R. v Prince*,[120] and its application in practice to all sexual offences where age was a factor, the legislature, on the recommendation of the Geoghegan Committee, abolished the three statutory defences in the 1885 statute based on mistake.[121] Indeed, both the minutes of the Committee and the subsequent heads for a Bill demonstrate an explicit intention to preserve strict liability in sexual offences relating to age where it had existed in the 1885 enactment and to introduce it to the three offences where it did not.[122] "To hold otherwise would be", as

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Cosgrave, November 26, 1932, NAI, DJUS H247/41B. The membership of the exclusively male committee included the Minister for Justice, the Attorney General, James Fitzgerald-Kenney and Desmond Fitzgerald, two former Ministers in the antecedent Cumann na nGaedheal administration, and James Dillon, a practising barrister who was elected as an independent TD for Donegal in the 1932 election. The three residual members encompassed the Labour deputy for Laois-Offaly, William Davin, Professor Edward William Thrift of Trinity College and the Independent Labour TD for Tipperary, Daniel Morrissey. The Geoghegan Committee convened ten times between December 1932 and July 1934. The minutes of the Geoghegan Committee are located in NAI, DJUS 90/8/50 and DJUS 90/4/4.

118. Heads for a Bill to amend the Criminal Law (Amendment) Acts, June 16, 1933, NAI, DJUS 90/8/50, p.1.
119. 53 *Dáil Éireann Debates* Col.1247, June 28, 1934.
120. (1875) LR 2 CCR 154.
121. 48 & 49 Vict. c. 69, ss.5, 6 and 7; Minutes of the Committee on the Criminal Law Amendments Act, December 13, 1932, NAI, DJUS 90/4/4, p.1; Minutes of the Committee on the Criminal Law Amendments Act, May 30, 1933, NAI, DJUS 90/4/4, p.1; Suggested Heads for a Bill to amend the Criminal Law (Amendments) Acts 1880–1885, undated, NAI, DJUS, 90/4/4, pp.1–3; Peter Charleton, *Offences against the Person* (Dublin: Round Hall, 1992), p.308.
122. Minutes of the Committee on the Criminal Law Amendments Act, December 13, 1932,

Geoghegan J. would later claim, an "unjustifiable distortion of what was clearly the intention of the Oireachtas of Saorstát Éireann".[123] With both the Government and the political opposition committed to the recommendations of the Committee and to suppressing parliamentary discourse on the Bill, the proviso was removed without any significant debate in the Houses of the Oireachtas.

VI

"Statutory rape" laws (as ss.1 and 2 of the 1935 Act were colloquially referred to) pose a "classic political dilemma" for legislators, lobby groups, feminists and women's organisations. As Olsen wrote, "[o]n one hand, they protect females ... and are a statement of social disapproval of certain forms of exploitation. On the other hand, statutory rape laws restrict the sexual activity of young women and reinforce the double standard of sexual morality".[124] Yet, no matter how critical one can be of the paternalistic philosophy underpinning these provisions of the Act of 1935, it still remains difficult to see how one can contend, in this particular context, that the legislature failed to compel men to be "more accountable for their own sexual behavior",[125] or indeed that these legislative provisions "put the protection of male sexual license above the protection of children from sexually predatory men".[126] A number of explanations can be offered to support this assertion. First, the aforementioned viewpoint belies the utilitarian argument underlying these offences, namely, that the social importance of protecting young girls from sexual exploitation justifies the requirement that a man should fully satisfy himself of the age of a young female before he has sexual intercourse with her and that these provisions "advanced important societal goals of deterrence" by ensuring that young girls were not subjected to "robust cross-examination on matters such as dress and appearance".[127]

Secondly, while there are legal scholars and child protectionists who would contend that these provisions were warranted in order to protect young girls from sexual exploitation by older males (particularly in cases where the age of the complainant could not be in any reasonable doubt), there is also a consensus

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NAI, DJUS 90/4/4, 1; Minutes of the Committee on the Criminal Law Amendments Act, May 30, 1933, NAI, DJUS 90/4/4, 1; Suggested Heads for a Bill to amend the Criminal Law (Amendments) Acts 1880–1885, undated, NAI, DJUS, 90/4/4, pp.1–3; Criminal Law Amendment Act 1935, ss.2, 9, Schedule of Repeals.

123. [2006] 4 I.R. 1 at 41.
124. Frances Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis" (1984) 63 *Texas Law Review* 387.
125. Maguire (2007), fn.1 above at 85.
126. Maguire (2009), fn.1 above, pp.173–174.
127. Submission of Gerard Hogan to the Joint Committee on the Constitutional Amendment on Children, February 16, 2008, pp.11–12.

that the scope of ss.1 and 2 of the 1935 Act was "over-inclusive"[128] and that it was unjust that a young male was automatically guilty of a very serious criminal offence even when the female appeared, or perhaps claimed, to be over 15 or 17 years.[129] Indeed, it seems fundamentally unfair that the female remained free of criminal liability in such circumstances, even if she consented to intercourse with a partner of her own age.[130] Here, the young male was automatically guilty of the offence if the girl was underage, even in a case where the girl had instigated the contact between them or where the defendant and the complainant were in a teenage relationship.[131] In this regard, one need barely look further than the Law Reform Commission's 1989 *Consultation Paper on Child Sexual Abuse*[132] and its 1990 *Report on Child Sexual Abuse* to observe the amendments suggested therein.[133] The 1990 Report, in particular, alluded to the austere nature of these offences:

> "There appeared to be little dissent from the view that the Irish law in this area was unduly harsh and wholly out of step with the law in other jurisdictions. While it may be again that a combination of prosecutorial and judicial discretion is ensuring that no problems arise, the possibility of serious injustice should none the less, in the view of the Commission, be removed."[134]

The 1990 Report recommended that in a prosecution for a consensual sexual offence, "there should be a defence available to the accused that he genuinely believed at the time of the act on reasonable grounds that the girl had attained the age of consent or an age attracting a less serious penalty". The Report also proposed that "in arriving at a conclusion as to whether he did so believe, the court should be entitled to take into account whether there were reasonable grounds on which he could hold such a belief".[135] The case against these provisions on this point was again reiterated by O'Malley in his book, *Sexual Offences: Law, Policy and Punishment.* Writing in 1996, he stated that:

> "Despite being apparently discriminatory against males, ss.1 and 2 of the Act of 1935 have never been challenged as being inconsistent with the Constitution. The male is guilty even if the female clearly consented and

128. Finbarr McAuley, *Report of the Criminal Law Rapporteur for the Legal Protection of Children* (Dublin: Stationery Office, 2006), p.5.
129. O'Malley, fn.20 above, p.94.
130. McAuley, fn.128 above, p.5.
131. McAuley, fn.128 above, p.5.
132. Law Reform Commission, *Consultation Paper on Child Sexual Abuse* (Dublin: Stationery Office, 1989).
133. Fn.33 above.
134. See fn.33 above, para.4.14.
135. See fn.33 above, paras 4.14–15.

there is no defence of genuine mistake as to age, a rule that may seem at variance with the generally subjective nature of criminal liability in Ireland."[136]

The young male, in such circumstances, could not advance a reasonable belief defence and was guilty of an offence carrying enormous social stigma and serious penalties of imprisonment—simply by reason of the fact that the girl was under the age of consent—even if on the facts he was actually "morally innocent" of the offence and took every reasonable step to satisfy himself that the girl was not underage.[137] Far from being unduly discriminatory against females, it can be attested that these provisions were seriously unjust to the category of young males who were in a position to put forward such a defence.[138]

Besides, it is also important to note that the exclusive concern of the legislature in ss.1 and 2 was the protection of young girls; the Act of 1935 was silent on the issue of the sexual exploitation of underage boys by mature females.[139] The enacting legislature, by virtue of the recommendations of the Geoghegan Committee, effectively left boys between the ages of 15 and 17 outside the protective cloaking of the 1935 legislation because of the erroneous belief that they were not subject to the same sexual attention at that age as young girls.[140] A woman who had sexual intercourse with a boy under 15 could have been convicted of indecent assault, as consent was no defence under the newly enacted s.14 of the 1935 Act, but she would have committed no offence if the boy was over 15, since male consent became fully operational at that age.[141] According to Edison, this type of dual discrimination (protecting females and punishing only males) was based on the assumption that non-marital sexual intercourse was harmful for young females (pregnancy), but not for males.[142] But even a fleeting glance through the extant Circuit Criminal Court Files in the National Archives reminds us that the gender-biased nature of ss.1 and 2 of the 1935 Act rested on the false presumption that young boys were not as vulnerable to sexual exploitation as young girls during this period, and we now

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136. O'Malley, fn.20 above, p.97.
137. Fn.127 above, p.11.
138. Fn.127 above, p.11.
139. See Professor Finbarr McAuley on the Supreme Court decision in *CC v Ireland* (broadcast on RTÉ Morning Ireland, May 24, 2006).
140. The sexual exploitation of underage boys by adult offenders was only alluded to briefly by the Carrigan Report. It stated that gross indecency between males was "a form of depravity" that was "spreading with malign vigour" and that some adult offenders systematically decoyed boys to become their "patients", who at first were void of knowledge of the nature of the acts to which they innocently submitted, but in the process of time from association with their deceivers became corrupt and debased. See fn.76, p.23.
141. Fn.139 above.
142. Rita Edison, "The Constitutionality of Statutory Rape Laws" (1980) 27 *UCLA Law Review* 757 at 760.

know that this certainly was not the case.[143] The irony is that, despite the fact that the 1935 Act was on the statute book for 71 years, between 1935 and 2006, there was more "widespread, persistent and callous sexual abuse during this period than we ever could have imagined".[144] Inevitably, children of both sexes suffered this abuse, albeit the perpetrators were predominantly male.

Finally, the fact remains that when s.1(1) of the 1935 Act was eventually challenged in *CC v Ireland*,[145] the Supreme Court held that the provision was unconstitutional on the ground that the failure to provide a defence of mistake represented a failure by the State to vindicate the appellant's personal rights as protected by Art.40 of the Constitution.[146] As Hardiman J. said:

> "It appears to us that to criminalise in a serious way a person who is mentally innocent is indeed 'to inflict a grave injury on that person's dignity and sense of worth' and to treat him as 'little more than a means to an end' in the words of Wilson J. [for the Canadian Supreme Court in R. v. Hess.] ... It appears to us that this, in turn, constitutes a failure by the State in its laws to respect, defend and vindicate the rights to liberty and to good name of the person so treated, contrary to the State's obligations under Article 40 of the Constitution."[147]

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143. *Report of the Commission to Inquire into Child Abuse* (Dublin: Stationery Office, 2009). See also Mary Raftery and Eoin O'Sullivan, *Suffer the Little Children: The Inside Story of Ireland's Industrial Schools* (Dublin: New Island Books, 1999).
144. Fn.6 above.
145. [2006] 4 I.R. 1. The Supreme Court also recently held that s.2(1) of the Act of 1935 is, and was at all material times, inconsistent with the Constitution. See *ZS v DPP* [2011] IESC 49.
146. For recent developments pertaining to the law in this area see Rossa Fanning, "Hard case; bad law? The Supreme Court decision in *A. v The Governor of Arbour Hill Prison*" (2005) 40 *Irish Jurist* 188; Deirdre O'Gara, "The Development of the Mistake as to Age in Ireland (1800s to 2006)" (2007) 25 *Irish Law Times* 176; Deirdre O'Gara, "Protecting Young Girls From Themselves: The Development of the Mistake as to Age Defence in England, Wales and Canada" (2007) 25 *Irish Law Times* 212; Deirdre O'Gara, "Protecting Young Girls From Themselves—Part Three: Reform in Ireland" (2007) 25 *Irish Law Times* 221; Mark Coen, "Whither Strict Liability" (2007) 25 *Irish Law Times* 77; Susan Leahy, "Hard Cases and Bad Law: An Overview of the Criminal Law (Sexual Offences) Act 2006" (2008) 26 *Irish Law Times* 38; Catherine O'Sullivan, "Protecting Young People from Themselves: Reform of the Age of Consent Law in Ireland" (2009) 16 *Dublin University Law Journal* 38; Andrew Ashworth, "Should Strict Liability be Removed from All Imprisonable Offences?" (2010) 45 *Irish Jurist* 1; David M. Doyle, "'The guilty sexual predator' and the 'innocent comely maiden': Gender, Paternalism and 'Statutory Rape' Law in Ireland" (2011) 21 *Irish Criminal Law Journal* 36; David Prendergast, "Strict Liability and the Presumption of Mens Rea after *CC v Ireland*" (2011) 46 *Irish Jurist* 211.
147. [2006] 4 I.R. 1 at 78–79.

Thus, in light of the case law on these provisions,[148] one could argue that they were objectionably paternalistic, but it is difficult to envisage how it could possibly be deduced that this aspect of the 1935 Act allowed men to be less accountable for their own sexual behaviour. On the contrary, it could plausibly be submitted that ss.1 and 2 "positively discriminated" against young girls, but one also cannot ignore the fact that it was fundamentally unjust that an accused could not advance an honest mistake defence in circumstances in which he took every reasonable step to satisfy himself that the complainant was not underage. As O'Malley observed, that s.1 of the 1935 Act was struck down by the Supreme Court was surprising for one reason alone—that it took so long to do so given that the finding of unconstitutionality was more or less inevitable.[149] There are, nevertheless, lobbyists who would deny that these provisions of the 1935 Act were discriminatory against young females or unduly paternalistic and would be in favour of amending the constitution to permit the Oireachtas to "reinstate that law or something close to it".[150]

148. *People (AG) v Williams* [1940] I.R. 195; *People (AG) v Powell* [1945] I.R. 305; *People (AG) v Kearns* [1949] I.R. 385; *People (AG) v Cradden* [1955] I.R. 130; *People (AG) v Quinn* [1955] I.R. 57; *People (AG) v Marshall* [1956] I.R. 79; *People (AG) v Trayers* [1956] I.R. 110; *People (AG) v Dermody* [1956] I.R. 307; *People (AG) v Ryan* [1960] I.R. 181; *People (AG) v Dempsey* [1961] I.R. 288; [1963] I.R. 255; *People (AG) v Dempsey* 1 Frewen 325 (1968); *Coleman v Ireland* [2004] IEHC 288; *CC v Ireland* [2006] 4 I.R. 1.

149. Thomas O'Malley, "Criminalising Child Abuse and Protect Constitutional Values", UCC Centre for Criminal Justice & Human Rights Annual Criminal Law Conference, June 27, 2008.

150. Submission of Thomas O'Malley to the Joint Committee on the Constitutional Amendment on Children, November 5, 2008, p.1.

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