

# Standard of Consent in Rape Law in India: Towards an Affirmative Standard

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## ABSTRACT

*This Article examines how rape law’s conceptualization of consent provides an objective standard to define the subjective experiences of rape survivors. It argues that because “consent” as currently conceptualized by the Indian legal system is often not a potent enough instrument to articulate the free choice of women in patriarchal societies, at the very least the standard of consent must be*

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*victim friendly to better preserve women's sexual autonomy. The Article first provides a brief descriptive survey of the existing standard of consent in Indian rape law and its evolution from previous standards. It then contextualizes consent within Indian law and culture to argue that the current standard especially burdens victims and exonerates perpetrators of responsibility in sexual interactions. To provide such context, the Article analyzes a series of judgments, mythology, politics, penal statutes, and media representation to establish the prevalence of rape culture in India. It highlights a continuing system of misogyny where the same patriarchal institutions that make it acceptable for perpetrators to deprive women of choice during sexual intercourse further deprive them of agency during rape trials. Specifically, this Article reveals how rape adjudication, alleged rapists' defense tactics during trial, and conversations surrounding rape in Indian courtrooms are replete with cultural rape myths and stereotypes. Having explained this context, the Article examines recent reforms in rape law to prove their inadequacy in realizing the rights of the victim. It concludes that the affirmative standard is a much-needed normative change to reduce legal ambiguity (almost always used to the detriment of the oppressed) with a more specific standard that discourages the implication, rationalization, and generalization of consent into existence when absent. Finally, the Article places this proposed reform within the context of a series of statutory reforms in rape law so far and concludes that it will further the feminist movement by extending rights to a target group of victims that the existing standard within Indian law excludes.*

## INTRODUCTION

*“My main claim is that a critical analysis of the function of consent in rape law shows that it presupposes what it undermines, namely women's full-blown sexual agency.”<sup>1</sup>*

“Consent” in classical liberal theory refers to the expression of autonomy and free will by competent and rational individuals who are free from coercion and pressure.<sup>2</sup> Postmodern feminists contend that this classical liberal view of “consent” does not reflect women's choices in a patriarchal society because it *overplays* female agency and is oblivious to the power differential between men and women, especially in the normative context of social institutions that exclude female experiences and eliminate any possibility of free choice for women.<sup>3</sup>

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1. Louise Du Toit, “The Conditions of Consent,” in *Choice and Consent: Feminist Engagements with Law and Subjectivity*, 59 (eds. Rosemary Hunter & Sharon Cowan, Routledge-Cavendish, 2007).
  2. See Rosemary Hunter & Sharon Cowan, “Introduction,” in *Choice and Consent: Feminist Engagements with Law and Subjectivity*, 1-9 (eds. Rosemary Hunter & Sharon Cowan, Routledge-Cavendish, 2007) (discussing the ideological tensions between scholars tackling agency in rape law).
  3. Carole Pateman, “Women and Consent,” 8 *Political Theory* 149 (1980); Diana Coole, “Re-Reading Political Theory from a Woman's Perspective,” 34 *Political Studies* 129 (1986);

Liberal feminists have predictably countered that this viewpoint disserves female agency by *underplaying* it, and that it furthers the infantilization of women by placing emphasis on a social and sexual contract that subordinates women to men, thus framing women as submissive, dependent, inexperienced, and immature creatures.<sup>4</sup>

This Article's analysis of the standard of consent in Indian rape law refutes the liberal feminist notion that acknowledging gendered inequality in accessing "choice" and "consent" is infantilizing; on the contrary, it argues that any successful statutory reform of consent standards in rape law ought to begin by acknowledging that the tangible constraints upon the consensual freedom and agency of women constitute day-to-day realities and not convenient constructions. Understanding that rape is not just a crime of violence, but predominantly an assertion of male power and dominance, allows us to situate rape law within the broader power structures that facilitate men's exercise of dominance over women and also encourage women to "voluntarily" adhere to patriarchal norms.<sup>5</sup> This framing of rape effectively contextualizes consent, revealing that more often than

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Lorenne M.G. Clark, "Women and Locke: Who Owns the Apples in the Garden of Eden?," in *The Sexism of Social and Political Thought*, 16-40 (University of Toronto Press, 1979); Elizabeth Frazer & Nicole Lacey, *The Politics of Community a Feminist Critique of the Liberal-Communitarian Debate* (University of Toronto Press, 1993).

4. Cynthia V. Ward, "The Radical Feminist Defense of Individualism," 89 *Northwestern University Law Review* 871, 874 (1995) (arguing that a feminist philosophy emphasizing male domination "reduces society's conception of 'woman' to the female role in sex, and further reduces that role to one of submission and passivity"); Hilary Lim, "Messages from a Rarely Visited Island: Duress and Lack of Consent in Marriage," 4 *Feminist Legal Studies* 203, 204, 210, 220 (1996) (citing Carol Gilligan for the proposition that if we don't assume that "masculinity equals normality" we discover that women have a different but not "immature" voice). Lim also argues that "colonialist discourse could and can slide easily in another direction, viewing some women as necessarily passive both socially and sexually" and cites some cases where "the court is particularly addressing the question of consent" as "one of the hallmarks of the autonomous subjects of modern moral and political theory that they are free agents who may transact with one another and are competent to give informed consent." *Id.* at 204. These courts characterize the "male legal subject" as "a mature moral being . . . who [is] capable of surrendering part of his autonomy as a matter of rational choice. The woman . . . on the other hand, is defined by her lack of autonomy and independence and therefore her lack of the ability to give consent to the sexual contract." *Id.* Lim cautions against such an approach by citing Williams who noted that a problem for feminism is that in learning "to undo images of power with images of powerlessness" it tends "to clothe the victims of excessive power in utter, bereft naivete." *Id.*; see also P.J. Williams, *The Alchemy of Race and Rights*, 155 (Virago, 1993); Miranda Kaye, "Equity's Treatment of Sexually Transmitted Debt," 5 *Feminist Legal Studies* 35, 46-47 (1997) (arguing that judicial constructions of the requirement of female consent in cases of a "sexually transmitted debt" involving wives as sureties, represent women as immature, inexperienced, too dependent on men, as their victims in need of protection); see generally C. Gilligan, *In A Different Voice* (Harvard University Press, 1982).
5. Maria Drakopoulou, "Feminism and Consent: A Genealogical Inquiry," in *Choice and Consent: Feminist Engagements with Law and Subjectivity*, 30 (eds. Rosemary Hunter & Sharon Cowan, 2007) ("[T]he feminist critic's location and interrogation of consent within a discourse on power, truth and subjectivity . . . allows for the granting and withholding of consent to function as an axis of freedom and to empower critique, whilst also activating conditions of domination and self-subjugation.").

not, women may seemingly “consent” to violent masculine sexual acts or undesirable intercourse because they lack an effective choice, and “consent” is safer than resistance.

Any consent standard that seeks to meaningfully categorize non-consensual sex as “rape” must affirm the subjective experiences of all victims, taking into consideration that “consent” conceptualized as tacit acceptance or non-resistance is not a potent enough instrumentality to protect the free will and choice of women. Women’s subjective experiences of rape are often subverted by the “objective” law against rape. In the trial process, for example, the defense inordinately focuses on the victim’s state-of-mind to demonstrate that women are mistaken about their own experiences and not capable of objectively knowing the nature of what happened to them.<sup>6</sup> As discussed below, rape defendants use tactics such as harrowing cross-examination to humiliate and psychologize the survivor before a patriarchal judge.<sup>7</sup> Defendants play on a deeply embedded cultural narrative to sow self-doubt in the rape survivor, compelling her as well as the adjudicators to mistake socially normalized male dominance—and submission to it—as romance and identify assault as seduction.<sup>8</sup> Rape law’s formal definition of consent actively ignores the social factors at work. It frames the modality by which a woman participates in sex, not as an active, equal partner, but as a passive, responsive object in a primarily male performance of sex with her body—in this conception, sex is inherently an act that the women “consents” to rather than engages in.<sup>9</sup>

To understand how this definition operates, we must fully contextualize it within India’s culture—a culture that suffers from abject gender inequality and violence against women. According to a June 2018 poll of women’s rights experts by the Thomson Reuters Foundation, out of 193 United Nations (UN) member states, India was the most dangerous country in the world for women, based on indicators of healthcare, economic resources, cultural or traditional practices, sexual violence and harassment, non-sexual violence, and human trafficking

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6. See Du Toit, note 1, at 61 (arguing that defense lawyers construct the victim as sexually ambiguous, irresponsible, inconsistent, and thus, unrapeable because only responsible moral agents and actors can be raped). “By adding ‘against her will and without her consent’ as necessary conditions to the very definition of rape, the law turns the woman’s deepest motives and feelings as well as her overt behavior during the forced ‘sex’ into ostensibly objective criteria for defining what happened to her.” Id.
  7. See Amita Dhanda, “Psychologising Dissent: Psychiatric Labelling and Social Control,” in *Engendering Law—Essays in Honour of Lotika Sarkar*, 321-38 (Eastern Book Company, 1999); see also Part III.C.
  8. See Ruby Aliment, “Saying ‘Yes’: How California’s Affirmative Consent Policy Can Transform Rape Culture,” 14 *Seattle Journal for Social Justice* (2016).
  9. Du Toit, note 1, at 61 (“This one-sidedness, this asymmetry with regard to sexual agency and subjectivity, the law assures us, is not the problem. It is, on the contrary, natural, and the normative background against which the deviation of rape has to be gauged. If heterosexual intercourse is something *men do*, then the other side of the coin is that sex is something that *women* naturally, or normally, undergo, passively experience, and *consent to*. Rape law thus both presupposes and naturalizes women’s consent to sex – ‘consent’ is the manner in which women ‘engage in’ sex, ‘have’ sex, and have *a sex*.”).

(including sex slavery and domestic servitude), as well as customary practices such as forced marriage, stoning, and female infanticide.<sup>10</sup> While there are no official statistics regarding non-partner sexual violence, 29 percent of Indian women face physical and/or sexual intimate partner violence, at least once in their lifetime.<sup>11</sup> In 2018, the UN's Gender Inequality Index, which measures gender inequality based on latest statistics of reproductive health, empowerment, and labor market participation, ranked India a dismal 127 out of 160 countries.<sup>12</sup> Moreover, the National Crime Records Bureau (NCRB) statistics and the government's own survey data provide compelling evidence demonstrating that less than 1 percent of sexual violence by husbands is reported to the police.<sup>13</sup> Despite this, the government has unabashedly argued for the retention of marital rape as an exception to rape under the Indian Penal Code (IPC) to preserve the "sacred" institution of marriage.<sup>14</sup> Furthermore, numerous feminist legal scholars have analyzed trends in judicial adjudication of rape and sex discrimination,<sup>15</sup> illustrating that the Indian judiciary—which exercises considerable interpretative power compared to those of other countries and enjoys immense political capital<sup>16</sup>—has often functioned to legitimize structural patriarchy and sex discrimination.<sup>17</sup>

Due to this Article's focus on the IPC, same-sex sexual violence is not discussed because § 375 of the IPC only conceptualizes the perpetrator as male and the victim as female. Moreover, while the reforms this Article advocates for under § 375 should also benefit transgender women who should be recognized as female under the language of the statute, such analysis is also beyond the scope of

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10. Belinda Goldsmith & Meka Beresford, "India Most Dangerous Country for Women with Sexual Violence Rife—Global Poll," *Reuters* (25 Jun. 2018), <https://perma.cc/3RDP-7PUE>.
  11. This figure represents the proportion of partnered women between ages fifteen and forty-nine who will experience intimate partner physical and/or sexual violence at least once in their lifetime. "National Family Health Survey (NFHS-4), 2015-16: India," *International Institute for Population Sciences* (2017), <https://perma.cc/XG4Q-B73E>.
  12. United Nations Development Programme, "Human Development Report, 2018 Statistical Update."
  13. Aashish Gupta, "Reporting and Incidence of Violence Against Women in India," *Rice Institute* (25 Sept. 2014), <https://perma.cc/22YL-ZPAD>
  14. Kanika Sharma & Aashish Gupta, "When Even Rape is Legal," *The Hindu* (10 Jun. 2015), <https://perma.cc/ED83-V74U>.
  15. Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (Cambridge University Press, 2016); Usha Ramanathan, "Images (1920-1950): Reasonable Man, Reasonable Woman and Reasonable Expectations," in *Engendering Law – Essays in Honour of Lotika Sarkar*, 33 (eds. Amita Dhanda & Archana Parashar, Eastern Book Company, 1999).
  16. See Pratap Bhanu Mehta, "The Indian Supreme Court and the Art of Democratic Positioning," in *Unstable Constitutionalism: Law and Politics in South Asia*, 233-60 (2015); Upendra Baxi, *The Crisis of the Indian Legal System* (Vikas Publishing House, 1982); Rajneesh Kumar Patel, *Administration of Justice in India Ethics and Accountability*, 117 (Deep & Deep Publications, 2011).
  17. See Kalpana Kannabiran, "Judicial Meanderings in Patriarchal Thickets: Litigating Sex Discrimination in India," 44 *Review of Women's Studies* 88 (2009).

this Article. It is important to acknowledge, however, that those assigned the female sex at birth are not the only survivors of rape in India;<sup>18</sup> often, non-conformity with gender boundaries not only functions as a basis for sex crimes, including rape, but also makes it harder for survivors to seek help.<sup>19</sup> This Article's focus, however, is narrowly centered on a specific form of gender-motivated violence in India. Research has shown that violence perpetrated by men against women is by far the most common in India and a gender-neutral rape law is likely to cause greater trauma and humiliation to the already marginalized female victim.<sup>20</sup> Indian feminists have argued that gender-neutrality in rape law is entirely divorced from the social reality of sexual abuse in the country.<sup>21</sup> Legal feminists the world over have cautioned against a gender-neutral model for its ill-considered attempts to construct a more ideal society based on a formal equality rhetoric, which stifles reforms and moves away from equity.<sup>22</sup> This is especially pertinent to consider in the Indian context for its glaring gender inequality and rampant domestic and public violence against women, explored in depth below.

This Article argues that § 375's definition of rape, as currently interpreted and applied within a cultural narrative that polices and subjugates female sexuality, fails to protect women who are forced to "consent" to sexual violence through lack of choice. It emphasizes the need for an affirmative consent standard to mitigate the harm to women under this system. This argument proceeds in three parts. According to § 375 of the IPC, the offense of rape is the commission of a penetrative act upon a woman by a man under seven circumstances, some of which address deception or underage intercourse.<sup>23</sup> The two circumstances relevant to

18. Same-sex violence is covered under § 377 of the IPC which criminalizes "carnal intercourse against the order of nature." It has recently been interpreted to decriminalize consensual sex between gays and lesbians, but still covers same-sex sexual violence. See *Navtej Singh Johar v. Union of India through Secretary Ministry of Law and Justice*, Writ Petition (Criminal) No.76 of 2016 (Supreme Court of India, 2018).
19. See Justice K.S. Panicker Radhakrishnan's separate and concurring opinion in *NALSA v. Union of India*, 5 S.C.C. 438, at ¶ 55 (Supreme Court of India, 2014) ("Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation, rape, forced anal and oral sex, gangrape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities. Further, non-recognition of identity of Hijras/transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc. . . . Since, there are no separate toilet facilities for Hijras/transgender persons, they have to use male toilets where they are prone to sexual assault and harassment."); Priti Salian, "'How Can You be Raped?' Doctor's Words to Transgender in India an Example of the 'Transphobia' that Stops Many Getting Health Care," *South China Morning Post* (12 Apr. 2019), <https://perma.cc/2AZX-TXTK>.
20. Flavia Agnes, "Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law," 37 *Economic and Political Weekly* 844 (2002).
21. Nivedita Menon, "Gender Just, Gender Sensitive, Not Gender Neutral Rape Laws," *Kafila* (8 Mar. 2013), <https://perma.cc/2GK7-KE4N>.
22. Martha Albertson Fineman, *The Illusion of Equality* (University of Chicago Press, 1999).
23. "A man is said to commit 'rape' if he: (a) penetrates his penis to any extent into the vagina,

this Article are: (1) committing the act against the woman's will, or (2) committing the act without her consent. By making "without her consent or against her will" the definitional requirements of rape, the law treats a woman's overt behavior during intercourse as a cold objective standard to substitute for her subjective experience of violation, thus ignoring what could in certain cases be "forced" sex that does not fall within the category of rape.

Part I discusses the current standard of consent in Indian rape law to show that the *status quo* burdens victims and exonerates perpetrators of responsibility in sexual interactions. Indian statutes, legal decisions, and commentaries condemning rape primarily focus on it as a crime that "lowers [a woman's] dignity and mars her reputation," rather than a crime violative of a woman's selfhood, individuality, or autonomy.<sup>24</sup> Legal decisions go so far as characterizing "chastity" or "virginity" as the "most valued possession of a woman"<sup>25</sup> and even rulings that otherwise lay down progressive guidelines regarding the credibility of victim testimony, frame rape as a crime that is in some ways worse than murder because "a murderer destroys the physical body of his victim (but) a rapist degrades the very soul of the helpless female."<sup>26</sup> As Sharon Marcus notes:

[I]n its efforts to convey the horror and iniquity of rape, such a view often concurs with masculinist culture in its designation of rape as a fate worse than, or tantamount to, death; the apocalyptic tone which it adopts and the metaphysical status which it assigns to rape implies that rape can only be feared or legally repaired, not fought.<sup>27</sup>

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mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or part of the body, not being the penis into the vagina, urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra or anus of a woman or any part of body of such woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven following descriptions: *First*. Against her will. *Secondly*. Without her consent. *Thirdly*. With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. *Fourthly*. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. *Fifthly*. With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. *Sixthly*. With or without her consent, when she is under sixteen years of age. *Seventhly*. When she is unable to communicate consent."

24. *Jugendra Singh v. State of UP*, 6 S.C.C. 297, at ¶ 39 (Supreme Court of India, 2012); see also *State of Punjab v. Ramdev Singh*, Appeal (Criminal) 547 of 1997 (Supreme Court of India, 2003); *Lillu Rajesh and Others v. State of Haryana* 14 S.C.C. 643, at ¶ 11 (Supreme Court of India, 2014).
25. *Bipul Medhi v. State of Assam*, 2008 Criminal Law Journal 1099, at ¶ 3 (Appellate Court, India, 2006).
26. *The State of Punjab v. Gurmit Singh and Others*, 2 S.C.C. 384 (Supreme Court of India, 1996).
27. Sharon Marcus, "Fighting Bodies, Fighting Words: A Theory and Politics of Rape

Such stereotypical judicial constructions also conflate non-consent with a complete physical incapacitation because it is believed that ordinarily a woman *would* resist because she *should* value her chastity more than life itself. These stereotypes require the victim to fight tooth and nail until rendered *helpless* or *lifeless* in order to signify her non-consent and meet numerous expectations to fit the characterization of a “typical” victim. The stereotype essentially creates a self-defense requirement unique to this crime. Even though India has formally abandoned a resistance standard in favor of a consent standard, these myths and stereotypes continue to inform rape adjudication.<sup>28</sup>

Part II contextualizes the law by highlighting the prevalence of rape culture in Indian politics, mythology, media, and legal codes, which leads to moral policing and censorship of female sexuality and myths of false rape accusation. Indian women’s sexuality is policed and regulated socio-culturally to a great extent<sup>29</sup> and expressions of women’s sexuality are prone to more licentious, entitled, and deliberate misinterpretation by men than the women may have intended to signify. Part II sets the stage for this Article’s ultimate conclusion that many negative stereotypes surrounding rape victims can be mitigated by an affirmative standard of consent. The affirmative standard leads to “the acknowledgment of specific, rather than generalized consent that would prompt courts to engage in a more explicit dialogue attempting to articulate and define such distinctions.”<sup>30</sup> An affirmative standard in this context protects women from unwanted sex by reducing the room for ambiguity in sexual encounters whereas the “no means no standard” is susceptible to manifestations of rape culture.

Critics argue that the affirmative standard makes it very easy for women to level false accusations; however, Part III will critique the myth of false allegations. Judges often perpetuate notions of women filing false rape cases after relationships turn sour and express sympathy for the alleged rapist. For example, a two-judge bench of the Bombay High Court, comprised of Justices Vidyasagar Kanade and Nutan Sardesai, noted that “in many such cases the accused men have to languish in jail for months or years.”<sup>31</sup> However, as a factual matter, false accusations of rape by women are no more common than false accusations by men or women of crimes of other categories.<sup>32</sup> Thus, this standard does not carry with it any harm

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Prevention,” in *Feminists Theorize the Political*, 387 (eds. Judith Butler & Joan W. Scott, Routledge, 2013).

28. See Satish, note 15, at 106-12.

29. See Renu Khanna & Janet Price, “Female Sexuality, Regulation and Resistance, Focus on Gender,” 2 *Population and Reproductive Rights* 29 (1994).

30. See “Acquaintance Rape and Degrees of Consent: ‘No’ Means ‘No,’ but What Does ‘Yes’ Mean?,” 117 *Harvard Law Review* 2341 (2004).

31. Shibu Thomas, “Rise in Post-Breakup ‘Rapes,’ Bombay High Court Worried,” *The Times of India* (28 Dec. 2016), <https://perma.cc/GP45-H6A7>.

32. Nicholas J. Little, “From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law,” 58 *Vanderbilt Law Review* 1321, 1330-31 (2005).

exclusive to rape adjudication: in order to prove that consent was absent, the defense can still resort to fact-finding through cross-examination.<sup>33</sup> Although there will always be factual uncertainty and no standard can eliminate swearing contests between witnesses,<sup>34</sup> the law's aim should be to reduce ambiguity and alter definitions to mitigate the historic imbalance of credibility afforded to male but not female constructions of the event.<sup>35</sup>

Further, Part III examines the problem of implied consent, the psychology of the victim and a range of possible responses to rape. It emphasizes the need for an affirmative consent standard in order to extend rights to a target group of victims that the current standard within Indian law excludes. This Part highlights that the existing consent standard of "no means no" is riddled with problems. Under § 375, "willingness to participate in the specific sexual act" can be conveyed "through words, gestures or any form of verbal or non-verbal communication."<sup>36</sup> The focus is more often on if these "gestures" *occurred* and not on what they *meant*.<sup>37</sup> Usha Ramanathan studies a catena of judgements to argue that the Indian judiciary's compassion and sympathy lie with its expectations of what a "reasonable man" would do.<sup>38</sup> By exonerating the "reasonable man" from moral and legal blameworthiness because one can identify with him while condemning and disbelieving the "unreasonable woman" who transgresses her subordination and gender role by leveling a rape allegation, the Indian judiciary reveals that it is prone to "meanderings in patriarchal thickets."<sup>39</sup> Thus, judicial interpretations of a victim's actions and gestures are patriarchal and ignorant of the range of possible responses to rape that are discussed below.<sup>40</sup> Based on the foregoing, this Part concludes that the affirmative standard is a much-needed normative change that will replace current ambiguity in law with a more specific standard that discourages rationalizing consent into existence when absent.

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33. John F. Decker & Peter G. Baroni, "'No' Still Means 'Yes': The Failure of the 'Non-Consent' Reform Movement in American Rape and Sexual Assault Law," 101 *Journal of Criminal Law and Criminology* 1081 (2011).

34. Stephen J. Schulhofer, "Taking Sexual Autonomy Seriously: Rape Law and Beyond," 11 *Law and Philosophy* 35 (1992).

35. Susan Caringella, *Addressing Rape Reform in Law and Practice*, 97 (Columbia University Press, 2008).

36. Explanation 2 to § 375 reads: "Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act."

37. See *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*, Criminal Law Appeal 944/2016, at ¶¶ 9, 10, 14, 15, 46 (Delhi High Court, 2017) (citing flirtations by the victim to acquit the perpetrator while not recognizing that the relevance and meaning of such actions was limited to signifying consent to specific and not all sexual actions); Aparajito Sen, "Consent In Indian Rape Law: A Case For An Objective Standard Of Determining Consent," *Oxford Human Rights Hub* (24 Nov. 2017), <https://perma.cc/37RU-J6EZ>.

38. See Ramanathan, note 15.

39. See Kannabiran, note 17.

40. See Section III.B.

## I. THE CURRENT STANDARD OF CONSENT IN INDIAN LAW

Ambiguities in legal definitions are often liable to be manipulated in the interests of the powerful, to the detriment of the powerless.<sup>41</sup> For instance, before the Criminal Law Amendment Act of 2013, courts had discretion to award milder sentences to rapists based on subjective, and ultimately irrelevant, determinations of “adequate and special reasons”<sup>42</sup> instead of applying the then-objective seven-year statutory standard in cases of non-aggravated rape. The minimum punishment for rape, aggravated or non-aggravated, has been increased from seven to ten years under the Criminal Law Amendment Act, 2018.<sup>43</sup> Furthermore, application of the relevant sections of the IPC that define consent in the context of rape reveal that seemingly victim-friendly definitions of rape have proven to be inadequate in the Indian sociocultural context. Section 90 of the Code defines consent generally and negatively while § 375 gives it a positive definition specific to the offense of rape. Both sections are to be read together in cases of rape, with the latter specific provision overriding the former as per settled rules of statutory interpretation. Section 90 declares that:

consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.

Explanation 2 to § 375 reads:

Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Moreover, consent in Indian rape law is revocable. According to Explanation 2 to § 375, consent has to be for the specific sexual act engaged in and thus may be granted for one act and subsequently withdrawn for another. The point when

41. Caringella, note 35, at 97 (“[T]he construction of meaning and the ability to make one’s construction prevail are at the root of a lot of ambiguities. In other words what he creates, or takes, or interprets the situation to be about and what she thinks happened or interprets as the meaning of his words and behaviors in a given situation are not phenomena that are equally likely to be believed. There is a historically grounded proclivity to give credence to male, not female, constructions.”).
42. The Criminal Law (Amendment) Act of 2013 removed the “adequate and special reasons” clause in Sections 376(1) and 376(2). Judges no longer have discretion to sentence a convicted person to imprisonment for less than ten years.
43. See Satish, note 15, at 65 (“In spite of holding that the term ‘adequate and special reasons’ in Section 376 needs to be strictly interpreted . . . the Court often considered factors such as the conduct of the victim . . .”) (internal citations omitted).

penetration occurs determines consent.<sup>44</sup> Thus, a woman may withdraw her consent during the act and from that point on the act would constitute rape. Withdrawal of consent after the act is completed will not be rape unless the woman's consent is vitiated by a multiplicity of factors, inter alia those mentioned in § 90.<sup>45</sup> Thus, although § 375 can and should be interpreted to cover post-penetration withdrawal of consent, its failure to expressly and specifically define rape to include instances where the rape survivor withdrew consent makes the law inaccessible to the victims of date rape, a grossly unresearched crime in India.<sup>46</sup> As discussed below, rigid notions regarding women's virginity as sacrosanct and pre-marital sex as taboo make date rape even more difficult for women to report or recognize as a crime.

All of the aforementioned legal ambiguities are made more troubling by the realities of rape adjudication. The primary witness in the case of rape is the survivor.<sup>47</sup> The Supreme Court of India has held that an accused rapist can be convicted based solely on the victim's testimony that she did not consent, if the presiding court considers the testimony to be reliable.<sup>48</sup> A victim's non-consent can be inferred via corroborative evidence, including surrounding circumstances, witnesses, and medical examinations.<sup>49</sup> The burden to prove that the act took place without the consent of the survivor lies on the prosecution and has to be discharged beyond reasonable doubt.<sup>50</sup> However, the prevalent rape culture discussed in Part II predictably leads to judicial distortions of § 375 and § 90 that make this burden almost insurmountable. And the Delhi High Court's recent application of these definitions provides a clear example.

*Mahmood Farooqui v. State (Govt. of NCT of Delhi)* demonstrates the dire need for an affirmative standard of consent in Indian law.<sup>51</sup> There, the accused allegedly forced himself on a researcher who had met him a couple of times before and had become well acquainted with him. The decision was criticized by academics and lawyers for its incorrect application of § 90 and its failure to apply

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44. Mrinal Satish, "Forget the Chatter to the Contrary, the 2013 Rape Law Amendments Are a Step Forward," *The Wire* (22 Aug. 2016), <https://perma.cc/F2SW-A5MP>.

45. Section 90 of the Indian Penal Code (1860) mentions that consent can be vitiated due to fear of injury, misconception of fact, insanity, unsoundness of mind, intoxication, inability to understand the nature, and consequence of act consented to or being a child.

46. See Salam Bitam Singh, Thounaojam Meera, & Thoidingjam Bijoy Singh, "Date Rape: A Study on Drug-Facilitated Sexual Assaults in Imphal," 28 *Journal of Medical Society* 86 (2014) ("Date rape is considered a curse of the Western world and instances of date rape are steadily rising in India; however, the exact statistics are not available. The present study has been carried out in our center to find out the incidence and pattern of date rape cases in Imphal."). This study was very limited as it considered only drug-facilitated sexual assault to be date rape and was geographically confined to one city with a sample size of only 510 cases of sexual assault incidents.

47. Satish, note 44.

48. *The State of Punjab v. Gurmit Singh & Others*, 2 S.C.C. 384 (Supreme Court of India, 1996).

49. Satish, note 44.

50. *Id.*

51. Criminal Law Appeal 944/2016 (Delhi High Court, 2017).

the specific definition of consent in Explanation 2 to § 375.<sup>52</sup> The judgement also invented a defense of mistake of fact for rape even though Indian statutory law does not provide for such a defense.<sup>53</sup> This is because mistake of fact is a defense to negate the *mens rea* of the accused; however, there is no *mens rea* requirement for rape which is sexual intercourse without a woman's consent, thus making this defense and the accused's perception of consent irrelevant.<sup>54</sup>

Exemplifying the Indian judiciary's harsh scrutiny of rape victims, the court characterized the following response of the complainant as a "feeble no" that did not adequately express her unwillingness:

The appellant kept on kissing the prosecutrix and telling her about her being a great woman. He also disclosed his intention of sucking her to which she promptly denied. The appellant and the prosecutrix were seated on the couch. The prosecutrix has then alleged that the appellant tried to pull down her underwear and she kept on pulling it up. The prosecutrix was thereafter immobilized by the appellant who forced oral sex upon her.<sup>55</sup>

The High Court wrongfully used § 90 of the IPC to argue that this "feeble no" does not negate consent by stating that, "instances of woman behavior are not unknown that a feeble no may mean a yes."<sup>56</sup> The court's comment on consent shows how in the absence of an affirmative standard, a negative standard invalidates the experience of the woman and improperly shifts the responsibility of the assault away from the perpetrator and onto her. An affirmative consent standard would preclude such a narrative around the victim's "no" and the vehemence with which it was articulated and would shift the focus to whether the accused sought permission or an affirmative "yes" for the specific sexual act.

A brief consideration of marital rape and early conceptions of rape also demonstrate why the current statutory definitions are stacked against victims. *First*, rape statutes were initially written for men and conceptualized rape as a property offense because women were considered to be men's property and their virginity was deemed to be a valuable commodity to their male relatives.<sup>57</sup> The retention of the marital rape exception is testimony to the strong leaning in Indian law towards the notions of *irrevocability* of consent and male ownership of the

52. Mihira Sood, "Why the Backlash Against the Mahmood Farooqui Judgment is Manipulative and Dangerous," *HuffPost* (29 Aug. 2016), <https://perma.cc/49VA-YWQN>; Himanshi Dhawan, "How to Judge Like a Feminist," *The Times of India* (15 Apr. 2018), <https://perma.cc/6QGB-G7AT>.
53. Indira Jaising, "Mahmood Farooqui's Acquittal Will Have Devastating Consequences for Rape Victims," *Hindustan Times* (29 Sept. 2017), <https://perma.cc/8DWQ-LFSJ>.
54. Satish, note 15, at 35 (chapter three covers "Law and Practice of Rape Adjudication in India").
55. *Mahmood Farooqui*, Criminal Law Appeal 944/2016, at ¶2 (Delhi High Court, 2017).
56. *Id.* at ¶¶ 46, 47, 78.
57. Keith Burgess-Jackson, *Rape: A Philosophical Investigation*, 44-49, 68 (Dartmouth Publishing Company, 1996).

female body in marital relations, stemming from the understanding of rape as a property offense.<sup>58</sup> This historical conception is manifest in the belief that a man cannot commit a crime against or violate what he owns and that women's bodies are naturally subject to patriarchal control.

*Second*, the rape adjudication cases involving a breach of promise to marry are also revealing.<sup>59</sup> For example, the Bombay High Court has held that if a promise to marry is genuine and the couple have sex, the man's subsequent failure to fulfil the promise to marry cannot be considered rape.<sup>60</sup> Similarly, the Supreme Court has held that sexual intercourse followed by a breach of promise to marry can be considered rape only if the prosecution can prove beyond reasonable doubt that the promise was false from the very start.<sup>61</sup> In other words, the act is not rape unless the prosecution proves that the man who obtained consent on the pretext of marriage did not intend to marry the woman when the act of penetration occurred.<sup>62</sup> Thus, cases that come before courts in this context largely lead to acquittals because it is very difficult to prove something as vague as the accused's fraudulent intention from the very start.<sup>63</sup> These cases exemplify judicial trends that characterize women as empowered, capable of giving consent, and dealing "maturely" with the man's breach of the very promise on whose pretext consent was obtained in the first place. For instance, in a recent judgment of the Bombay High Court, Justice Mridula Bhatkar observed that an educated woman could not have been deceived, and thus was not raped on the pretext of marriage.<sup>64</sup> The

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58. Justice Verma Committee, *Committee Report of the Committee on Amendments to Criminal Law*, 113 (PRS Legislative Research, 2013).
59. A breach of promise to marry refers to a situation where one person who promised to marry another fails to keep their word, thereby breaching the promise. Such cases cannot be considered rape unless it can be proven beyond reasonable doubt that the promise was false from the very start and that the woman's consent was thereby obtained deceptively.
60. *Akshay Manoj Jaisinghani v. State of Maharashtra*, Anticipatory Bail Application Number 2221/2016, at ¶7 ("Initially, a boy and a girl genuinely may want to marry and are true to their emotions and establish sexual relationship, however, after some time, they may find that they are not mentally or physically compatible and one decides to withdraw from the relationship. Under such circumstances, nobody can compel these two persons to marry only because they had sexual relationship . . . There may be moral bonding between the two persons when they indulge into sexual activities with promise to marry and it is also a fact that ultimately women only can remain pregnant and therefore, she suffers more than the man. However, in law, this cannot be labelled in any manner as a rape.").
61. *Deepak Gulati v. State of Haryana*, 7 S.C.C. 675 (Supreme Court of India, 2013).
62. See Satish, note 44.
63. Ila Ananya, "Woman Files Breach of Promise Case. Man Gets Arrested for Rape. Now they are Working Together Against False Rape Cases," *The Ladies Finger* (11 Feb. 2017), <https://perma.cc/FL9W-4HAN>.
64. *Kunal Mandaliya v. State of Maharashtra*, Criminal Write Petition Number 1787 of 2016, at ¶ 6 (Bombay High Court, 2016) ("The prosecutrix at the time of filing the complaint was 30 years old and was nearly 25 to 26 years old when the first incident of sexual intercourse took place. Thus, she was aware of the consequences of keeping sexual relations with a man and she was also aware that there may be differences between two persons and they may find each other compatible. The girl was highly educated and also 25 years old. Therefore, the consent cannot be said to have been obtained by fraud.").

courts create fictional constructions of female empowerment in sexual relations and ignore the female experience of consent in a context where consent may not be freely given when obtained through a fraudulent promise of marriage. Definitions must try to modify and undo the historic propensity to give greater credence and significance to male constructions of events.<sup>65</sup> Thus, the effect of rape culture is that the conversation surrounding consent excludes women and ignores the societal constraints and social censure that women consenting to premarital sex are subjected to. Value judgements regarding women's right to engage in premarital sex are all too pronounced in verdicts that deny any legal remedy to women whose consent was deceptively obtained and, additionally, chide them for their "immoral" acts, which they must engage in at their own peril.<sup>66</sup>

These cases undermine women's sexual autonomy and their *right* to engage in premarital sex as an equal. Such judicial victim-blaming and overplay of female agency is ignorant of both the Indian social context and women's experiences that their "sexual autonomy" and "sexual self-determination"<sup>67</sup> are violated if consent for it was deceptively obtained. The normative exoneration of men from accountability for their words or acts in sexual relations allows them the privilege of not *affirmatively* obtaining the consent of their partners prior to engagement in such acts. Women on the other hand, bear the undue and impossible burden of ascertaining their partners' intentions if they choose to engage in premarital sex. Vilification of women and denial of justice to them makes rape within premarital sex a predictable hazard without a legal remedy. While the state and the judiciary both are complicit in arguing that they have no business in the bedroom when it comes to criminalizing marital rape, a probe by the National Investigation Agency of India was deemed essential to nullify an adult woman's intimate decision to choose who to marry because she could not be trusted to make such choices on her own.<sup>68</sup> Such responses to women's exercise of sexual choices are a cause and effect of rape culture.

## II. CONTEXTUALIZING RAPE CULTURE: FACTS & MYTHS

The previous Part summarized how India's statutory law defines consent and how the judiciary applies definitions of rape. Now, Part II contextualizes how these laws are stacked against the survivor, discussing the legitimation and perpetuation of rape culture in India through religion, politics, media, and the law. Policing of women's sexuality is not unique to India, but it does have certain features particular to the Indian context. For example, Uma Chakrovarty traces

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65. Caringella, note 35, at 97.

66. *State v. Ashish Kumar*, Sessions Case 109/13, at ¶ 35 (Delhi District Court, 2013).

67. Caringella, note 35, at 97.

68. Kavita Krishnan, "SC Should Defend Women's Privacy, Autonomy, Not Perpetuate 'Love Jihad' Myth," *The Wire* (20 Aug. 2017), <https://perma.cc/WE9Q-9CE8>.

how the relationship between caste, gender, and class in India is centered around stringent control over women's sexuality not only for the maintenance of patrilineal succession but also the purity of caste, an exclusively Indian institution.<sup>69</sup> Per the 2011 census, almost 80 percent of India's population follows Hinduism.<sup>70</sup> The Manusmriti, a very influential ancient Hindu text prescribing codes of conduct, attributes the habit of lying and sinfulness to women as just one manifestation of their weakness, impurity, and inferiority.<sup>71</sup> Moreover, India's legal system deals with its uniquely multicultural identity through a system of personal laws—different bodies of law apply to different cultural and religious groups.<sup>72</sup> For example, the post-colonial Indian state retained large chunks of family law that accommodate cultural minorities, especially the Muslim population, despite their conflict with the constitutional promises of gender justice.<sup>73</sup> The Christian leadership in India is apathetic and silent towards concerns of domestic violence and dowry but vociferously opposes abortion and contraceptives.<sup>74</sup> Catholic women who follow the Code of Canon Law are entirely excluded from ordination and all offices concerned.<sup>75</sup> Indian media further perpetuates the inequalities deeply embedded in Indian culture via mythical and religious representations.

### A. The Politics of Religious Mythology

It is imperative to discuss rape culture in India within the realm of Indian politics, which is inseparably married to religion, both of which work to normalize and trivialize rape, sometimes going as far as justifying it. Women's rights have rarely been recognized as deontological categories unto themselves. Public discourse around them has been used instrumentally to serve the causes of the patriarchal, religious, and political elite. The debate on the Uniform Civil Code (UCC), which attempts to replace India's current system of personal laws with a common set of rules for all citizens, has been politicized to such an extent that the discussion is no longer about protecting women from discriminatory practices, but instead about recognizing Hinduism as a superior model that must be followed by

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69. Uma Chakravarti, "Conceptualizing Brahmanical Patriarchy in Early India: Gender, Caste, Class, and State," *Economic and Political Weekly* 579 (1993).
  70. "2011 Census Data," *Office of the Registrar General & Census Commissioner, India* (2011); "India's Religions by Numbers," *The Hindu* (26 Aug. 2015), <https://perma.cc/JZ8C-WY8Y>.
  71. Julie Leslie, "Essence and Existence: Women and Religion in Ancient Indian Texts," in *Women's Religious Experience* (Croom Helm, 1983).
  72. See generally Denkila Bhutia, "Development of Personal Laws in India: A Historical Account," 8 *International Research of Management Science and Technology* 284 (2017).
  73. See Narendra Subramanian, "Legal Change and Gender Inequality: Changes in Muslim Family Law in India," 33 *Law & Social Inquiry* 631 (2008).
  74. Virginia Saldanha, "The Power of Religion Over Women in India," *Global Sisters Report* (10 Nov. 2016), <https://perma.cc/GKH4-YYV2>.
  75. "Impact of Religion and Culture on Women's Empowerment," *Matters India* (21 Oct. 2016), <https://perma.cc/YV4P-P23V>.

people of other religions.<sup>76</sup>

Feminists have time and again sought to detach themselves from what has come to be an increasingly religiously charged majoritarian discourse on “Hindutva,” a brand of nationalism explored below in greater depth, and voiced their opinion that the proposed UCC reforms have absolutely nothing to do with gender justice.<sup>77</sup> This is because, contrary to popular belief, Hindu law is not better than any other family law system for the pursuit of gender equality.<sup>78</sup> Thus, feminists reject a UCC system that merely replaces a diverse system of family laws with a uniform Hindu code. Yet, the reforms within the system of personal laws fall short in dealing with gender injustice because they focus too narrowly on disputes over the *interpretation* or *origin* of religious texts. Religion and personal law as we know them today are a negotiated reality, a colonial invention,<sup>79</sup> and an institution to perpetuate social injustice and structural patriarchy.<sup>80</sup> Outlawing only social practices that are aberrations from the “correct” interpretations or legitimate origin of religious texts engenders impossible debates that should ideally be resolved only by testing religious/social practices against constitutional commitments of equality. Religion, which plays a monumental part in the lives of Indians, must be included within the purview of fundamental-rights based judicial review. Feminist logic dictates that family law reforms must not be based on correct/incorrect interpretations or legitimate/illegitimate origins of the impugned practices, but rather measured by their constitutional morality and evaluated based on the goal of a more egalitarian and gender just society.<sup>81</sup>

The current rise of fanatic nationalism and the feminist struggles against it have roots in Indian history. In 1923, V.D. Savarkar coined the term Hindutva, or “Hinduness” to describe an exclusive brand of Hindu nationalism; in 1989, the Bhartiya Janata Party (BJP), India’s current ruling government party, adopted Hindutva as its ideology and has been propagating it ever since.<sup>82</sup> According to Savarkar, Hindu men’s “chivalrous” practice of not using rape as a war tactic was one of the virtues that cost them too dearly in the intermittent battles for supremacy against the Muslims beginning in the eleventh century.<sup>83</sup> Savarkar unambiguously

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76. See Amrita Chhachhi et al., “UCC and the Women’s Movement,” 33 *Economic and Political Weekly* 487 (1998).

77. Nivedita Menon, “It Isn’t About Women,” *The Hindu* (15 July 2016), <https://perma.cc/T3YV-8DXT>.

78. *Id.*

79. Saptarshi Mandal, “Do Personal Laws Get their Authority from Religion or the State—Revisiting Constitutional Status,” *Economic & Political Weekly* (2016).

80. Jayanti Alam, *Religion, Patriarchy and Capitalism* (Kalpaz Publications, 2013).

81. See *Indian Young Lawyers Association & Others. v. State of Kerala & Others*, Writ Petition (Civil) No. 373 of 2006, at ¶¶8-11 (Supreme Court of India, 2018) (Justice Chandrachud, concurring).

82. See Vinayak Damodar Savarkar, *Hindutva: Who is a Hindu?* (John Press, 1942); Plaban Gupta, “LS Poll Results Prove BJP Original Mascot of Political Hindutva; Rahul’s Wishy-Washy Attempts Won’t Work,” *Firstpost* (1 Jun. 2019), <https://perma.cc/7AV7-7L7A>.

83. Vinayak Damodar Savarkar, *Six Glorious Epochs of Indian History* (Bal Savarkar, 1st ed.,

vitiated any concept of women's sexual autonomy in Hindu nationalism by stating that not raping during war was "suicidal."<sup>84</sup> In India, not only have his misogynistic remarks not dampened his celebration as a hero of nationalism, but the rape and brutalization of women and young girls has increasingly become a routine technique during communal clashes.<sup>85</sup> For example, the 2002 Gujarat riots were a three-day period of inter-communal violence in the western Indian state of Gujarat, followed by a year of further violence against the minority Muslim population after the initial incidents.<sup>86</sup> The report of the Concerned Citizens Tribunal (CCT), an eight-member inquiry commission on the carnage, noted that rioters subjected hundreds of women to torture, rape, gang rape, insertion of objects into bodies, stripping, and molestation.<sup>87</sup> Further, in 2002, an all women international committee comprising gender experts from US, UK, France, Germany, and Sri Lanka toured the violence-affected regions, noting that "sexual violence was being used as a strategy for terrorizing women belonging to minority communit[ies] in the state."<sup>88</sup>

The foregoing illustrates that, in patriarchal societies, rape is a form of "preferred political violence."<sup>89</sup> Further, in a country like India, rape is not only condoned as a political tool, but even neatly packaged as the doing of the unchaste victim herself. For example, according to Mohan Bhagwat, leader of the Rashtriya Swayamsevak Sangh—a hardline Hindu nationalist organization, regarded as a mentor and parent organization of the BJP—rapes take place in cities, and "not in villages," because women in cities have been influenced by western culture and thus wear more revealing clothing.<sup>90</sup> Both Savarkar's approving attitude towards rape as a tool to punish adversaries and Bhagwat's attribution of rape to a lack of female chastity find roots in early Indian mythologies.

For example, it is interesting to juxtapose the strict sexual regulation of

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1971).

84. Id. at 167-87.

85. Harsh Mander, "Between Memory and Forgetting: Massacre and the Modi Years in Gujarat" (Yoda Press, Undated), excerpted in Harsh Mander, "One Thing Was Distinctly Rotten About 2002 Gujarat Riots: Use of Rape as a Form of Terror," *The Print* (24 Apr. 2019), <https://perma.cc/H8AQ-WQYQ>.

86. Parvis Ghassem-Fachandi, *Pogrom in Gujarat: Hindu Nationalism and Anti-Muslim Violence in India* (Princeton University Press, 2012).

87. "Crime Against Humanity (Volume II): An Inquiry into the Carnage in Gujarat," *Concerned Citizens Tribunal* (2002). The Tribunal collected 2,094 oral and written testimonies, both individual and collective, from victim-survivors and also independent human rights groups, women's groups, NGOs, and academics.

88. "Intl Experts Spoil Modi's Party, say Gujarat worse than Bosnia," *Press Trust of India* (19 Dec. 2002), <https://perma.cc/PV77-AV9G>.

89. Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India*, 3 (Oxford University Press, 2014) (citing to Susan Brownmiller's work as a text that framed "rape [as] a normal mode of exerting patriarchal power," and as an act of "intentional, premeditated, and political violence against women").

90. "Rapes Happen in India, not Bharat," *India Today Online* (4 Jan. 2013), <https://perma.cc/Q4K9-RSEB>.

females in Hindu mythology with the voyeurism of the male Gods. Ahalya was one of the five (or according to some sources six) *panchakanyas*—heroines of the Hindu epics who were valued for their virginity. These virgins were considered so pure that their names could dispel sin when chanted.<sup>91</sup> Ahalya, who was the wife of Gautama Maharishi, was raped by Indira who impersonated her husband and beguiled her into having intercourse with him. Despite being tricked, she was cursed by her husband in an act of victim-blaming and shaming to be invisible to all, lest her beauty take the better of any man and compel him to rape her. She was to be tortured by her guilt, lead a life of acute suffering, and forbidden from consuming any food or drink. Indira, the rapist, was cursed too but managed to alleviate his curse using his godly powers.<sup>92</sup> He continues to be worshipped throughout the country.

Per contra, Lord Krishna as mentioned in the holy text of *Srimad-Bhagavatam*, engages in playful sexual activity with multiple *gopīs* (young women). The way Krishna’s behavior is depicted in most mythological tales is no short of “eve-teasing”—a South Asian euphemism used to describe public sexual harassment of women, usually through catcalls, suggestive remarks, and groping.<sup>93</sup> For example, Krishna steals the *gopīs*’ clothing while they bathe naked in the river and then subjects them to teasing and suggestive remarks as they stand shivering in the water to hide their nakedness: “Taking the girls’ garments, He quickly climbed to the top of a kadamba tree. Then, as He laughed loudly and His companions also laughed, He addressed the girls jokingly.”<sup>94</sup> “[L]ike all young girls from respectable families,” the *gopīs* “considered the embarrassment of appearing naked before a young boy to be worse than giving up their lives,” but they were willing to do anything, even be viewed without clothes, to fulfil Krishna’s desires.<sup>95</sup> After revealing their bodies for his pleasure, the *gopīs* dedicate themselves to Krishna who could take “advantage” of the *gopīs* for his “pastimes.”<sup>96</sup> Later in the tale, the *gopīs* are hyper-sexualized as they bask in Krishna’s advances:

Their senses overwhelmed by the joy of having His physical association, the

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91. Pradip Bhattacharya, “Five Holy Virgins, Five Sacred Myths: A Quest for Meaning,” 141 *Manushi* (2004).

92. Pratibha Ray, “Ahalya’s Voyage: From Transgression to Transcendence,” in *Revisiting the Pancha Kanyas: Proceedings of the National Seminar*, 22-30 (2003).

93. Ranjani Iyer Mohanty, “The Term ‘Eve-Teasing’ Must Die,” *The Wall Street Journal Blog* (21 Apr. 2013), <https://perma.cc/LL2Y-FDQT> (“In the Indian term ‘eve-teasing,’ the word ‘eve’ alludes to the biblical story of Eve tempting Adam to stray from the path of righteousness. An Oxford English Dictionary definition for ‘teasing’ is ‘to tempt someone sexually with no intention of satisfying the desire aroused.’”).

94. “Chapter 22: Kṛṣṇa Steals the Garments of the Unmarried Gopīs,” in A.C. Bhaktivedanta Swami Prabhupada, *Srimad-Bhagavatam, Tenth Canto: The Summum Boum* (The Bhaktivedanta Book Trust, 1977).

95. Id.

96. Id.

gopīs could not prevent their hair, their dresses and the cloths covering their breasts from becoming disheveled. Their garlands and ornaments scattered, O hero of the Kuru dynasty.<sup>97</sup>

These stories illustrate how Indian culture allows only two possible constructions of the female body: virginal and pure, or sexually unchaste and defiled; however, neither approach characterizes women’s sexuality as autonomous. In the stories, women who express their sexuality can either be made invisible or objectified through hyper-visibility. This constructed binary in our culture robs women of a subjective human existence and makes their sexual desires inaccessible to them due to the imprisonment of their bodies through sanctification or objectification. Rape culture doubly undermines women’s sexual agency by both alienating women from their own sexual desires and commodifying their bodies as mere sites for male sexual pleasure. This de-sexualization and sexualization caters primarily to phallogocentric interests and engenders a culture of male entitlement, and female normalization and internalization of the same. The articulation of female sexuality is only permitted through the male gaze in subordination to male sexuality, which is why it is “normal” to imagine a fifteen-year-old girl married to a man as a sexual being as long as her sexuality fulfils her husband’s interests<sup>98</sup> but impossible to recognize respectably the sexual expression of an adult woman through her choice of a partner. (Only as late as October 2017, in the case of *Independent thought v. Union of India*,<sup>99</sup> the Supreme Court ruled that the exception to § 375 that makes marital rape legal would not apply to cases where the victim was below the age of eighteen. Previously, despite the existence of laws against Child Sexual Abuse, marital rape of women between the ages of fifteen and eighteen was covered within the exception.)<sup>100</sup>

## B. Media Portrayals and Moral Policing

The ancient myths described in Part II.A. above are remanufactured in India’s contemporary cultural diet through media portrayals, including Bollywood. Articulation of female sexual desire and autonomy, and its depiction in the media, is predictably and routinely censored by the Central Board for Film Certification on the grounds of public order and decency.<sup>101</sup> The Board’s standards

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97. “Chapter 33: The Rasa Dance,” in A.C. Bhaktivedanta Swami Prabhupada, *Srimad-Bhagavatam, Tenth Canto: The Summum Boum* (The Bhaktivedanta Book Trust, 1977).

98. Indian Penal Code, § 375, Exception 2 (1860).

99. Writ Petition (Civil) No. 382 of 2013 (Supreme Court of India, 2017).

100. Deya Bhattacharya, “SC Says Marital Rape Can’t Be Considered Criminal: Tradition Doesn’t Justify Assault, Child Marriage,” *Firstpost* (11 Oct. 2017), <https://perma.cc/AQW6-9M87>.

101. In exercise of powers conferred by the Cinematograph Act of 1952, the Central Government directed that in sanctioning films for public exhibition, the Board of Film Certification follow a set of guidelines including, among other things, refusal to certify if any part of the film is

presuppose women as asexual beings whose sexuality is considered relevant only for its potential to pleasure the male.<sup>102</sup> Portrayal of women in Bollywood is “vulgarized” only when women are depicted as sexual subjects not objects.<sup>103</sup> Bollywood depictions woefully lack any meaningful conceptualization of women’s consent. Female agency is often normatively regarded as something that men can toy with. The portrayal of “macho men” in Bollywood as excessively violent and the portrayal of women as persons who can be wooed by persistent stalking, “eve teasing,” and harassment, leads to media constructions that reproduce and replicate gendered differences in power by naturalizing them instead of questioning their social constructions.<sup>104</sup>

The articulation of female sexual desire and female agency is anathema to certification boards,<sup>105</sup> while female sexuality subservient to the male gaze constantly bypasses such scrutiny. Thus, though sexual women are considered obscene, women’s bodies are sophisticatedly prostituted for advertising products in a consumerist capitalist setting. Femininity is marketed by necessitating the removal of natural biological hair and distinguishing it from raw masculinity to serve male interests.<sup>106</sup> Advertisements laden with sexual innuendoes objectify women while others completely make invisible their work, economic contribution, or sexual desires. They also reflect that girls are socialized to aim to be objects worthy of the male gaze.<sup>107</sup> The Indecent Representation of Women (Prohibition) Act—a 1986 law that supposedly promotes respect for women by prohibiting obscene representations—was the result of conservative lobbying and more often than not bans all sexually suggestive representations of women (not just disrespectful ones), reinforcing the notion that only sexless women are worthy of respect and thus feeding into a repressive puritanical culture in the name of tradition.<sup>108</sup>

Such repressive traditions lead to the prevalence of honor killings in India, which reflect the burden on Indian women to conform to highly restrictive standards of morality, sexuality and the feudal consciousness,<sup>109</sup> and culture of male entitlement over the female body.<sup>110</sup> As per the latest National Crime

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against public order, decency, or involves defamation or contempt of court or is likely to incite commission of any offence.

102. Brinda Bose, “When the Towel Drops: Sexuality, Censorship and Cinema,” *India Seminar* (2007), <https://perma.cc/FSD5-J5B8>.

103. See id.; see also Monika Mehta, “What Is Behind Film Censorship? The Khalnayak Debates,” *5 Jouvert* 583 (2001).

104. See Michael Kimmel, *The Gendered Society* (Oxford University Press, 2000).

105. The Wire Staff, “Censor Board Strikes Again: ‘Lipstick Under My Burkha’ Denied Certification,” *The Wire* (23 Feb. 2017), <https://perma.cc/6WST-E9Q9>.

106. “Selling Women a Self-View,” *3 Manushi* 24 (1979), <https://perma.cc/P358-H65N>.

107. Id.

108. Madhu Kishwar & Ruth Vanita, “Using Women as a Pretext for Repression—The Indecent Representation of Women (Prohibition) Bill,” *37 Manushi* 2, 10 (1987).

109. *Lata Singh v. State Of U.P.*, 5 S.C.C. 475, at ¶18 (Supreme Court of India, 2006).

110. Rituparna Chatterjee, “An India Bloodied by Chauvinistic Caste Politics,” *The Telegraph* (6

Records Bureau (NCRB) data, twenty-eight honor killings were reported in India in 2014, 251 in 2015, and seventy-seven in 2016.<sup>111</sup> Cases of honor killings increased by nearly 800 percent in 2015.<sup>112</sup> While women's rights groups have been campaigning to treat honor killings as a unique crime, the government has done nothing to address the killings as such.<sup>113</sup> Further, such data does not mirror the actual prevalence of the crime because families feel ashamed to report it and honor killings are often culturally regarded as fitting punishment for violation of caste and gender norms; thus, honor killing are underreported.<sup>114</sup> These crimes are also regularly covered up by the administration as it shares its notions of honor with the community.<sup>115</sup>

Despite underestimating the true prevalence of honor killings, existing statistics reveal that Indian culture regards the female body as disposable at the male's whim, and that the female body is disposed of quite literally when it does not serve its sole purpose: preserving family honor through marriage to a male partner chosen by male relatives. In fact, the metric for judging familial "honor" in patriarchal societies often gauges the degree of control exercised over female members of the household.<sup>116</sup> As the prevalence of honor killings evidences, women's exercise of a basic choice like choosing their life partner can sometimes only be achieved through transgression. When rebellion is the only modality available to a woman to exercise even basic autonomy, consent as it is fails to articulate her desires and she must routinely renegotiate the boundaries of socialization, internalization, safety, propriety, and honor in a bid to exercise her choices. The mentality of robbing women of agency, the sense of entitlement over their bodies, and the blatant disregard for women's choices lies at the heart of both honor killings and rape. In such a paradigm, it is of utmost importance that women are sexually empowered through the introduction of the affirmative consent standard in Indian rape law.

In addition to practices like honor killings, which affirm the same assumptions that justify rape, the crime of rape is also informed by the media's manufactured narratives, social perceptions, and assumptions about victims, perpetrators, complicity, and culpability. The IPC,<sup>117</sup> Indian Criminal Procedure

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Oct. 2018), <https://perma.cc/VG9R-FD2T>.

111. "356 Honor Killing Cases Reported in 2014-16: Hansraj Gangaram Ahir," *The New Indian Express* (31 Jul. 2018), <https://perma.cc/5922-W867>.
112. Aimee Brannen, "Honor Killings in India 'Soar by Nearly 800 Percent,'" *The Daily Mail Online India* (7 Dec. 2016), <https://perma.cc/3RE6-MER9>.
113. Kubra Fatima, "'India Needs a Separate Law to Tackle Honor Crimes': Activists Demand, is Govt Listening?" *The News Minute* (21 May 2017), <https://perma.cc/96PJ-MTK3>.
114. Tarique Anwar, "'We Will Not Let Girls Be Born or Let Them Study' Say Khaps," *News Click* (7 Feb. 2018), <https://perma.cc/FT8C-DV43>.
115. Brannan, note 112.
116. Sherry B. Ortner, "The Virgin and the State," 4 *Feminist Studies* 19 (1978).
117. Indian Penal Code, § 228(A) punishes whoever discloses by printing or publication the identity of the victim of a rape.

Code,<sup>118</sup> Press Council of India guidelines,<sup>119</sup> and the News Broadcasters' Standards Authority Guidelines<sup>120</sup> all emphasize that news reporting should protect the privacy of survivors of sexual violence. However, in practice, a comparison of the way an American newspaper (*The New York Times*) and an Indian newspaper (*The Times of India*) covered rape cases revealed that while the American victim was relatively invisible, the Indian victim was hyper-visible.<sup>121</sup> This is similar to the taxing focus that the Indian trial process places on the victim, including scrutiny of her responses, character, and clothing. The media, in its focus on the victim, perpetuates the culture of shame by blaming and shaming victims, and framing them as complicit in the violation against them.<sup>122</sup> Sensational and overdramatized reporting of gory details in rape cases is the norm.<sup>123</sup> This is done in order to increase viewership in a society that treats rape voyeuristically.<sup>124</sup> Such coverage decontextualizes the issue, naturalizes male aggression, trivializes the victim's trauma, and implicitly condones the crime.<sup>125</sup> Media coverage has also occasionally led to large street protests, thus driving Indian politicians to advocate for knee-jerk and under-researched positions in order to appease the public—positions that window-dress the complex structural causes of sexual violence.<sup>126</sup> For example, the Criminal Law Amendment Act of 2018 responded to the gangrape and murder of an eight-year-old girl in Kathua and a seventeen-year-old girl in Unnao by awarding the death penalty for child rapists.<sup>127</sup> Such responses detract attention from the sites through which power is perpetuated (i.e. the police, state, and societal norms) by excluding them from the narrative.

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118. Section 327(3) of the Criminal Procedure Code prohibits any reporting of a court case that deals with the sexual exploitation of a child, without the specific permission of the court. The NHRC has extended these guidelines to all rape victims irrespective of age (<https://perma.cc/JWB3-MVVL>).
119. Press Council of India, *Norms of Journalistic Conduct*, 13 (2010) (“While reporting crime involving rape, abduction or kidnap of women/females or sexual assault on children, or raising doubts and questions touching the chastity, personal character and privacy of women, the names, photographs of the victims or other particulars leading to their identity shall not be published.”).
120. News Broadcasters' Standards Authority, “2013 Guidelines on Reportage of Cases of Sexual Assault,” *NBA New Delhi* (7 Jan. 2013), <https://perma.cc/F7GX-96BW> (“In reporting on matters involving sexual assault, news channels are advised to carefully balance the survivor's right to privacy and that of the survivor's family with public interest.”).
121. See Vrushali Patil & Bandana Purkayastha, “Sexual Violence, Race and Media (In)Visibility: Intersectional Complexities in a Transnational Frame,” 5 *Societies* 598 (2015).
122. See Shakuntala Rao, “Covering Rape in Shame Culture: Studying Journalism Ethics in India's New Television News Media,” 29 *Journal of Mass Media Ethics* 153 (2014).
123. Amanat Khullar, “The Indian Media Needs to Rethink How it Reports Rape,” *Herald* (23 Feb. 2017), <https://perma.cc/37G2-MWPD>.
124. Namita Bhandare, “Reporting Rape,” *Live Mint* (8 Aug. 2016), <https://perma.cc/XM38-RVND>.
125. See *id.*
126. Persis Sidhva, “Off With Their Heads: Why the New Ordinance for Death Penalty for Rapists Won't Do,” *The Wire* (22 Apr. 2018), <https://perma.cc/5B5R-APL8>.
127. “President Kovind Gives Assent to the Criminal Law (Amendment) Act,” *The Indian Express* (12 Aug. 2018), <https://perma.cc/5KVT-6MQG>.

### C. Rape Myths and Stereotypes

Indian society is rife with myths and stereotypes that perpetuate rape culture. Martha Burt and Rhoda Estep have analyzed misconceptions that mask the real cause of sexual assault, including myths that victims are malicious, that rape is not damaging, and that women are essentially responsible for male sexual behavior.<sup>128</sup> Rape myths are both descriptive (reflecting typical societal conceptions of rape) and prescriptive (mandating how women should react to rape).<sup>129</sup> Both are evidenced in the judicial system. On the descriptive side, the Supreme Court detailed societally-expected reactions to rape in the cases of *Bharwada*,<sup>130</sup> *Kamalanantha*,<sup>131</sup> and *Rafiq*,<sup>132</sup> which described a “type” of victim—mostly traumatized or experiencing “deathless shame”<sup>133</sup>—whose testimony was credible enough to not require corroboration. Further, prescriptive rape myths are exemplified by medical jurisprudence textbooks that required injury or visible marks of struggle to ascertain rape.<sup>134</sup> A resistance standard existed because Indian culture deemed virginity to be sacrosanct and, therefore, believed that a woman must guard her chastity and “honor.”<sup>135</sup> Even though such myths have formally been purged from evidentiary rules, the legal system in India, and in other countries that have similarly done away with formal resistance requirements, continues to perpetuate these myths through informal biases. For example, in 1987, one study revealed that conviction rates in London were 94 percent in cases of virgin victims of rape while only 48 percent in cases of victims with a sexual history.<sup>136</sup> The study demonstrates that conviction rates for rape directly correlate with the presence of factors that make a victim “a typical rape victim.”<sup>137</sup> The typical victim, according to the study, was sexually inexperienced, raped by a stranger, resisted, incurred physical injuries, and reported the crime promptly.<sup>138</sup> This study suggests that judges and juries subconsciously viewed the rape of a woman who has had sexual intercourse in the past to be less grave than that of one who is a virgin. This cultural norm is even stronger in India, where women’s sexuality is strictly policed and even more value is placed on chastity, and notions of chastity and virginity abound in mythology. These myths and stereotypes are

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128. Martha R. Burt & Rhoda E. Estep, “Who is a Victim?: Definitional Problems in Sexual Victimization,” in *Attitudes Toward Rape*, 25 (ed. Colleen A. Ward, Sage Publications, 1995).

129. Satish, note 15, at 106.

130. *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, 1983 AIR 753.

131. *Kamalanantha & Others v. State of Tamil Nadu*, 5 S.C.C. 194 (Supreme Court of India, 2005).

132. *Rafiq v. State of U.P.*, 4 S.C.C. 262.

133. *Id.*

134. Satish, note 15, at 45-50, 107. See Hari Singh Gour, *The Penal Law of India*, 3228 (10th ed., 1982-84) (“Excepting of course prostitutes and other mercenaries women are seldom prone to translate their thoughts in these matters into words. They usually leave the matter of consent to tacit understanding . . . Consent can be inferred from non-resistance.”).

135. *Id.*

136. Zsuzsanna Adler, *Rape on Trial*, 101 (Routledge Kegan & Paul, 1987).

137. *Id.* at 120.

138. *Id.* at 119.

reflected in conviction and sentencing outcomes, proving how women have to shoulder the majority of the burden in the rape trial process. This burden can be mitigated with an affirmative consent standard that qualifies as rape any sexual act that the woman did not unequivocally and vocally consent to, thereby reducing the impact of the victim's past sexual history or the absence of physical injuries in determining the alleged rapist's guilt.

Further, an affirmative standard is needed to combat the myths that normalize rape based on men's psychology and women's fault in enticing them. These myths were perpetuated by the "hydraulic theory," which persisted through the mid-twentieth century. This theory was so patriarchally intuitive that numerous empirical and doctrinal studies had to rebut it before it could be discarded. According to this model, rapists were psychologized with "priapism and conditions approaching satyriasis" or a "mental weakness" which made their lustful urges uncontrollable,<sup>139</sup> while all women were inherently masochistic, thus engineering their own sexual assaults.<sup>140</sup> This Freudian mode of analysis trivialized, normalized, and rationalized crimes of violence as acts of passion resulting out of the perpetrator's uncontrollable lust as well as the victim's own provocativeness and masochistic desires. Research has proven conclusively that rapists do not have higher testosterone levels<sup>141</sup> and that neither sexual abstinence nor deprivation caused rape.<sup>142</sup> As a matter of fact, rapists had more consensual sex than non-rapists.<sup>143</sup> In 1965, Paul Gebhard along with his colleagues at the Institute for Sex Research (now the Kinsey Institute) published *Sex Offenders: An Analysis of Types*,<sup>144</sup> which illustrated that married rapists were just as likely to have active marital sex lives as any other men. The effect of these results, consistent across political orientations made the belief that rape was caused by frustration or priapism completely indefensible.<sup>145</sup> Yet, the myth of the male

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139. Richard von Krafft-Ebing, *Psychopathia Sexualis*, 56 (1886); David Abrahamsen, *Psychology of Crime* 163, 165 (Columbia University Press, 1960) ("[T]he offender needs an outlet for his sexual aggression and finds a submissive partner who unconsciously invites sexual abuse and whose masochistic needs are being fulfilled.").

140. Karen Horney, "The Problem of Feminine Masochism," *The Psychoanalytic Review* 675, 676 (2013) (summarizing psychoanalytic views that "[w]hat the woman secretly desires in intercourse is rape and violence, or in the mental sphere, humiliation").

141. Anu S. Aromäki, Ralf Lindman, & C.J. Peter Eriksson, "Testosterone, Sexuality and Antisocial Personality in Rapists and Child Molesters: A Pilot Study," 110 *Psychiatry Research* 239 (2002).

142. Martin L. Lalumiere et al., "The Causes of Rape: Understanding Individual Differences in Male Propensity for Sexual Aggression," *American Psychological Association* 10961-000 (2005).

143. See Antonia Abbey et al., "Cross-sectional Predictors of Sexual Assault Perpetration in a Community Sample of Single African American and Caucasian Men," 32 *Aggressive Behavior* 54 (2005).

144. Paul H. Gebhard, *Institute for Sex Research, Sex Offenders: An Analysis of Types* (Harper & Row, 1965).

145. Sandra Newman, "Until We Treat Rapists as Ordinary Criminals We Won't Stop Them," *Aeon* (30 Mar. 2017), <https://perma.cc/4ZF8-HSKM> ("Thus the hydraulic model of rape

primal urge and female provocativeness is still deeply rooted in society and continues to affect rape prosecution as well as sentencing in India.

Further, these unjustifiable beliefs have persisted and are manifested in rape myths and stereotypes that inform rape adjudication globally. For example, physical attractiveness is an attribute that continues to modify perceptions of rape victims. Conventionally attractive victims are perceived more favorably, even though they are also considered to be more seductive.<sup>146</sup> In a reductionist sense, this takes us back to the old hydraulic model of rape and boils down rape to a sex crime that is born out of the male primal urge and female provocativeness rather than a patriarchal male desire to express entitlement, dominance, and control over the female body. Evaluations of victims based on appearance are informed by rape culture, including the lingering influence of the hydraulic theory, which seeps into the trial and sentencing processes. That is what makes rape a unique crime: the victim, more than the perpetrator, is placed in the dock and judged severely.<sup>147</sup> The defense attorney, aided by definitions contained in rape law, discounts her testimony by painting women's sexual responses as inherently ambiguous.<sup>148</sup> Apart from that, defense attorneys, courts, and society use both pre-rape and post-rape behaviors as fertile grounds to discredit the victim.<sup>149</sup> With respect to pre-rape behavior, cautious victims who try to discharge the unfair responsibility of preventing rapes are perceived more positively than those who were "careless."<sup>150</sup> In terms of post-rape behaviors, emotionally charged victims are easier to believe and identify with than the restrained ones.<sup>151</sup>

In India, courts were authorized to sentence a rapist to a prison term less than the minimum punishment for rape by relying on "adequate and special

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persisted until the latter half of the 20th century, when it was abruptly shattered by a deadly combination of feminist theory and empirical research."); see also David P. Bryden & Maren M. Grier, "The Search for Rapists' 'Real' Motives," 101 *Journal of Criminal Law & Criminology* 171 (2013); B. A. McPhail, "Feminist Framework Plus: Knitting Feminist Theories of Rape Etiology Into a Comprehensive Model," 17 *Trauma, Violence, & Abuse* 314 (2016).

146. Sheila Deitz & Lynne Byrnes, "Attribution of Responsibility for Sexual Assault: The Influence of Observer Empathy and Defendant Occupation and Attractiveness," 108 *Journal of Psychology* 17 (1981); Lawrence G. Calhoun et al., "The Effects of Victim Physical Attractiveness and Sex of Respondent on Social Reactions to Victims of Rape," 17 *British Journal of Social and Clinical Psychology* 191, 191-92 (1978).
147. Du Toit, note 1, at 65 ("It is no wonder that, given the law as it stands, lawyers for the defense zoom in on the state of mind of the rape victim, since that provides a particularly vulnerable target: the ambiguous zone of female sexual subjectivity.").
148. Id. at 65 ("Of course, my claim is not here that women's sexual subjectivity is inherently ambiguous, but that it is constructed as such, first and foremost by the law against rape itself.").
149. Colleen A. Ward, *Attitudes Toward Rape*, 75 (Sage Publications, 1995).
150. Id.
151. Kalpana Kannabiran, "A Ravished Justice: Half a Century of Judicial Discourse on Rape" in *De-Eroticizing Assault: Essays on Modesty, Honour and Power*, 130 (eds. Kalpana Kannabiran & Vasanth Kannabiran, Calcutta: STREE, 2002) (noting that in order for rape survivors to be believed, their "emotional turmoil too must be expressed in clearly recognizable ways"); Karl Ask & Sara Landström, "Why Emotions Matter: Expectancy Violation and Affective Response Mediate the Emotional Victim Effect," 35 *Law and Human Behaviour* 392 (2010).

reasons” until the Criminal Law Amendment Act of 2013 prohibited them from doing so and imposed mandatory sentences. The pre-2013 practice showed the persistence of rape myths as courts wrongly interpreted the conduct of the defendant, the age and conduct of the victim, and the gravity of the criminal act as mitigating factors.<sup>152</sup> Specifically, courts cited a defendant’s potential disrepute and mental agony,<sup>153</sup> the victim’s marriage (though, not to the perpetrator),<sup>154</sup> the defendant’s marriage (though, not to the victim),<sup>155</sup> as well as the poverty of the defendant,<sup>156</sup> to justify a lesser sentence. Given that discretionary decision-making is a fact of adjudication and allows for individualized justice, it is important to note the role of discretion in furthering discrimination. In the context of rape, judicial discretion coupled with the societal context established in the previous Parts of this Article denies justice for rape victims. Research corroborates that orthodox attitudes inform discretionary decision making and undermine reform.<sup>157</sup>

Another myth that shows the need for an affirmative consent standard, and is further explored in Part III below, is the myth that acquaintance rape is less severe and traumatizing than stranger rape.<sup>158</sup> Contrary to this myth, evidence indicates that acquaintance rape causes comparable or even greater trauma than stranger rape through violation of trust, crippling self-doubt, and undermining of self-esteem.<sup>159</sup> The harm of acquaintance rape and date rape should not be discounted, especially because studies have shown they are grossly underreported and extraordinarily difficult to prove.<sup>160</sup> The affirmative standard ensures that acquaintance rape, which is not currently sociologically viewed as rape, is also effectively penalized and eventually widely recognized as rape.

The preceding Part identified cultural myths that result in rape victims shouldering the burden, and suffering humiliation, during rape trials. The next Part will argue that an affirmative consent standard is needed to mitigate the impact of

152. *State of Karnataka v. Krishnappa*, 4 S.C.C. 75 (Supreme Court of India, 2000).

153. *Raju v. State of Karnataka*, 1 S.C.C. 453 (Supreme Court of India, 1994).

154. *The State of Punjab v. Gurmit Singh & Others*, 2 S.C.C. 384 (Supreme Court of India, 1996).

155. *State of Chhattisgarh v. Derha*, 9 S.C.C. 699 (Supreme Court of India, 2004).

156. *Zindar Ali Sheikh v. State of West Bengal*, 3 S.C.C. 761 (Supreme Court of India, 2009).

157. Caringella, note 35, at 98 (“[R]esearch on reform has shown that old fashioned attitudes about females lying about rape, asking for rape, and so on influence discretionary decision making to undermine reform goals.”).

158. Jennifer Temkin, “‘And Always Keep A-hold of Nurse, For Fear of Finding Something Worse’: Challenging Rape Myths in the Courtroom,” 13 *New Criminal Law Review* 710, 715-16 (2010).

159. Mary P. Koss et al., “Stranger and Acquaintance Rape,” 12 *Psychology of Women Quarterly* 1 (1988); Rana Sampson, “Acquaintance Rape of College Students,” *Community Oriented Policing Services, U.S. Department of Justice*, 13 (2011), <https://perma.cc/9BYU-W9M4> (“Acquaintance rape victims suffer the same psychological harms as stranger-rape victims: shock, humiliation, anxiety, depression, substance abuse, suicidal thoughts, loss of self-esteem, social isolation, anger, distrust of others, fear of AIDS, guilt, and sexual dysfunction”); see also Caringella, note 35, at 87.

160. Phil Rumney, “When Rape Isn’t Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape,” 19 *Oxford Journal of Legal Studies* 243, 247 footnote 32 (1999) (collecting a number of sources that “suggest[] that victims are more likely to report experiences of stranger rape than non-stranger rape to the police,” and that “juries are more likely to convict in cases of stranger rape”).

the aforementioned myths and stereotypes around female conduct and extend protection to victims even in the context of date rape. Such a standard would legally recognize that though the male may be sexually aroused, his urges are not uncontrollable and, therefore, he should not be allowed to use the ambiguity of a negative consent standard to his advantage to evade responsibility. The affirmative standard shifts the focus from extraneous and irrelevant factors such as the victim's conduct to the responsibility of the man to affirmatively seek consent.

### III. STATUTORY REFORM OF THE STANDARDS OF CONSENT

As feminist scholar Sandra Lee Bartky wrote: "Feminist consciousness is the consciousness of victimization."<sup>161</sup> In a rape culture that "condones physical and emotional terrorism against women and presents it as a norm," women experience a continuum of actual and threatened violence that ranges from "sexual remarks to sexual touching to rape itself."<sup>162</sup> Thus, it follows from the context explained by the preceding Parts of this Article that any revised standard of consent in India's rape law must take into account not just survivors of rape but all women who are victimized by India's rape culture, including those who are likely to be raped or have to live their lives in fear of being raped. Unfortunately, this is a subset that encompasses all women in India.

This Part argues that to address the social pressures that all women face, it is also important to: (1) reconsider the cultural understanding that tacit acceptance equals consent, (2) understand that social pressures can manufacture consent that is not informed by free choice, and (3) address the way that the trial process can further traumatize rape victims. This Part argues that in order to rectify these power imbalances, rape law reforms should require affirmative consent during the sexual encounter. Under an affirmative standard of consent, the man is mandated to seek consent at each point of the sexual encounter to ensure by words or actions, an express agreement prior to engagement in sexual contact, thereby increasing the sexual responsibility of men.<sup>163</sup> This allows the focus to rightfully shift from the conduct of the prosecuting witness signifying non-consent to the efforts made by the accused to seek consent.<sup>164</sup>

#### A. The Need for a Statutory Consent Standard that Accounts for Power Imbalances

The question at the heart of rape law reform efforts is what standard to use in drawing the distinction between sex that is acceptable and sex that is

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161. Sandra Lee Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression*, 21 (Psychology Press, 1990).

162. "Preamble," in *Transforming a Rape Culture* (eds. Emilie Buchwald et al., Milkweed Editions, 1993).

163. Cynthia Ann Wicktom, "Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws," 56 *The George Washington Law Review* 399, 402 (1988).

164. Craig T. Bymes, "Putting the Focus Where It Belongs: Mens Rea, Consent, Force, and the Crime of Rape," 10 *Yale Journal of Law & Feminism* 278, 279 (1998).

criminal. In light of a culture that is immersed in patriarchal discourses surrounding rape, engaging in *legal* reform of the definition of “acceptable” sex in order to bring about *cultural* shifts and protect potential victims seems like a futile endeavor<sup>165</sup> but ultimately constitutes an essential step in bringing about greater change.<sup>166</sup> Ultimately, while scholars and activists note that statutory reform is sometimes marginal and inadequate, and cannot normatively shift the cultural treatment of victims overnight, they nonetheless acknowledge it as an effective step forward. Accordingly, they argue that, to effectively protect women, legal reforms must deconstruct the oppressive meanings that have been institutionally constructed.<sup>167</sup> Similarly, my suggestion for an affirmative standard of consent is aimed at extending the language of rape law and goes beyond the alteration of technical rules to encompass rape survivors’ lived experiences, including their harrowing experiences of patriarchal scrutiny during the trial process.<sup>168</sup>

Rape law reform must appreciate the spectrum of women’s potential responses to sexual advances.<sup>169</sup> To declare a permissive sexual act as lawful, it is important to ascertain that the permission must not be given due to the fear of authority or power differential between the actor and the woman, which assumes far more importance in extremely gendered and unequal societies like India. Very often victim’s reactions are akin to what scholars describe as “frozen fright,”<sup>170</sup> “traumatic infantilism,”<sup>171</sup> or “pathological transference.”<sup>172</sup> Evidence has shown that traumatic infantilism occurs when a victim is extremely frightened and borderline panicked, “there is a heightened distortion of perceptive thinking and judgment” such that most learned behavior is abandoned and all efforts are directed at self-preservation “with the adaptive and innate patterns of early childhood.”<sup>173</sup> One scholar, for example, instantiates pathological transference in the context of a victim held at gunpoint.<sup>174</sup> He notes that in such situations the

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165. For arguments regarding the limits of law in bringing about social justice, see Carol Smart, *Feminism and the Power of Law* (Routledge, 1989); *Capitalism and the Rule of Law: From Deviancy Theory to Marxism* (ed. Bob Fine, Hutchinson London, 1979).

166. Amita Dhanda & Archana Parashar, “Introduction,” in *Engendering: Essays in Honour of Lotika Sarkar*, 11 (Eastern Book Company, 1999) (“It is futile to expect the law to deliver a revolution but at the same time it is not possible to disengage from the law.”).

167. See Margaret Davies, *Asking the Law Question*, 224 (The Law Book Company, 1994).

168. Dhanda & Parashar, note 166.

169. Robin West, “Sex, Law and Consent,” in *The Ethics of Consent: Theory and Practice* (Oxford University Press, 2008).

170. Peggy Reeves Sanday, *A Woman Scorned: Acquaintance Rape on Trial*, 283 (University of California Press, 1997) (“The requirement of affirmative consent, Schafran says makes an important distinction between consent and “frozen fright.” Frozen fright means that the “victim cannot physically or verbally resist at all.” However, her silence and passivity does not mean that she is responsive in any positive sense, only that she is unable to resist. Thus, silence can never be interpreted as consent, because it may mean dissent or forced submission.”).

171. Martin Symonds, “The Rape Victim: Psychological Patterns of Response,” 36 *The American Journal of Psychoanalysis* 29 (1976).

172. Id. at 30.

173. Id. at 29.

174. Id. at 30.

victim may have “little or no energy left for overt resistance.”<sup>175</sup> The victim’s usual response is a feeling of profound exhaustion when the gunman leaves; some even feel grateful to the gunman for giving them back their life and are “reluctant to assist in his prosecution.”<sup>176</sup> Thus, in these situations the victim may be cooperative, empathic, submissive, and appeasing qua the perpetrator. The current standard of consent makes it extremely easy to argue in court that this undesired sex was in fact consensual.

The affirmative standard should be adopted to avoid the sometimes-impossible task of distinguishing between “frozen fright” and a passive grant of permission. More importantly, such a standard should be adopted to relieve women of the burden of responding in a particular fashion. Simplifying the standard protects women from the risks of presumed consent as well as against judgments based on how they responded to the violative act. Thus, an affirmative standard would extend rape law’s coverage to non-consensual sexual intercourse that has so far not been criminalized under existing rape law, putting into action proposals of feminist scholars who believe the law should punish all sex that is “unwanted.”<sup>177</sup> This proposal is justified by the irrefutable morality of respect for choice, autonomy, and bodily integrity.<sup>178</sup> Requiring men to obtain women’s consent substantively reduces the emphasis on the subjective responses of the victim, which currently play a vital role, uniquely in rape law, in the very definition and perception of the offense.

The “Dilemma of Difference” turns on the conflict between an approach that considers everyone equally and another which recognizes differences and entails affirmative action to rectify those hierarchically ordered differences.<sup>179</sup> One of the purposes of rape law must be to recognize the especially vulnerable situation of women in sexual relationships. The affirmative standard of consent spells this difference out better than the negative standard that exists in the *status quo* because it protects a marginalized group from being violated due to a normative “blurring” of the lines of consent.<sup>180</sup> It creates objective criteria that are better-suited to the victim’s interests and precludes the use of evidence of her initial desire to engage in sex or her tacit acceptance of advances in a situation of powerlessness to determine the legality of the act.

## B. Acquaintance Rape and the Presumption of “Consent”—Reducing

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175. Id.

176. Id. (“This is a form of pathological transference similar to that seen in young children who have been markedly neglected, rejected, abused, and even brutalized by immature, ineffective parents.”).

177. See Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press, 1998).

178. Id. at 111 (arguing that “[e]ven without making threats that restrict the exercise of free choice, an individual violates a woman’s autonomy when he engages in sexual conduct without ensuring that he has her valid consent”).

179. Martha Minow, “Foreword: Justice Engendered,” 101 *Harvard Law Review* 10, 12 (1987).

180. Vanessa Grigoriadis, *Blurred Lines: Rethinking Sex, Power, and Consent on Campus* (HMH Books, 2017).

### “Misunderstandings”

It is difficult to report most rapes around the world because of the backlash and humiliation that accrues to rape victims.<sup>181</sup> Indian politicians have also acknowledged the *status quo* of gross underreporting.<sup>182</sup> There is a wide variation in estimates due to lack of comprehensive data on unreported rapes. According to a UN report, across fifty-seven countries (including India), only 11 percent of sexual assault and rape cases are actually reported.<sup>183</sup> Any societal constraint that makes rape a difficult crime to report operates even more acutely in Indian society given the rigid and deeply entrenched patriarchal structures that systematically marginalize women.<sup>184</sup> A 2002 study by Vasudev found that only 10 percent of rape cases are actually reported and of that 10 percent, only 5 percent of the accused are eventually convicted.<sup>185</sup> Contrary to the idea that there are rampant false rape accusations, statistics clearly show that rape is in fact a severely underreported crime. Popular notions of false reporting originate from and perpetuate rape culture, leading to institutional failures in a trial process where the presumption that a rape victim is lying is widely prevalent.

The problem of underreporting is even more acute in cases of date rape. According to Nita Bhalla, writing for the Thomson Reuters Foundation, almost 90 percent of India’s rapes are committed by people known to the victim.<sup>186</sup> In 2015, 34,651 rape cases were reported across India.<sup>187</sup> Out of these, 33,098 rapes were committed by someone known to the victim (95.5 percent of all rape cases).<sup>188</sup> Without an affirmative consent standard, many rapists who know their survivors might presuppose consent based on their prior relationship.<sup>189</sup> As early as the mid-1980s, certain studies in the United States primarily focused on undetected rapists—men who had never had crimes reported against them.<sup>190</sup> These

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181. Ramalingam Shanmugam, “Informatics About Fear to Report Rapes Using Bumped-Up Poisson Model,” 3 *American Journal of Biostatistics* 17 (2013).
182. Staff Reporter, “Woman Raped at Construction Site,” *The Hindu* (14 Jun. 2015), <https://perma.cc/DHM7-EB95>.
183. UN Women, “Factsheet: Progress of the World’s Women (2011-12),” 4 <https://web.archive.org/web/20111205195445/http://progress.unwomen.org/wp-content/uploads/2011/06/EN-Factsheet-Global-Progress-of-the-Worlds-Women.pdf>
184. See notes 100-108.
185. See B.R. Sharma & Manisha Gupta, “Gender Based Violence in India: A Never-ending Phenomenon,” 6 *Journal of International Women’s Studies* 114 (2004).
186. Nita Bhalla, “Almost 90 Percent of India’s Rapes Committed by People Known to Victim,” *Reuters* (21 Aug. 2015), <https://perma.cc/59WS-SFPK>.
187. “Chapter 5: Crime Against Women,” in *Crime in India*, 85 (National Crimes Record Bureau, 2015).
188. *Id.*
189. *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*, Criminal Law Appeal 944/2016, at ¶46 (Delhi High Court, 2017); Bahuli Sharma, “Ms X v Mahmood Farooqi: A Dangerous Precedent for Interpreting Consent in Rape Cases in India,” *Oxford Human Rights Hub* (23 Apr. 2018), <https://perma.cc/8ZZD-RD3E> (“In addition to the incorrect definition of consent, the High Court has asked for a higher threshold for ‘lack of consent’ in cases where the survivor knew the accused or is/was in a relationship with him.”).
190. David Lisak, “Understanding the Predatory Nature of Sexual Violence,” 14 *Sexual Assault Report* 49 (2008).

unreported rapes are usually date rapes that are unlikely to involve the use of overt physical force.<sup>191</sup> Victims were likely to be either incapacitated by alcohol, or pressured to succumb to the man's desires after first rejecting the sexual encounter.<sup>192</sup> As one article analyzing the recent studies on self-reported rapes notes:

Most [self-reported rapists] were college students, and it seems incredible that this group would confess sex crimes to total strangers. However, as long as the word "rapist" didn't appear in the questionnaire, men were comfortable answering "yes" to questions such as: "Have you ever had sexual intercourse with an adult when they didn't want to because you used or threatened to use physical force?" In interviews<sup>193</sup> conducted by the psychologists David Lisak and Susan Roth at Duke University in North Carolina, and later<sup>194</sup> by Lisak and Paul Miller at Brown University in Rhode Island, it turned out that respondents somehow didn't realize that this was a description of rape.<sup>195</sup>

An affirmative standard reduces the room for such "misunderstandings" about what constitutes rape and draws the link between undesired sex and rape in explicit terms. As evident from the aforementioned studies, a culture that has normalized date rape needs definitions that leave no room for plausible deniability. Thus, there needs to be a built-in safeguard within the standard of consent to negate the way the *status quo* conveniently presumes the existence of consent. Against such a context, this Article argues that the current standard of consent in India is both a cause and effect of rape culture. In a culture where women are still struggling to reclaim their bodies, the affirmative standard better preserves and protects their sexual autonomy.<sup>196</sup> An affirmative standard ensures that the absence of a "no" is not deliberately or mistakenly arm-twisted into a "yes" due to a culture of active male entitlement. It would mitigate the negative standard's problems of not just ineffective communication but also male entitlement and presumption of consent at all times for all acts and could protect a plethora of victims including but not limited to victims of date rape and acquaintance rape.<sup>197</sup> Affirmative consent would help men understand more clearly the violent nature of sex without consent.

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191. See E.J. Kann, "Date Rape: Unofficial Criminals and Victims," 9 *Victimology* 95 (1984).

192. *Id.*

193. David Lisak & Susan Roth, "Motives and Psychodynamics of Self-Reported, Unincarcerated Rapists," 60 *American Journal of Orthopsychiatry* 268 (1990).

194. David Lisak & Paul M. Miller, "Repeat Rape and Multiple Offending Among Undetected Rapists," 17 *Violence and Victims* 73 (2002).

195. See Newman, note 145.

196. See Shilpa Phadke, Sameera Khan, & Shilpa Ranade, *Why Loiter?: Women and Risk on Mumbai Streets*, 31-40 (Penguin Books India, 2011) (discussing how Indian women's presence in public spaces is inherently transgressive, requiring them to dress and behave in a modest way to signal that they are "good" Indian women and worthy of protection).

197. US English Oxford Dictionary defines date rape as rape committed by someone with whom the victim has gone on a date.

When we recognize that consent can be communicated without words, it is also important to note that threats can also be implied. For instance, one scholar notes that a woman when surrounded by four large men may be too fearful to say no or actively reject their advances.<sup>198</sup> However, an obligation on the men to seek consent might mitigate the circumstance. If nothing else, it forces the rapists to acknowledge that their behavior constitutes rape, something that even educated youth in the so-called “first world” are failing to comprehend as noted above.<sup>199</sup> Thus, there would be a greater number of men who would answer in the affirmative when asked if they pressured a woman into having sex than those who would acknowledge or admit that they raped a woman;<sup>200</sup> therefore, it can be safely concluded that an affirmative standard can act as a mental deterrent to men by clarifying to them the gravity and criminal nature of their actions. The *presence* of consent under this standard is not presumed, instead there exists a burden to prove whether it was *obtained*.

### C. Weaponizing Rape Culture Against Rape Survivors at Trial

Women are continually denied meaningful choice in patriarchal societies. The same hierarchical authoritarian structures that deprive a woman of choice during sexual intercourse further deprive her of agency during the trial where she has no real ability to react the way she desires but, rather, must try to fit the expectations of a sympathetic victim. In her book, *Public Secrets Of Law*, Pratiksha Baxi illustrated that rape culture’s colonization of Indian courts only reinforces “phallogocentric” notions of justice.<sup>201</sup> She argues that rape trials in India, instead of demystifying rape, perpetuate the secrecy around it and allow it to be reproduced and renegotiated via the creation of false ambiguity around what rape means and whether the victim was raped.<sup>202</sup> The discourses that are created during trial regarding women’s consent and the violent trial tactics that seek to destroy victims’ testimonies continue to remain a mystery.<sup>203</sup> These trial tactics ensure that

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198. Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, 77 (Harvard University Press, 1998).

199. Lisak & Roth, note 193.

200. Newman, note 145.

201. See Baxi, note 89, at xxiv.

202. Id. at xxiii-xxiv; see also Michael Taussig, *Defacement: Public Secrecy and the Labor of the Negative*, 6 (1999) (“Such is the labor of the negative, as when it is pointed out that something may be obvious, but needs stating in order to be obvious. For example, the public secret. Knowing is essential to its power, equal to the denial. Not being able to say anything is likewise testimony to its power.”); Carolyn Nordstrom, “Rape: Politics and Theory in War and Peace,” 11 *Australian Feminist Studies* 147 (1996) (“Public secrets tend to coalesce around matters of power and its abuse. They are thus generally imbued with relationships of domination, contestation, and resistance.”).

203. Baxi, note 89, at xxix (“Different effects of power and knowledge congeal to disqualify the testimony of rape at the various sites of the law including the police station, forensic science laboratory, the hospital and the court.”); see also id. at xxvi (“Every lawyer knows that women’s testimonies are distorted, disciplined and misrepresented in rape trials. Defense lawyers talk, sometimes boastfully about how courtroom speech routinely converts the testimony of rape into a confession of consensual sex.”); Susan Brownmiller, *Against Our Will: Men, Women, and Rape*, 387 (Simon & Schuster, 1975) (“[W]hile men successfully

the conversation on rape remains androcentric and continues to exclude women's voices and experiences by capitalizing on the shame and objectification they face in talking about their bodies and incidents of violation in patriarchal and victim hostile trials. The creation of ambiguity around the concept of "consent" gives greater currency to an affirmative consent standard because such a standard clarifies and makes concrete the absence of consent, protecting against the current courtroom practices that manufacture consent while inscribing violence on women's testimonies in the courtroom.

Women's testimonies are often discredited by continuing to *legitimate by practice* in courtrooms that which the law has deemed *formally illegitimate* on grounds of injustice to the victim.<sup>204</sup> Such practices include setting a high standard for corroboration of the victim's testimony,<sup>205</sup> and reasoning that delays in registering a rape complaint suggest the victim's narrative is false.<sup>206</sup> The victim is repeatedly constructed as a habitué, filing cases to get money through compromises.<sup>207</sup> Further, the construction of rape in terms of an offense against society conceals the way that law manifestly injures a survivor of rape by mandating her to mimetically reproduce in words what exactly was done to her in a courtroom, often in the presence of her rapist.<sup>208</sup> This scandalization of what is meant to be private, eroticizes rape.<sup>209</sup> These practices are not justified or mandated by law, but are reproduced over time, alienating the victim further from

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convinced each other and us that women cry rape with ease and glee, the reality of rape is that victimized women have always been reluctant to report the crime and seek legal justice—because of the shame of public exposure, because of that complex double standard that makes a female feel culpable, even responsible, for any act of sexual aggression committed against her, because of possible retribution from the assailant . . . and because women have been presented with sufficient evidence to come to the realistic conclusion that their accounts are received with a harsh cynicism that forms the first line of male defense.”).

204. Nordstrom, note 202.

205. *Rajesh v. State of Rajasthan Through P.P.*, Criminal Appeal No. 178/2016 (High Court of Rajasthan, 2017) (“The witnesses who have been relied by the learned trial court are closely related to the prosecutrix and therefore they are highly interest witnesses. They have not stated truth before the Court. Allegations contained in the complaint were substantially diluted by the prosecutrix . . . inasmuch as whatever allegations she has reiterated in her statement are not corroborated by any evidence whatsoever. Even the medical evidence did not indicate any injury on any part of her body which suggested that she was never subjected to any forcible rape. Thus, there is induction of only two possibilities; first, there is no rape committed or second that she was a consent party.”).

206. See *id.* (citing, skeptically, the victim's explanation that “delay in filing criminal case against the accused occurred owing to reason that the accused wanted to defame [her] and due to fear that her engagement [to one other than the accused] could be broken,” but ultimately deciding that the delay combined with what the court perceived as unreliability of the prosecution witnesses, undermined the accusation).

207. *Virender alias Bittu v. State of Haryana*, Criminal Appeal No. 1931-SB of 2002, at ¶ 21 (Punjab and Haryana High Court, 2010) (“[The defense attorney] submitted that reliance cannot be placed upon the testimony of the prosecutrix as she and her family members are habitual of leveling such type of allegations.”).

208. See Du Toit, note 1, at 61-65.

209. Veena Das, “Sexual Violence, Discursive Formations and the State,” 31 *Economic & Political Weekly* 2416 (1996) (During rape trials, “the body is objectified in ways that become a kind of judicial pornography”).

her own experience as well as the trial process. In the context of patriarchy and rape culture, any conversation about a woman's anatomy as part of a rape trial becomes objectification of the woman which seeks to embarrass, shame, and humiliate her.

Defense tactics are inordinately focused on the victim's state of mind while treading roughshod over her selfhood and crediting the male's perception and construction of whether the sexual encounter was consensual.<sup>210</sup> There occurs a "double rape," wherein the trial process, like the rape itself, breaks down the victim as a sexual subject and reconstructs her rape in a competitive public setting.<sup>211</sup> In other words, the patriarchal legal system views a woman's sexual subjectivity as inherently ambiguous; therefore, the defense splits the victim's selfhood into categories (analyzing mind, body, will, and actions separately) to make "objective" sense out of the victim's subjective experience, which the legal system does not view as conclusive proof of whether or not she gave her consent.<sup>212</sup> Thus, the legal system disqualifies her rape by rendering the event ambiguous.<sup>213</sup> This sexual ambiguity is demonstrated by discrediting a woman's testimony on grounds of internal inconsistency and lack of clarity of expression of desire, thus constructing her as "unrapeable" on account of her inability to unambiguously reject a demand for intercourse.<sup>214</sup>

#### D. Affirmative Consent: Legal Recognition of Social Realities

Following UN recommendations, Indian rape law should strengthen the "unequivocal and voluntary agreement" standard laid down in the IPC<sup>215</sup> by requiring proof of steps taken by the accused to ascertain the complainant's consent.<sup>216</sup> The Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW)—a UN oversight and monitoring body on women's rights—similarly endorsed a definition that requires proof of steps taken to ascertain the rape survivor's assent in *Vertido v. The Philippines*,<sup>217</sup> reasoning that

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210. Baxi, note 89, at 77 (arguing that state-sponsored medical jurisprudence invents clinical tests (such as the two-finger test) to medicalize consent, introduce references to the victim's past sexual history, and make doctors the final arbiters of the presence or absence of consent. "Consent is an empty category from the point of view of the woman . . . the object of diagnosis here is not the harm caused to the survivor but how society is injured by the act of rape").

211. *Id.*

212. Du Toit, note 1, at 62.

213. *Id.*

214. *Id.* at 63 ("By 'breakdown as sexual subject' I simply mean here that, under cross examination, rape complainants are often portrayed as internally inconsistent, as somehow less than full sexual subjects with sexual desires clear to themselves and to everyone else. The court drama which enacts and performs the breakdown of the complainant as sexual subject is simultaneously an uncanny repetition of her breakdown as subject during the rape itself and legal 'proof' that she is essentially 'unrapeable', since only full and responsible sexual agents can clearly dissent to or resist 'normal' male sexual advances.").

215. Indian Penal Code, § 375, Explanation 2 (1860).

216. UN Department of Economic and Social Affairs, *Handbook for Legislation on Violence Against Women*, 26-28 (2010).

217. *Vertido v. The Philippines*, Communication No. 18/20081, 15-17 (CEDAW, 2010) (CEDAW

the affirmative standard minimizes further victimization of the survivor in rape trials.<sup>218</sup> The standard minimizes women's victimization by shifting the burden to the defense to prove that steps were taken to obtain consent, obligating men to be absolutely sure that their partner consents to the intended sexual activity instead of indoctrinating women into continuously attempting to self-police and ensure sure that they do not appear to be "asking for it."<sup>219</sup> The current consent standard in Indian rape law under § 375 and § 90 is the product of a society that makes women the guardians of morality and exempts men of responsibility for their own sexual behavior. Because the existing standard does not unambiguously require men to seek consent, it creates greater room for ambiguity and imposes an inordinate burden on women as courts engage in subjective scrutiny of women's gestures, actions, and words.<sup>220</sup>

It is unfortunate that rape law reforms in India have not occurred routinely in discharge of the state's positive obligation to make the law more victim-friendly in a rape-prone and highly patriarchal society.<sup>221</sup> They have only occurred as a reactionary and ancillary response to certain cases that received immense media attention.<sup>222</sup> Further, public responses to reforms in rape law have not been encouraging. After the gruesome gang-rape and murder of a twenty-three-year-old in Delhi, the Criminal Law (Amendment) Act of 2013 was passed, resulting in an overwhelmingly ignorant and misinformed cry over false allegations. Such public outrage over the myth of the false allegation did not factor in that: *Firstly*, women filed more rape cases after the Amendment not because it became easy to misuse rape law but because the expanded definition of rape finally recognized a greater

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issued the determination and clarified guidelines in response to a Filipino national who reported that she was a victim of discrimination against women within the meaning of Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women and stated that the Philippines, a party to the Convention, violated her rights under the same).

218. See id.

219. Ezra Klein, "'Yes Means Yes' is a Terrible Law, and I Completely Support It," *Vox* (13 Oct. 2014), <https://perma.cc/VR3T-8CS7>.

220. See for example, the court's subjective interpretation of the victim's initial interest in the defendant as categorical consent in *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*, Criminal Law Appeal 944/2016, at ¶¶ 9, 10, 14, 15, 46 (Delhi High Court, 2017).

221. "Criminal Law Amendment that Proposes Death Penalty for Child Rape Convicts Passed in Lok Sabha," *The Hindu* (30 Jul. 2018), <https://perma.cc/9C48-GHEA>.

222. For example in *Tuka Ram v. State of Maharashtra* ("the Mathura Rape Case"), AIR 1979 SC 185 (Supreme Court of India, 1978), the Supreme Court of India shocked the collective conscience of the country by overturning the conviction of a constable who raped a fourteen-year-old child while she was in custody, citing the lack of injury on her body and her past sexual activity to assert that she had consented to the encounter. The decision led to the reforms in the Criminal Law (Amendment) Act of 1983; see also Upendra Baxi et al., "An Open Letter to the Chief Justice of India," 14 *SCC Journal* 17 (1979) (urging the Supreme Court to rehear the widely criticized the Mathura Rape Case). Moreover, the Criminal Law (Amendment) Bill, 2010 was a legal measure that only received serious consideration after a young sportswoman died by suicide after molestation and sexual harassment by the Inspector General of Police in 1990, followed by years of legal battles and harassment by the police. See Kalpana Sharma, "The Other Half: Defining Sexual Assault," *The Hindu* (31 May 2010), <https://perma.cc/V7MY-SLLZ>. Similarly, Criminal Law (Amendment) Bill, 2018 was passed after the rape and murder of a minor in Kathua, Jammu and Kashmir, and a similar case in Unnao, Uttar Pradesh. See note 128.

number and wider variety of sexual acts to which women did not consent. For instance, the definition of rape under § 375 was expanded from non-consensual penile-vaginal penetration to also include oral sex, as well as the insertion of an object or any other body part into a woman's vagina, urethra, or anus without her consent.

*Secondly*, scholars have concluded that false accusations of rape by women are no more common than false accusations by men or women of crimes of other categories.<sup>223</sup> *Thirdly*, the Amendment added a subsection that penalizes the police for failing to register a First Information Report (FIR) in a rape case, leading police to wrongly register cases as rape cases even if the complaints did not actually constitute allegations of rape, thereby perpetuating the myth of false allegations.<sup>224</sup> Dr. Satish calls this a problem of the application of law, where if a woman approaches the police looking for a legal remedy, she is likely to be misguided that her experience, even if it does not involve deception/conditional consent, falls within the definition of rape.<sup>225</sup> This often happens in cases of breach of promise to marry which have increased after the Amendment<sup>226</sup> which provided the police with an easy way to categorize complaints that involve sexual situations between unmarried couples without having to conduct any further investigation.<sup>227</sup> *Fourthly*, it is pertinent to note that the clamor against misuse of laws often comes from a position of privilege and is exclusively targeted at laws meant to address systemic social injustice—for example, § 376: Punishment for Rape, or § 498-A: Husband or Relative of Husband of a Woman Subjecting Her to Cruelty.<sup>228</sup> There is no comparable public outrage around the misuse of tax laws leading to large scale tax evasion (dubiously rechristened “avoidance” by the elite) or the misuse of any other IPC provisions.<sup>229</sup> Such responses only highlight the slow pace of social change, the limits of technical changes in the law in achieving it and the necessity to bring about normative and cultural shifts in the criminal justice system to make it more victim friendly and achieve social justice institutionally.

Affirmative consent is a *de jure* solution mitigating the despairing *de facto* situation. The *de facto* situation is the presumption of women consenting implicitly under all circumstances until they say “no,” and the *de jure* solution is the addition of a categorical clause negating implied consent. In other words, the law needs to define consent so as to make it “less presumed, less frequent, and less rationalized into existence when absent.”<sup>230</sup> This is where affirmative consent

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223. Little, note 32, at 1321, 1330-31.

224. Indian Penal Code, § 166A (1860).

225. Bhavya Dore, “Rape Laws: A Call for Change,” *Live Mint* (18 Mar. 2017), <https://perma.cc/H473-BUW9>.

226. V. Narayan, “Sex After False Promise of Marriage Leads Cases of Rape in Maharashtra,” *The Times of India* (18 Nov. 2013), <https://perma.cc/XPZ2-P4JK>.

227. *Id.* at 225.

228. Jayshree P. Mangubhai & Aloysius Irudayam S.J., “Building a Subaltern Women's Perspective,” in *Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India*, 148 (eds. Kannabiran, Kalpana, & Ranbir Singh, SAGE Publications Inc., 2008).

229. See Shraddha Chaudhary, “Reconceptualising Rape in Law Reform,” 13 *Socio-Legal Review* 163 (2017).

230. Caringella, note 35, at 110.

ameliorates the problem. By actively seeking consent, men would be forced to acknowledge that it is absent unless the woman says “yes.” Implied consent allows the judicial system to accept a presumption that the prosecuting witness harbors ulterior motives like regret, resentment, and malice—a presumption unique to the crime of rape because such motives are not presumed in other crimes like theft or robbery.<sup>231</sup> Such a presumption ignores that a woman stands to lose much more than she stands to gain when she brings forth a rape charge.<sup>232</sup> Thus reforms must attempt to make the agreement to engage in sexual acts more voluntary or positive so as to protect women whose consent is presumed when they reluctantly submit in the absence of aggravating factors.

The legally-driven cultural shift that this Article calls for is not without precedent. In *National Legal Services Authority (NALSA) v. Union of India*,<sup>233</sup> the Supreme Court of India cited the Yogyakarta Principles on the application of International Human Rights Law to emphasize the social perceptions of gender characteristics and the obligation of states to discard “prejudicial or discriminatory attitudes or behaviors related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.”<sup>234</sup> In *Navtej Singh Johar v. Union of India*, the Supreme Court of India decriminalized same-sex relations, resting its decision in part on the finding that laws criminalizing same-sex relations discriminated on the basis of sexual orientation, which constitutes discrimination on the basis of sex itself and therefore violates Article 15(1) of the Indian Constitution.<sup>235</sup> In his concurring opinion in *Navtej Singh Johar*, Justice Chandrachud reaffirmed the argument in *NALSA*, which held that homosexuality was criminalized because it militated against a society based on “stereotypical generalizations of binary genders.”<sup>236</sup> His concurrence noted that “§ 377 rests on deep rooted gender stereotypes”<sup>237</sup> and highlighted that these heterosexist stereotypes are based on hierarchical gender roles:

if individuals as well as society hold strong beliefs about gender roles—that men (to be characteristically reductive) are unemotional, socially dominant, breadwinners that are attracted to women and women are emotional, socially

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231. *Id.* at 114.

232. *Id.* at 115-17; Brownmiller, note 203, at 387; see also Aruna Kashyap & Liesl Gertholtz, *Dignity on Trial: India’s Need for Sound Standards for Conducting and Interpreting Forensic Examinations of Rape Survivors* (Human Rights Watch, 2010).

233. 5 S.C.C. 438 (Supreme Court of India, 2014).

234. *Id.* at ¶ 22 (quoting Principle 2(F), Yogyakarta Principles 2006).

235. *Navtej Singh Johar v. Union of India*, Writ Petition (Criminal) No. 76 of 2016, at ¶46 (Supreme Court of India, 2018) (Justice Chandrachud, concurring) (“[O]ne cannot simply separate discrimination based on sexual orientation and discrimination based on sex because discrimination based on sexual orientation inherently promulgates ideas about stereotypical notions of sex and gender roles.”); see Constitution of India, article 15 (1) (1950) (“The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”).

236. *NALSA vs. Union of India*, 5 S.C.C. 438, at ¶59 (Supreme Court of India, 2014).

237. *Navtej Singh Johar*, Writ Petition (Criminal) No. 76 of 2016, at ¶53 (Justice Chandrachud, concurring).

submissive, caretakers that are attracted to men—it is unlikely that such persons or society at large will accept the idea that two men or two women could maintain a relationship.<sup>238</sup>

Such judicial examples show that the law occasionally acknowledges that there is nothing inevitable about legal assumptions or social constructs surrounding gender. This Article concludes that an affirmative standard in rape law can bring about a shift in such normative assumptions about gender and sexual relations, especially the way those assumptions are expressed during trials where survivors currently face excruciating scrutiny and suspicion.

An affirmative standard would help bring about normative change by protecting against patriarchal judges who want to find consent where there is none. Under § 155(4) of the Indian Evidence Act of 1872, courts recognized “general immoral character” of the survivor as a legitimate defense technique until that section was repealed in 2004.<sup>239</sup> More than a decade later, shaming survivors and using their past sexual history to mutilate their testimonies continues to be common practice.<sup>240</sup> In 2017, while awarding bail to three law students convicted by a lower court for blackmailing and gang-raping a fellow student, a division bench of the Punjab and Haryana High Court noted in its bail order that though the allegations of blackmail and threat were diabolic, examination of the victim’s testimony led to the conclusion that she carried blame because of her “misadventure stemming from a promiscuous attitude and a voyeuristic mind.”<sup>241</sup> The court pointed out that the victim had exchanged nude photos with the perpetrator after he “sent his own nude pictures and coaxed [her] into sending my own nude pictures.”<sup>242</sup> The court went on to state: “The perverse streak in both [parties] is also revealed from her admission that a sex toy was suggested by [the perpetrator] and her acceptance of the same.”<sup>243</sup> Affirmative consent prevents courts from reading meaning into a victim’s actions, especially in a culture which largely holds victims’ behavior, attire, and character responsible for what happens to them.<sup>244</sup>

A major criticism of the affirmative standard is its inability to determine whether silence combined with passive conduct could contextually signal an

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238. *Id.* at ¶ 44.

239. Indian Evidence Act, § 155(4), states that if a man is prosecuted for rape or attempt to ravish, “it may be shown that the prosecuterix was of generally immoral character.”

240. Durba Mitra & Mrinal Satish, “Testing Chastity, Evidencing Rape,” 49 *Economic & Political Weekly* 52 (2014) (“Despite the change in the law excluding a woman’s past sexual history, medical exams continue to assess women’s past sexual history through medical tests that claim to demonstrate women’s habituation to sexual intercourse.”).

241. *Hardik vs. State of Haryana*, Cr. M. No. 26930 of 2017 in Cr. A. No. D-662 of 2017 (High Court of Punjab & Haryana, 2017).

242. *Id.*

243. *Id.*

244. See e.g. Amrit Dhillon, “Men Blame Women in Western Clothes: India’s Rape Culture is Thriving,” *The Sydney Morning Herald* (8 Dec. 2018), <https://perma.cc/DFS2-A6KV> (citing examples of victim-blaming based on clothing and western attitudes).

affirmative agreement to sex.<sup>245</sup> However, in that regard no legal standard can be a perfect solution and do away with contextual subjectivity in human communication. In terms of degree, an affirmative standard is preferable because it requires a conversation prior to engaging in sexual acts, makes communication clear, and renders sexual encounters less likely to be misinterpreted. It reduces subjectivity by at least placing the objective responsibility on men to actively seek consent. It makes it easier for a woman to decline because, even though passivity and submission cannot be the *only* basis of inferring consent even under current law, a woman's passivity is more likely to color context and imply consent where the male is not obligated to seek it.<sup>246</sup> An affirmative standard reduces the relevance of such passivity and silence. It goes a long way in changing the conversation, from one of active male sexual entitlement to that of acknowledgement of female sexual autonomy.<sup>247</sup>

In conclusion, an affirmative consent requirement would instigate a cultural shift by legitimizing the experiences of rape survivors who did not resist and eventually acquiesced to their rapist's advances due to lack of real choice. Doing away with definitions of rape that required force or resistance helped create a stronger cultural perception against so-called "real rape" as being limited to rape that involves aggravated factors or some degree of force. However, there are existing challenges to recognition of rape when it does not involve the use of force and resistance.<sup>248</sup> To overcome these challenges through statutory reform, lawmakers in India must recognize that a standard requiring the assertion of non-consent is a resistance requirement in and of itself. Thus, it is important for the next wave of reforms in India to focus on legal recognition of rape where consent is presumed or perceived as implied, i.e. in cases of date rape or non-aggravated rape. Affirmative consent reduces ambiguity in the recognition of non-consent to

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245. See Jonathan Witmer-Rich, "Unpacking Affirmative Consent: Not as Great as You Hope, Not as Bad as You Fear," 49 *Texas Tech Law Review* 57 (2016); Michelle J. Anderson, "Negotiating Sex," 78 *Southern California Law Review* 1401, 1405-06 (2005) ("When things heat up, . . . the Yes Model melts into the No Model, in which silence constitutes consent.").

246. Indian Penal Code, § 375, Explanation 2 (1860) ("Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.").

247. Jenée Desmond-Harris, "Yes Means Yes: California's New Sexual Assault Law, Explained," *Vox* (9 Oct. 2014), <https://perma.cc/RT3F-W98P> (Emphasizing that the law is "a departure from the more common approach to sexual assault allegations, which is to ask if the alleged victim ever said 'no.' . . . In the California college campus context, that will change to 'Did she say yes?'); Wendy Adele Humphrey, "'Let's Talk About Sex': Legislating and Educating on the Affirmative Consent Standard," 50 *University of San Francisco Law Review* 35, 41, 55 (2016) ("At educational institutions across the nation, the affirmative consent standard shifts the burden during a campus disciplinary board's investigation and adjudication of sexual misconduct allegations. Instead of asking a sexual assault complainant if he or she said 'no' during the sexual encounter . . . the questioning is directed toward the accused and becomes a matter of whether the alleged victim actually expressed a 'yes.'"); Little, note 32, at 1347 ("The traditional system works on the assumption that consent can be presumed unless withdrawn by the women. The victim is therefore required to demonstrate to the jury's satisfaction that she made the man aware that she did not wish to engage in sexual intercourse. Under an affirmative consent standard, the law presumes that a woman does not grant consent unless she is asked.").

248. Criminal Law (Amendment) Act (1983).

intercourse, especially in the absence of any conspicuous aggravating circumstances.

### CONCLUSION: AFFIRMATIVE CONSENT—A STEP FORWARD FOR SEXUAL AUTONOMY

The purpose of the initial Parts of this Article was to establish context, compare the Indian rape-law standard with the desired standard of affirmative consent, and highlight affirmative consent as a more effective means of protecting women's sexual agency. Any argument against such reform holds little weight because once the real victims of the current standard have been identified and distinguished from men who artificially claim to be victimized by an affirmative standard, it becomes easy to ascertain whose interests the law must aim to protect. In order for the culture of male entitlement over female bodies to end, the law has to be used as a tool to modify the language of discourse and effect change.

In the Introduction, I discussed the clash between feminists who argue that women cannot provide meaningful consent due to societal constraints and those who believe that such a construction infantilizes women and undermines their sexual agency. Feminists, however, largely agree on the diagnosis of patriarchal subversion of women's sexual agency, autonomy, and self-determination, and seek to achieve ends that best preserve female rights. An affirmative consent standard becomes a necessary step in the process, regardless of their differing views because it provides a more *specific* and *freer* means of articulating women's rights by precluding the presumption of *implied consent*.

When the very formulation of rape law *trivializes* and *eroticizes* the crime as one in which the modality of women's participation is *passive* and *secondary*, relevant in terms only of what the "men as primary subjects do" and "women as secondary objects consent to,"<sup>249</sup> it is important to make women's participation more active. When the formulation of consent as such envisages them as passive, the least we could do is give to them and thereby their experience a more assertive, affirmative, and primary role in the negotiation of consent. Opponents critique the potential misuse of an affirmative consent standard, but their concerns are rash: *Firstly*, the standard presents no irreparable harm because it only shifts an extraordinary burden off women and asks men to bear responsibility that they have evaded for far too long. The standard does not deny defendants any safeguards like the right to counsel, cross-examination of witnesses, and a public hearing. Furthermore, rape myths of false allegations have been conclusively refuted.<sup>250</sup> *Secondly*, the defense of consent in most cases is extremely difficult for prosecutors to overcome and fairly easy for the accused to raise.<sup>251</sup>

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249. Du Toit, note 1, at 61.

250. Lavina M. Weizel, "The Process That Is Due: Preponderance of The Evidence as The Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints," 53 *Boston College Law Review* 1613, 1625 (2012).

251. Wicktom, note 163, at 399, 402; see also Mary Wood, "City Attorney Shares Reality of Prosecuting Sexual Assault Cases," *University of Virginia School of Law* (2001), <https://perma.cc/LVW2-ARKR>.

Further, critics argue that an affirmative standard over-criminalizes even desired sexual activity, which lacks prior overt communication.<sup>252</sup> However, if both parties desired the activity, the likelihood of women levelling charges against the man is low, especially in a country like India which inordinately prizes female virginity and puritanism and has a heavily androcentric and victim-hostile trial process. Even accepting the criticism of over-criminalization in certain cases, the reform is a risk worth incurring because “the contrary standard inevitably has the opposite and far more dangerous effect of permitting sexual penetration when such intimacy is entirely unwanted.”<sup>253</sup> In the Indian socio-legal context, the risk of women suffering the consequences of unwanted sexual intimacy due to a culture of female passivity and silence far outweighs the risk presented by the critics.

A negative standard legalizes sex if a woman *allows* it to take place in a context dominated by one-sided initiation and immense power differential.<sup>254</sup> An affirmative standard, on the other hand, operationalizes the articulation of a woman’s unequivocal desire to engage in intercourse and determines an answer to a categorical question put forth to her. It safeguards against excusing rapists due to miscommunication by making communication clearer and ensures that the absence of a “no” is not treated as a “yes.”<sup>255</sup>

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252. Janet Halley, “The Move to Affirmative Consent,” 42 *Signs Journal* (2015).

253. Model Penal Code § 213.2 comment (c)(ii), *American Law Institute* (Preliminary Draft No. 5, 2015).

254. Du Toit, note 1, at 62.

255. See Aliment, note 8, at 212.