

THE NEW INTERPRETATION OF CONSENT: HOW INDIA COULD IMPLEMENT AN EFFECTIVE AFFIRMATIVE CONSENT STANDARD

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I. INTRODUCTION

“Rape is one of the most egregious violations of human dignity and bodily autonomy, standing at the intersection of violence, power, and the oppression of individual liberty.”

— Anushri Joshi, *Rape Laws in India: A Detailed Analysis under Section 375 IPC and Section 63 of the Bharatiya Nyaya Sanhita*¹

According to India’s National Bureau of Crime’s most recent report in 2022, women across India reported 63,498 cases of rape and 6,735 cases of attempt to rape.² Of the reported cases, only 27.4% went to trial and ended in conviction.³ Despite public outcry and the high prevalence of rape,⁴ the conviction rate for rape remains lower than that for murder, kidnapping, and other violent crimes.⁵ 35% of women in India between the ages of fifteen and forty-nine suffer sexual or physical violence by a husband or partner, which is 8% higher than the world average for intimate partner violence.⁶ Despite the high prevalence of intimate partner violence,

1. Anushri Joshi, *Rape Laws in India: A Detailed Analysis under Section 375 IPC and Section 63 of the Bharatiya Nyaya Sanhita*, 2023, LEGAL SERV. INDIA, <https://www.legalserviceindia.com/legal/article-18509-rape-laws-in-india-a-detailed-analysis-under-section-375-ipc-and-section-63-of-the-bharatiya-nyaya-sanhita-2023.html> (last visited Nov. 14, 2025).

2. NAT’L CRIME REC. BUREAU, *IPC Crimes against Women (Crime Head-wise & State/UT-wise)* 2022, <https://www.ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1701935180TABLE3A2.pdf> (last visited Jan. 24, 2025). Cf. Anupriya Dhonchak, *Standard of Consent in Rape Law in India: Towards an Affirmative Standard*, 34 BERKLEY J. GENDER L. & JUST. 29, 54, 58–59 (2019) (explaining rape is a difficult crime to report and that some incidents of rape, especially those in which the victims know the perpetrator, remain severely underreported).

3. Nikita Jain, *In India’s Rape Culture No Woman is Safe*, THE CITIZEN (Aug. 22, 2024, 23:15 ET), <https://www.thecitizen.in/in-depth/in-indias-rape-culture-no-woman-is-safe-1061189>.

4. See FP EXPLAINERS, *A Rape Every 16 Minutes: The Shocking Numbers on Crimes Against Women in India*, FIRSTPOST (Aug. 14, 2024, 12:14 PM IST), <https://www.firstpost.com/explainers/a-rape-every-16-minutes-the-shocking-numbers-on-crimes-against-women-in-india-13804414.html> (reporting 51 rape cases occur in India per hour); Saikat Kumar Bose, *Why Kolkata Doctor’s Rape-Murder Case Went to CBI: Court’s Tough Remarks*, NDTV (Aug. 14, 2024, 2:47 PM IST) (documenting the nationwide protests over the rape and murder of a 31-year-old doctor at a state-run hospital).

5. Jain, *supra* note 3.

6. India, WORLD BANK GRP., <https://genderdata.worldbank.org/en/economies/india> (last visited Jan. 24, 2025).

Indian law does not criminalize marital rape.⁷ The Bharatiya Nyaya Sanhita (the BNS), or the Indian Justice Code, provides a marital exception to rape and removes criminal liability from a man who performs sexual intercourse or sexual acts with his own wife if she is above the age of eighteen.⁸

Under Section 63 of the BNS, the criminal act of rape is when a man penetrates any body part or object into a woman,⁹ or causes a woman to do so with him or a third party against her will or without her consent.¹⁰ This distinction establishes two tracks for prosecuting rape: “against her will” and “without her consent.”¹¹ Section 63 defines consent as 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.”¹² The statutory text on its face suggests “without her consent” is distinct from “against her will” because the former asks whether the complainant communicated her “willingness” to participate in the sexual activity, rather than her unwillingness. This Article will show, however, that the current interpretation of consent has blurred the distinction between the two tracks because the complainant’s communication of her unwillingness, or lack thereof, plays a major role in each track.¹³

Under India’s current consent interpretation, rape occurs “without her consent” if a complainant clearly indicates an absence of agreement or unwillingness.¹⁴ In simple words, India adopts a “no-means-no” consent standard rather than a “yes-means-yes” consent standard.¹⁵ It is unclear whether prosecution, in addition to showing the complainant did not consent, must also show the defendant had a

7. See Helen Regan, *Marital Rape is Still not Outlawed in India. Changing that Would be “Excessively Harsh,” Government Argues*, CNN (Oct. 11, 2024, at 21:32 EDT), <https://www.cnn.com/2024/10/11/india/indian-government-marital-rape-intl-hnk/index.html> (documenting the Indian government’s opposition to criminalizing marital rape as the Indian Supreme Court considers the marital exception’s constitutionality).

8. The Bharatiya Nyaya Sanhita, 2023, §63 (India) [hereinafter “BNS”].

9. See Aayush Akar & Shubhank Suman, *Critical Analysis of Rape of Male in India*, IPLEADERS (Apr. 16, 2020) <https://blog.ipleaders.in/critical-analysis-of-rape-of-male-in-india> (stating that Indian law does not recognize male rape). In 2013, the Justice Verma Committee recommended making India’s rape laws “gender-neutral” but the recommendation was firmly rejected by many women groups because rape is “an explicitly patriarchal crime.” *Id.* Though male children are protected against rape under the Protection of Children from Sexual Offences Act, male adults are only given protection against sodomy. *Id.* Because rape committed against women by men is the most common example of rape in India, this Article discusses enforcing affirmative consent only in such a context. Dhonchak, *supra* note 2, at 34.

10. BNS, § 63.

11. Meghan Campbell, *Clarifying the Law on Consent in The Verma Report*, OXHRH, <https://ohrh.law.ox.ac.uk/clarifying-the-law-on-consent-in-the-verma-report> (last visited Nov. 15, 2025).

12. BNS, § 63.

13. See *infra* Part II (discussing the court’s finding that “a feeble no may mean a yes”).

14. Nikunj Kulshreshtha, *A Critical Analysis of the Standard of Consent in Rape Law in India*, 13 ONATI SOCIO-LEGAL SERIES 1428, 1446–50 (2023) (stating precedent requires women to communicate their lack of consent adequately till the point where the accused is made fully aware of it).

15. Dhonchak, *supra* note 2, at 37.

requisite mental intent, or *mens rea*, either at all or only in certain circumstances.¹⁶ What is clear, however, is that a finding of rape rests on the court's determination of a complainant's credibility and behavior rather than the defendant's conduct.¹⁷ Although courts are careful not to assess irrelevant and unlawful factors when deciding whether consent existed, they routinely consider those very factors in evaluating a complainant's credibility, which almost always impacts the ultimate consent determination.¹⁸

Whether rape should be assessed as a crime of violence or a violation of autonomy has been widely contested; the former being the historically dominant approach.¹⁹ If rape is a crime of violence, then there is an implicit suggestion that rape occurs after violent, aggressive, or forceful behavior.²⁰ If rape is a violation of autonomy, then the analysis focuses on whether there was an interference—violent or non-violent—with bodily integrity and choice.²¹ India has characterized, and continues to characterize, rape as a crime of violence or a “fate worse than death.”²² For decades, Indian law only recognized a woman's unwillingness if there was force or resistance.²³ More recently, Indian law has deprioritized force and physical resistance in favor of adopting a consent framework.²⁴ Despite this shift, India's rape law still favors rape as a crime of violence and holds that not all indications of unwillingness may truly be a denial of consent.²⁵

16. See *infra* Part II (discussing whether a *mens rea* requirement exists considering India's “mistake of fact” defense).

17. See *infra* Part II.B (analyzing the standard for assessing a victim's credibility and its impact on consent determinations).

18. Kulshreshtha, *supra* note 14, at 1434–39 (exemplifying how Indian courts have considered extraneous circumstances for determining consent); see Part II.B (discussing factors the Supreme Court of India relied upon to determine the complainant's credibility).

19. See Dorothy E. Roberts, *Rape, Violence, and Woman's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993) (criticizing whether characterizing rape in relation to autonomy rather than violence effectively addresses the nuances of rape and experiences of rape victims); Dhonchak, *supra* note 2, at 59–60 (advocating for an autonomous view of affirmative consent while arguing affirmative consent mitigates “male entitlement” and helps men understand the “violent nature” of sex without consent).

20. Roberts, *supra* note 19, at 362–63 (suggesting that if rape is violence, then coercive behavior that does not amount to violence but nonetheless disregards a woman's sexual autonomy is not rape).

21. See Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 L. & PHIL. 35, 70–71 (1992) (explaining the capacity to choose and an individual's bodily integrity are two relevant elements of autonomy).

22. Kulshreshtha, *supra* note 14, at 1436 (characterizing rape as a “fate worse than death” and quoting *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 403 (“A murderer destroys the physical body of his victim; a rapist degrades the very soul of the *helpless* female.”) (emphasis added)).

23. Rashmi Singh, *Rape Laws in India: An Analysis*, 5 INDIAN J.L. & LEGAL RSCH. 1, 2–4 (2023) (discussing the history of rape laws in India beginning with force and resistance); see also Dhonchak, *supra* note 2, at 36 (explaining the belief a woman would resist because she “*should* value her chastity more than life itself”).

24. BNS, § 63 (explaining that the lack of physical resistance to the act of penetration by itself does not convey consent).

25. See *infra* Part II.A for a discussion on *Mahmood Farooqui v. State* and the analysis of whether “no” really means “no.”

As this Article will discuss further, though India adopted seemingly progressive language to define consent, the current interpretation regressively cements sexual activity between a man and a woman as something a woman can only reject.²⁶ Rape occurs only if a man performs sexual acts with a woman after she communicates her unwillingness so clearly that neither the court nor the defendant—who are considering the woman's education, prior relationship, sexual history, personality, and clothing—can question the absence of consent.²⁷ This interpretation fails to recognize the importance of a woman's affirmative expression of autonomy. It implicitly establishes a resistance requirement, which has been explicitly removed, and callously places the onus on women to prevent rape.²⁸

To remedy this injustice, India must reject its negative consent interpretation and adopt an affirmative consent interpretation so that rape is understood as “any sexual act a woman did not unequivocally . . . consent to.”²⁹ Scholars have debated whether an affirmative consent interpretation is the proper remedy for addressing the high prevalence of rape in India.³⁰ The arguments center on whether an affirmative consent standard will be effective. They argue this standard will “remain toothless” because consent reform will not create the cultural shift that is necessary to combat rape against women.³¹ Others propose the affirmative consent standard cannot remove current obstacles affecting consent interpretation and will instead create new problems.³²

Implementing an affirmative consent standard in India will face challenges and cannot, by itself, generate the cultural shift necessary to reduce the prevalence of rape. Nonetheless, recognizing the harmful consequences of India's current consent framework, India should adopt an affirmative consent standard.³³ This Article addresses how India can implement an affirmative consent standard and argues it can be effective with the right implementation.³⁴ Part II examines India's current

26. See Dhonchak, *supra* note 2, at 30–32, 59 (discussing how India's consent standard frames a woman's consent as a passive response and presumes its existence, thereby cementing sexual activity as something a woman can only reject).

27. See *infra* Part II.A (discussing the court's interpretation of consent).

28. Dhonchak, *supra* note 2, at 67 (“[R]equiring the assertion of non-consent is a resistance requirement in and of itself.”); Kulshreshtha, *supra* note 14, at 1433 (discussing how India's negative consent interpretation placed the onus on victims to ensure the accused is fully aware of their unwillingness).

29. Dhonchak, *supra* note 2, at 52.

30. Compare Dhonchak, *supra* note 2 (advocating an affirmative consent standard could effectively address the male entitlement and oppressive gendered norms in India) with Kulshreshtha, *supra* note 14, at 1446–50 (arguing that an affirmative consent standard alone cannot achieve social change without broader reforms).

31. Cf. Kulshreshtha, *supra* note 14, at 1446–50 (arguing proper reform requires comprehensive sexual education alongside legal reform).

32. See Janet Halley, *The Move to Affirmative Consent*, 42 J. WOMEN CULTURE & SOC'Y 1 (2016) (analyzing affirmative consent standards on college campuses across the United States and exposing weaknesses in application).

33. See *infra* Part II.A for a discussion of India's current legal standard for rape.

34. See Dhonchak, *supra* note 2, at 31–34 (arguing affirmative consent considers the “tangible constraints” on Indian women imposed by daily realities and patriarchal norms).

legal standard for rape, highlighting how a negative consent interpretation that hinges on a complainant's conduct leads to inequitable results and creates uncertainties about what evidence is required to prove rape.³⁵ Part III outlines recognized approaches to enforcing affirmative consent and argues which approach would be most suitable for India.³⁶ Part IV draws on normative policies to argue how cultural challenges to implementing an effective affirmative consent standard can be mitigated.³⁷

II. INDIA'S CURRENT LEGAL STANDARD FOR RAPE

In India, rape is when a man penetrates any body part or object into a woman or causes a woman to do so with him or a third party against her will or without her consent.³⁸ There was no legal definition of consent under Indian law until the Criminal Law Amendment Act of 2013 (Nirbhaya Act).³⁹ In 2013, India, for the first time, provided an explicit definition of consent and expanded the scope of rape to include non-penetrative sexual acts.⁴⁰ One way to convict a defendant of rape requires the prosecution to prove beyond a reasonable doubt that the defendant committed a sexual act with a woman "without her consent."⁴¹ It is unclear whether the criminal act of rape requires the defendant to have a particular *mens rea*.⁴² If a *mens rea* is required, it is still unclear whether prosecution must prove the defendant's mental culpability in all or a few circumstances of rape.⁴³ The following

35. See *infra* Part II for a detailed analysis of India's consent interpretation, the role of complainant credibility, and the burden of proof.

36. See *infra* Part III for a general discussion of affirmative consent approaches modeled through the rape laws of New Jersey, Tasmania, and Sweden.

37. See *infra* Part IV for a discussion on implementing comprehensive sex education and judicial training in India.

38. BNS, § 63.

39. See generally Arkapriva Ghosh, *The Nirbhaya Case: Legal Analysis of a Landmark Verdict*, LEX TIMES (Dec. 26, 2023), <https://www.thelextimes.com/the-nirbhaya-case-legal-analysis-of-a-landmark-verdict> [<https://web.archive.org/web/20250217114600/https://www.thelextimes.com/the-nirbhaya-case-legal-analysis-of-a-landmark-verdict/>] (discussing the gang rape and murder of 23-year-old woman on a moving bus served as a "catalyst for legislative changes" and symbol for the issue of sexual violence).

40. Singh, *supra* note 23, at 8–9.

41. Dhonchak, *supra* note 2, at 39; see also The Bharatiya Nyaya Sanhita, 2023, §63 (India).

42. See Dhonchak, *supra* note 2, at 40 ("[T]here is no *mens rea* requirement for rape."); Sujitha Senthilnathan, *All You Need to Know About Mens Rea*, IPLEADERS (Jan. 18, 2022), <https://blog.ipleaders.in/all-you-need-to-know-about-mens-rea> (listing rape as a strict liability crime). Compare *State of Maharashtra v. Raja alias Rajendra* (1997), <https://lextechsuite.com/Raja-Versus-The-State-1997-02-03> (observing the Indian Penal Code sections specify the ingredients of each offence and prosecution is only required to show the facts fit the statutory elements) with M.V. Sankaran, *Mens Rea in Rape: An Analysis of Reg. v. Morgan and Sections 375 and 79 of the Indian Penal Code*, 20 J. OF INDIAN L. INST. 438, 453–58 (suggesting there is "no doubt" that a mental element underlies the offense of rape despite *dicta* explaining it would be impermissible to import *mens rea* from English Law into the Indian Penal Code).

43. See *Mahmood Farooqui v. State (Gov't of NCT of Delhi)*, CrI. A. 944 of 2016, para. 92 (Del. High Ct. Sept. 25, 2017), <https://indiankanoon.org/doc/160377045> (explaining that the court

discussion will first explain the current consent interpretation, and then it will explain how credibility and evidentiary burdens, which are independent from the consent analysis, affect consent determinations.

A. *India's Consent Interpretation*

India has enacted various legal provisions targeting the legal elements and punishments for rape.⁴⁴ One of the most relevant provisions for interpreting consent under Section 63 is the Criminal Law Amendment Act of 2013, also known as the Nirbhaya Act.⁴⁵ Consent is defined as 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.”⁴⁶ There is no valid consent if it is obtained by a misconception of fact, or from a child, insane person, or intoxicated person.⁴⁷

A plain reading of the statutory language in Section 63 suggests rape occurs if a man performs a sexual act with or to a woman without *affirmatively receiving* the woman’s “unequivocal voluntary agreement” to willingly participate in the sexual act.⁴⁸ The plain reading also suggests there is no *mens rea* requirement since there is none written.⁴⁹ However, these suggestions would starkly contrast with India’s traditional understanding of rape per which a complainant’s conduct is scrutinized from the defendant’s subjective perspective.⁵⁰ The High Court of Delhi’s decision to acquit the defendant in *Mahmood Farooqui v. State* also supports the plain reading interpretation of consent is wrong.⁵¹

In *Farooqui*, the High Court overturned the lower court’s conviction⁵² and acquitted the defendant alleged to have performed oral sex on the complainant

questioned whether the defendant, who had a prior relationship with the complainant, had the “requisite mental intent” of violating the complainant or was “genuinely mistaken” that the complainant’s communication meant consent).

44. See, e.g., Sanjushree Deo, *Anti-Rape Laws in India*, 1 JUS. CORPUS L.J. 201 (Mar. 2021); Singh, *supra* note 23, at 1.

45. Singh, *supra* note 23, at 8–9 (“The Indian Penal Code, 1860, the Code of Criminal Procedure, 1973, and the Indian Evidence Act, 1872 all underwent significant revisions as a result of the Criminal Law Amendment Act 2013 . . .”).

46. BNS, § 63.

47. *Id.* at §63(iii)–(vi); see also Kulshreshtha, *supra* note 14, at 1432.

48. Kulshreshtha, *supra* note 14, at 1432 (explaining the consent language suggested a progressive standard in which a man was required to obtain unequivocal consent before initiating sexual contact).

49. BNS, § 63.

50. See Anant Prakash Narayan, *Delhi High Court’s Judgment of Mahmood Farooqui v. State (Govt. of NCT of Delhi) and Debate of Consent in the Rape Cases: An Analysis*, 12 NUALS L.J. 156, 159–60 (2018) (explaining how India’s traditional model for assessing consent scrutinized the victim’s character and behavior to justify the accused’s subjective perspective, leading to the conclusion that “Indian rape victims were doubly suspect”).

51. See *id.* at 166–67 (arguing the High Court interpreted consent in a “misogynist” manner and asserted an “old notion” of resistance and consent).

52. Singh, *supra* note 23, at 12.

without her consent.⁵³ The complainant explained the defendant kissed the complainant, disclosed his intention of performing oral sex, and pulled her underwear down as they were seated on the couch.⁵⁴ During these advances, the complainant said, “No,” and pulled up her underwear each time he pulled it down.⁵⁵ The defendant continued to advance upon which the complainant obliged, feigned an orgasm, and left soon after.⁵⁶ The complainant justified her submission by testifying that she feared further resistance would put her at risk of harm.⁵⁷ The High Court nonetheless found the evidence was inconclusive as to whether the incident occurred without consent at all, and, even if so, whether the defendant knew the complainant did not consent.⁵⁸ The High Court emphasized that the complainant and defendant knew one another prior to the alleged incident and had previous incidents of kissing.⁵⁹

The High Court made clear that consent must be categorical, unequivocal, voluntary, and given in a manner that signifies a willingness to participate.⁶⁰ It also clarified that the lack of physical resistance and the existence of a prior physical relationship does not automatically generate consent.⁶¹ The High Court stated that it nonetheless must consider what was communicated to the defendant because the defendant and complainant had a prior relationship involving physical contact.⁶² Under this framework, the High Court assessed the phrase “without her consent” by focusing on whether the complainant, from the defendant’s subjective perspective, sufficiently communicated the absence of consent.⁶³ Though the High Court held that the evidence was inconclusive,⁶⁴ the High Court’s analysis set a precedent for interpreting consent in which a woman’s “no” could mean something other than a “no.”⁶⁵ More specifically, the High Court held that a “feeble ‘no’ may mean a

53. Dhonchak, *supra* note 2, at 39–40.

54. Farooqui, CrI. A. 944 of 2016 at para. 2; *see also* Dhonchak, *supra* note 2, at 40.

55. Farooqui, CrI. A. 944 of 2016 at paras. 2, 17; *see also* Dhonchak, *supra* note 2, at 40.

56. Farooqui, CrI. A. 944 of 2016 at paras. 3, 15, 46; *see also* Kulshreshtha, *supra* note 14, at 1433.

57. Farooqui, CrI. A. 944 of 2016 at paras. 15, 81 (describing the complainant’s fear was based on the widely publicized Nirbhaya case in which one of the rapists declared that if the victim did not resist, she might have lived); *see also* *India’s Daughter* (Assassin Films), Transcript at 10:21:13:05 (Mukesh Singh’s statement), https://www.journeyman.tv/film_documents/7745/transcript/ (“When being raped, she shouldn’t fight back. She should just be silent and allow the rape. Then they’d have dropped her off after ‘doing her’, and only hit the boy.”) (last visited Nov. 16, 2025).

58. Farooqui, CrI. A. 944 of 2016 at para. 102.

59. *Id.* at paras. 73–74.

60. *Id.* at para. 76.

61. *Id.* at paras. 74–76.

62. *Id.* at para. 77.

63. *Id.* at paras. 77–78, 83; *see also* Narayan, *supra* note 50, at 181 (explaining the court evaluated “without her consent” from the accused’s subjective vantage, effectively requiring the complainant to communicate non-consent sufficiently to negate his claimed belief).

64. Farooqui, CrI. A. 944 of 2016 at para. 102.

65. Singh, *supra* note 23, at 13; *see also* Shreya Shree, *Revisiting ‘Consent’ Under Indian Rape Law*, 14 NAT’L L. SCH. J. 219, 228 (2018) (explaining how the Court recognized different degrees of rape as opposed to a typical “no-means-no” or affirmative interpretation of consent).

‘yes’.”⁶⁶

The High Court interpreted “without her consent” to mean a negative consent standard in which the woman’s intelligence, social stature, and relationship to the defendant determines what the court would accept as an adequate absence of consent.⁶⁷ It found that women who are “well-educated” or “intellectually or academically capable” must provide more than a “weak ‘no.’”⁶⁸ This is because it would be difficult to decipher whether an academically proficient woman’s “feeble no” and “little or no resistance” was “actually a denial of consent” when she knows the defendant.⁶⁹ Yet, if the complainant and defendant were involved in “some form of banned connection,”⁷⁰ then requiring an “emphatic ‘no’” would be “impossible.”⁷¹ But if at least one of the parties is “not well-versed” in social norms, then a “mere expression of reluctance *might*” be a denial of consent.⁷²

The High Court acknowledged that the complainant said “no” and pulled up her underwear multiple times.⁷³ It ultimately concluded, however, that the defendant could have lacked the unspecified “requisite mental intent” of violation because he could have genuinely mistaken her “no” and behavior as consent under Section 63.⁷⁴ The High Court strengthened the impression that the complainant may have consented when it also applied Section 28, which invalidates *existing* consent if consent was given under fear of injury or misconception of fact and if the defendant knew or had reason to believe consent was given under fear of injury.⁷⁵ The High Court held there was “no communication” of fear by the complainant; instead, she made only the “mental move of feigning orgasm” to end the incident which communicated “wrongly and mistakenly” that the complainant consented.⁷⁶

Section 63 does not expressly include a requisite mental culpability as an

66. Farooqui, *CrI. A. 944 of 2016* at para. 78; Dhonchak, *supra* note 2, at 40.

67. *See* Singh, *supra* note 23, at 12–13 (citing the High Court’s reasoning).

68. Singh, *supra* note 23, at 12–13.

69. Farooqui, *CrI. A. 944 of 2016* at para. 78.

70. Shree, *supra* note 65, at 228 (meaning parties who are strangers or are in a prohibited relationship).

71. Singh, *supra* note 23, at 12.

72. Singh, *supra* note 23, at 12–13 (emphasis added).

73. Farooqui, *CrI. A. 944 of 2016* at paras. 2, 58, 96.

74. Dhonchak, *supra* note 2, at 40; *see* Narayan, *supra* note 50, at 181 (explaining the court held based on a singular piece of evidence that the defendant could not understand the nature of consent due to his alleged bipolar disorder); Shree, *supra* note 65, at 226 (finding the complainant’s gestures, relationship, and behavior did not make known or communicate her fear or non-consent to the defendant thus creating doubt).

75. BNS, § 28 (“A consent is not such a consent as intended by any section of this Sanhita, (a) 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; or (b) if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or (c) unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.”).

76. Farooqui, *CrI. A. 944 of 2016* at para. 82.

element of rape.⁷⁷ Only if consent is given under fear of injury or misconception of fact does Section 28 require the prosecution to prove that the defendant knew or had reason to believe so.⁷⁸ The plain reading of Sections 63 and 28 emphasize that rape involves sexual acts committed without the voluntary, unequivocal, and sound communication of *willingness* to participate in the sexual act. Yet, under *Farooqui*, rape occurs only if a woman “adequately” communicates her *unwillingness* to the extent that defendants—at least those sharing a relationship or sexual history⁷⁹ with her—are “fully aware” of her unwillingness.⁸⁰ This interpretation reintroduces a resistance requirement, otherwise prohibited, and makes the standard of consent into a presumptive standard rather than a proactive one.⁸¹ Yet, when the High Court’s decision was appealed, the Supreme Court of India refused to review the decision and reasoned that the *Farooqui* decision was “extremely well decided.”⁸² The High Court’s interpretation reinforces the idea that women are ambiguous in their desire and “do not know what they want or mean what they say—at least when they say no.”⁸³

B. Presuming and Proving the Absence of Consent

Proving the existence or absence of consent is shaped not only by the interpretation of consent under Section 63 but also by evidentiary presumptions concerning consent and the complainant’s credibility. The Delhi High Court’s interpretation of consent in *Farooqui* implies that prosecution has a burden to prove beyond a reasonable doubt (a) that the woman did not consent and (b) that, where a relationship exists, the defendant knew the woman did not consent.⁸⁴ It remains unclear whether mental culpability is an element required for rape generally.⁸⁵ Under Section 120 of the Bharatiya Sakshya Adhiniyam (the BSA), formerly Section 114 of the Indian Evidence Act, the court presumes the absence of consent in circumstances enumerated in Section 64 of the BNS,⁸⁶ provided the prosecution

77. BNS, § 63.

78. *Id.* at § 28(a).

79. *Cf.* Kulshreshtha, *supra* note 14, at 1433 (identifying that most rapes are committed by persons known to the victims).

80. Kulshreshtha, *supra* note 14, at 1433.

81. *Id.*

82. Amit Anand Choudhary, *Mahmood Farooqui rape Acquittal ‘Extremely well Decided’, says Supreme Court, Dismissing Appeal Against Earlier Verdict*, THE TIMES OF INDIA (Jan. 19, 2018), <https://timesofindia.indiatimes.com/india/mahmood-farooqui-rape-acquittal-extremely-well-decided-says-supreme-court-dismissing-appeal-against-earlier-verdict/articleshow/62566322.cms>.

83. Shree, *supra* note 65, at 228; *see also* Dhonchak, *supra* note 2, at 51–55; Harshita Kushwa, *The Need to Reform Rape Laws – Section 375 and Beyond*, 2 INDIAN J.L. & LEGAL RSCH. 1, 13 (2021).

84. *See supra* Part II.A for a full discussion of the High Court’s interpretation of consent in *Farooqui*.

85. *See supra* note 42 (discussing the competing views on whether a *mens rea* exists or not).

86. *See* BNS, § 64(2)(a)–(m) for a list of relationships triggering the presumption for absence of consent including but not limited to police officers, public servants, member of armed forces, jail home or custodial management, relatives, guardians, or persons in a position of trust. The

establishes (a) that sexual intercourse occurred; (b) that consent is contested; and (c) that the woman testifies she did not consent.⁸⁷ This statutory presumption with the High Court's analysis in *Farooqui* suggests that prosecution, to prove rape, is not strictly required to prove the defendant knew the complainant lacked consent.

The prosecution's ability to meet its burden is shaped by the court's determination of the complainant's credibility since, for example, a complainant's testimony alone can support a finding of rape.⁸⁸ Establishing a woman's credibility is globally difficult and central to rape cases. In India, however, establishing credibility in court proceedings is notably difficult because the prosecution must rebut a court's inexplicit assumption that women alleging rape are not credible.⁸⁹ Her testimony must be of "sterling quality which inspires confidence and is absolutely trustworthy."⁹⁰ A sterling witness is one who is of a "very high quality and caliber," and whose version is "unassailable."⁹¹ The court that is considering the testimony of such a complainant should be in a position to accept her testimony on its face value "without any hesitation."⁹² To assess a complainant's credibility, courts routinely assess factors including her sexual history, pre-incident and post-incident behavior, social stature, education, personality and character.⁹³ Although these factors are unlawful to weigh in determining whether consent existed, they nonetheless impact the consent analysis because courts treat these factors as indicators of credibility and consequently hesitate to accept a complainant's

presumption for absence of consent can also be triggered if the defendant is proven to be in a "position of control or dominance over a woman." *Id.* at §64(2)(j). It is plausible to argue men in India are assumptively in a position of "control or dominance" since women in India are often held to "highly restrictive standards of morality, sexuality and feudal consciousness, and culture of male entitlement over the female body." Dhonchak, *supra* note 2, at 48.

87. The Bharatiya Sakshya Adhiniyam, 2023, §120 (India) [hereinafter "BSA"].

88. See Kulshreshtha, *supra* note 14, at 1434 (explaining the Supreme Court of India's holding in *Bharwada Bhoginbhai Hirjibhai v. State of Gujrat* that a finding of rape may be based on the sole testimony of the victim).

89. Tannvi Tannvi & Sharmila Narayana, *The Challenge of Gender Stereotyping in Indian Courts* <https://www.tandfonline.com/doi/epdf/10.1080/23311886.2022.2116815?needAccess=true>.

90. Bhumika Indulia, *Destruction of Crucial Evidence, Calculated Narrative, Conduct not Natural of rape Victim . . .*, SCCTIMES ONLINE (May 28, 2021), <https://www.sconline.com/blog/post/2021/05/28/rape-accused-tarun-tejpal>.

91. *Farooqui*, CrI. A. 944 of 2016 at para. 54.

92. *Id.*

93. See Kulshreshtha, *supra* note 14, at 1434–35 (explaining that judges justify probing a victim's "moral" credibility on the premise that it would be wrong to punish a defendant based on a person deemed "morally bankrupt"); Kulshreshtha, *supra* note 14, at 1434–39 (listing the presence or absence of injuries, an aggressive resistance to rape, the sexual lifestyle of the victim, the post-assault behavior, and culture of the woman as factors in determining consent). Consider how one court rendered a victim's testimony as credible because she cried on multiple occasions following the rape, but another court dismissed a victim's testimony because she fell asleep after being raped since the act of falling asleep afterwards was "unbecoming of an Indian woman." Kulshreshtha, *supra* note 14, at 1436. In another example, the court found that the woman "was not so vulnerable" that she would fail to object to being raped on the pretext of marriage since she was an "ultra-modern lady who enjoyed alcohol with men." Kulshreshtha, *supra* note 14, at 1437.

testimony.⁹⁴

The Supreme Court of India, for example, after an almost eight-year trial, upheld the defendant's acquittal on appeal in *State of Goa v. Tarun Tejpal* because of the complainant's lack of credibility.⁹⁵ The Supreme Court emphasized the prosecution had the burden to prove beyond a reasonable doubt that the defendant confined and raped the complainant in the elevator of a luxury hotel as alleged.⁹⁶ There was no mention of the defendant's *mens rea* or knowledge. The Supreme Court affirmed, per Section 64(2)(j), that the defendant was in a "position of authority or dominance" as the Editor-in Chief of the magazine that the complainant was associated with as a journalist.⁹⁷ The complainant claimed she did not consent, but the Supreme Court did not seem to presume the absence of consent under Section 120 of the BSA.⁹⁸ The Supreme Court's analysis focused on extraneous factors informing the complainant's credibility and whether the incident took place at all.⁹⁹ Ultimately, the Supreme Court found the complainant was not credible in her allegation since she (a) had "glaring contradictions" that "cannot be expected from an educated journalist;" (b) lacked any "injury on her body;" and (C) lacked a confession from the defendant, among other factors.¹⁰⁰

The Supreme Court refused to consider the question of consent altogether because it decided the complainant was not credible in her allegation entirely. It noted "glaring" contradictions within the complainant's testimony, namely the difference between her statement that she "picked up her underwear" and her statement that she "pulled her underwear" before walking out of the elevator.¹⁰¹ The Supreme Court not only questioned why the complainant did not fight back but doubted the complainant struggled at all since there were no injuries.¹⁰² The Supreme Court further reasoned that because the complainant, who worked for the defendant, continued to interact with him after the incident, her conduct was inconsistent with that of someone who had been assaulted.¹⁰³ Proving the absence of consent is already difficult, but women in India face an even greater hurdle: being believed at all.¹⁰⁴ A

94. See Kulshreshtha, *supra* note 14, at 1433 (mentioning how the absence of injuries should not be read as proof of consent); BNS, § 63 (explaining the lack of physical resistance alone does not mean consent); Crim. Law (Amend.) Act, 2013, No. 13 of 2013, § 25 (India) (disallowing evidence of a victim's character or previous sexual experience to determine the quality of consent); Kulshreshtha, *supra* note 14, at 1436 (explaining how post-assault behavior has no legal bearing on the consideration of bail hearings); Farooqui, para. 69 (referring to the Supreme Court's holding in *Mukesh v. State of Chhattisgarh* which explained that the complainant's state of mind cannot be precisely analyzed because each person reacts differently to stressful situations).

95. Indulia, *supra* note 90.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Indulia, *supra* note 90.

101. *Id.*

102. *Id.*

103. *Id.*

104. Dhonchak, *supra* note 2, at 63; see Shree, *supra* note 65, at 225–229 (explaining the Court found the complainant credible but still denied her assertion that she did not consent).

woman in India, if she wants to be believed, should ensure that her behavior before, during, and after the incident matches that of a typical rape victim so she can convince a court that the incident occurred at all.¹⁰⁵ While women in India, as victims, must overcome an implicit burden of proof that is prejudiced against them, defendants—such as the one in *Tejpal*—who enjoy the presumption of innocence can expect the “benefit of doubt” and walk away acquitted.¹⁰⁶

C. *Implications of India’s Consent Standard*

There is a high prevalence of rape in India in part because political decisions, religious platforms, and media overly sexualize women and normalize male entitlement to sexual activity with women.¹⁰⁷ Court decisions like those in *Farooqui* and *Tejpal* reflect the cultural assumption that a woman is responsible for her own safety and for a man’s behavior.¹⁰⁸ These decisions support the well-rooted notion that “boys will be boys” while women could have always made a better choice.¹⁰⁹ India’s negative consent standard fails to acknowledge the gender inequality and power dynamic between men and women in India.¹¹⁰

Under *Farooqui*, the High Court regressively interpreted India’s seemingly progressive consent provision to require a woman to clearly communicate her unwillingness to the defendant.¹¹¹ Though it is unclear whether the complainant must always prove the defendant knew she did not consent, the practical implication of *Farooqui* is that she should.¹¹² If she does not, then the defense can argue the complainant did not mean “no” when she gave a “feeble no.”¹¹³ The defense could also manipulate the complainant’s behavior, their past relationship if it exists, and social stature to show that the complainant’s communication of non-consent was at least ambiguous and insufficient.¹¹⁴

105. Kulshreshtha, *supra* note 14, at 1434–39 (providing an example of how an Indian court could not fathom how consent could be fraudulently obtained from a 25-year-old educated woman); *supra* note 93.

106. Indulia, *supra* note 90.

107. Dhonchak, *supra* note 2, at 42–50; *see also* Bhat, 2021 SCR at para. 23 (explaining how women are routinely subjected to various forms of verbal and physical assault and harassment, yet these abuses are often romanticized in cinema).

108. *See* Shree, *supra* note 65, at 226 (explaining the High Court’s reasoning that the complainant’s gestures, relationship, and behavior did not make known or communicate her fear or non-consent to the defendant thus creating doubt).

109. *See* Bhat, 2021 SCR at para. 23 (stating sexual violence against women is often viewed through a “boys will be boys” prism which has a lasting effect on survivors).

110. *Id.* at para. 20 (“Women are discriminated against and subordinated not only on the basis of sex, but on other grounds too, such as caste, class, ability, sexual orientation, tradition and other realities.”).

111. *See* Kulshreshtha, *supra* note 14, at 1432 (explaining the consent language suggested a progressive standard in which a man was required to obtain unequivocal consent before initiating sexual contact).

112. *See supra* Part II.A (discussing how complainant’s failure to clearly communicate her non-consent to the defendant in *Farooqui* negated a finding of rape).

113. *Farooqui*, CrI. A. 944 of 2016 at para. 78.

114. *Id.*

Rather than recognizing a woman's willingness as necessary for all sexual activity, India's legal standard for rape places the burden on women to prevent rape by requiring they adequately communicate unwillingness. Interpreting consent this way blurs the line between rape that occurs "without her consent" and rape that occurs "against her will." It also undermines the statutory definition that suggests on its face that sexual activity performed without the communication of willingness is sufficient to constitute rape.¹¹⁵ To counteract these hardships, India should adopt an affirmative consent standard, which, as this Article will discuss in Part III, is the "best way to legally recognize women [as] equal partners in any sexual interaction."¹¹⁶ India should continue to define consent as an "unequivocal voluntary agreement" that communicates a woman's "willingness to participate."¹¹⁷ However, legislation should be adopted to reinterpret the statutory language so that a man commits rape "without her consent" whenever he engages in sexual activity with a woman without first obtaining her unequivocal, voluntary communication of *willingness* to participate.¹¹⁸

III. ADVOCATING FOR AN AFFIRMATIVE CONSENT STANDARD

There is a growing call for India to adopt an affirmative consent or "yes-means-yes" standard as a mechanism to confront India's rape culture and create incentives for better male behavior.¹¹⁹ One rationale is that adopting this standard into law could, for example, incentivize men to respect a woman's agency,¹²⁰ her "right to self-determination," and her "bodily integrity."¹²¹ Journalist Ezra Klein has even dubbed affirmative consent as the "You Better Be Pretty Damn Sure Law," explaining:

The Yes Means Yes law could also be called the You Better Be Pretty Damn Sure law. You Better Be Pretty Damn Sure she said yes. You Better

115. See BNS, § 63; *supra* note 111.

116. Shree, *supra* note 65, at 230.

117. BNS, § 63.

118. BNS, § 63; see *infra* Part III (explaining the effect of adopting an affirmative consent standard).

119. Accord Dhonchak, *supra* note 2 (demanding affirmative consent in India); Avanti Deshpande, *Adopting the Affirmative Consent Standard: India Needs to Move Toward Victim-Friendly Rape Adjudication*, JURIST NEWS (June 15, 2022, 9:00 AM), <https://www.jurist.org/commentary/2022/06/avanti-deshpande-affirmative-consent-india> (advocating affirmative consent will protect a woman in India's "sexual autonomy"); Kartik Hede, "Yes means Yes" – *Arguing for an Affirmative Standard of Consent*, PGCL MOOT CT. SOC'Y (Nov. 13, 2021), <https://www.mootcourtsocietypgcl.com/post/yes-means-yes-arguing-for-an-affirmative-standard-of-consent> (establishing affirmative consent will account for the "gross power imbalance" in India and serves as a "robust platform" against passivity being construed as consent).

120. Beatrice Diehl, *Affirmative Consent in Sexual Assault: Prosecutors' Duty*, 28 GEO. J. LEGAL ETHICS 503, 507 (2015) (supporting that an affirmative consent standard requires a man to ensure that he has the affirmative consent of the woman before engaging in the sexual activity).

121. Cf. Omprakash V. Nandimath, *Consent and Medical Treatment: The legal paradigm in India*, 25 INDIAN J. UROLOGY 343 (2009), <https://pmc.ncbi.nlm.nih.gov/articles/PMC2779959/pdf/IJU-25-343.pdf> (discussing how even well-intentioned medical practitioners must receive express or implied consent prior to treating an individual because a patient has the basic right to her "autonomy and self-determination").

Be Pretty Damn Sure she meant to say yes, and wasn't consenting because she was scared, or high, or too tired of fighting. If you're one half of a loving, committed relationship, then you probably can Be Pretty Damn Sure. If you're not, then you better fucking ask.¹²²

Supporters argue the affirmative consent standard acknowledges a woman's autonomy in sexual relations and addresses the inherent social inequalities between men and women.¹²³ The question here is not if India should adopt an affirmative consent standard, but it is how India should implement an affirmative consent standard so that the intended goals are met.

Adopting this standard in India will pose challenges. One challenge that is not applicable to India, however, is the broad critique that an affirmative consent standard fosters an intensely repressive and sex-negative moral order and cements a male-power/female-helplessness power structure.¹²⁴ India has traditionally been a sex-negative and highly patriarchal society entrenched with gender-based violence and gender inequality.¹²⁵ Under India's current consent interpretation, a woman in India has a choice but only to "adequately" reject or resist¹²⁶ since there is a presumption that a woman agrees to sexual activity "at all times for all acts."¹²⁷ It is the failure to convict those who perpetuate this assumption by committing rape that threatens the safety of women in India and exacerbates the male-dominance power structure, not adopting an affirmative consent standard.¹²⁸ The *Farooqui* and *Tejpal* cases demonstrate that rape analysis prioritizes the male perspective, which guides expectations for women behavior to the point that even a woman's explicit "No" may be deemed insufficient.¹²⁹ The affirmative consent framework would counter these results by targeting male entitlement and removing the "presumption of consent at all times for all acts."¹³⁰

122. Ezra Klein, "Yes Means Yes" is a Terrible Law, and I Completely Support it, VOX (Oct. 13, 2014, 10:30 AM), <https://www.vox.com/2014/10/13/6966847/yes-means-yes-is-a-terrible-bill-and-i-completely-support-it>.

123. See Dhonchak, *supra* note 2, at 55–57 (discussing how affirmative consent can address women in India's lack of "free choice" to engage in sexual activity because of gender-based power imbalances).

124. Halley, *supra* note 32, at 259.

125. See Himanshi Upadhyay & Sonal Upadhyay, *Rape Culture in India*, 6 INT'L J.L. MGMT. & HUMAN. 943 (2023) for a report explaining how the primary reasons of India's present rape culture are gender-based violence and patriarchal society; see Dhonchak, *supra* note 2 (providing examples of how India's patriarchal society generates its current rape culture).

126. See Narayan, *supra* note 50, at 181 (explaining the High Court evaluated "without her consent" from the accused's subjective vantage, effectively requiring the complainant to communicate non-consent sufficiently to negate his claimed belief).

127. Dhonchak, *supra* note 2, at 59.

128. See Dhonchak, *supra* note 2, at 40 (arguing without an affirmative standard a woman's experience is invalidated, and the responsibility of the assault improperly shifts from the perpetrator onto her). But see Aya Gruber, *Not Affirmative Consent*, 47 U. PAC. L. REV. 683, 692 (2016) (citing critics who argue that the affirmative consent standard radically reforms behavioral norms around sex by convicting and incarcerating those who "merely engage in ordinary practices").

129. *Farooqui*, CrI. A. 944 of 2016 at para. 78; see also *supra* Part II (discussing India's current legal standard for rape).

130. Dhonchak, *supra* note 2, at 59; see also Lois Pineau, 'Date Rape: A Feminist Analysis',

Other challenges, nonetheless, apply to India and should be addressed prior to adopting an affirmative consent standard. Consent can be understood in three ways: (1) as an internal mental state of agreement, (2) as an external act of expressing agreement regardless of internal feelings, or (3) as a combination of an internal agreement and external communication.¹³¹ Under an affirmative consent standard, the question remains whether a complainant's willingness is determined by her internal state of mind, her external expression, or both.¹³² Although the approaches are distinct, a trier of fact will almost always consider a complainant's words or actions when either determining her state of mind or evaluating the communication exchanged, or both.¹³³ Regardless of the approach chosen, whether the evidence is sufficient can also depend on the mental culpability the defendant must legally possess for criminal liability.¹³⁴ The defendant's conduct may become relevant depending on if he is required to *knowingly*, *recklessly*, or *negligently* engage in a sexual act without another person's consent.¹³⁵ Thus, adopting an affirmative consent standard requires answering two questions: (1) what constitutes evidence of internal or external consent¹³⁶ and (2) what level of mental culpability the defendant must have.¹³⁷

To support how India should adopt an affirmative consent framework, the following discussion will first examine three models of affirmative consent, each addressing (a) how to determine what counts as valid consent and (b) what level of

8 L. & PHIL. 217, 234 (1989) (“[I]f a man wants to be sure that he is not forcing himself on a woman, he has an obligation either to ensure that the encounter really is mutually enjoyable, or to know the reasons why she would want to continue the encounter in spite of her lack of enjoyment.”).

131. Gruber, *supra* note 128, at 686; *see also* Tom Dougherty, *Affirmative Consent and Due Diligence*, 46 PHIL. & PUB. AFF. 90, 91–95 (2018) (explaining the Mental and Behavioral View of interpreting consent and offering the Duty of Due Diligence as an alternative approach that considers the external communication of both parties).

132. Gruber, *supra* note 128, at 687.

133. Gruber, *supra* note 128, at 687–88.

134. *See* Eric Sandoval, *The Case for an Affirmative Consent Provision in Rape Law*, 94 N.D.L. REV. 455, 464–66 (2019) (revealing how a refusal to assess a defendant's *mens rea* places an inappropriate emphasis on the victim and her actions while refusing to analyze the defendant with a heightened level of scrutiny). *But see* Gruber, *supra* note 128, at 705–06 (arguing it is difficult to assess *mens rea* since a trier of fact could conclude that the defendant “reasonably believed” the complainant consented and that there was a “substantial risk” that the communication of consent was insufficient); Kulshreshtha, *supra* note 14, at 1448–89 (questioning whether knowledge or conscious *mens rea* can even be attributed to the men in India since these men traditionally do not consider the need to seek consent).

135. *Accord* Gruber, *supra* note 128, at fn. 34 (noting the Model Penal Code Draft 5 specified a *mens rea* of knowledge or subjective recklessness, in contrast to the jurisdictions that adopt one of negligence); Dougherty, *supra* note 131, at 94 (explaining how *knowingly* and *recklessly* are commonly accepted approaches to *mens rea* but there is more controversy over recognizing *negligence*).

136. *See* Gruber, *supra* note 128, at 687–90 (discussing the debate over what is sufficient for valid consent).

137. *See* Dougherty, *supra* note 131, at 94–95 (discussing the debate over whether knowingly, negligence, or recklessness are grounds of culpability when engaging in nonconsensual sex).

mental culpability the defendant must possess.¹³⁸ Each analysis will then conclude by arguing which aspects of the model India should adopt and which it should reject.

A. *A Defendant's Belief in Consent Must be Reasonable*

One approach to defining valid consent is to evaluate the circumstances known to the defendant through a “reasonable person” standard.¹³⁹ Under this approach, the defendant escapes liability only if the defendant believed he had consent and if that belief was reasonable under the circumstances.¹⁴⁰ This approach favors an external expression of consent because it requires the complainant to show an observable indication of consent, or the lack thereof.¹⁴¹ The following will model this approach through New Jersey law since New Jersey was an early adopter of affirmative consent and of this approach.¹⁴²

New Jersey law defines sexual assault as sexual penetration “without the affirmative and freely given permission of the victim.”¹⁴³ The New Jersey Supreme Court in defining consent as affirmative and freely given permission emphasized each person has the “right to decide who may touch [their] bodies, when, and under what circumstances.”¹⁴⁴ The prosecution maintains the burden to prove (a) that the defendant engaged in sexual penetration without permission and (b) that any belief of consent if alleged by the defendant was not reasonable.¹⁴⁵ The latter portion can be proven by either showing the defendant “did not actually believe” that affirmative permission had been given freely or that the “belief was unreasonable” under all the circumstances.¹⁴⁶

The surrounding circumstances include the complainant’s actions, statements, or evidence of whatever form that could support the defendant believed she had consented.¹⁴⁷ There is no requirement to show the existence of force, so sexual penetration without consent is unlawful even if the defendant only used the force

138. See Part III.A–C (evaluating approaches to the affirmative consent standard by examining consent laws in New Jersey, Tasmania, and Sweden).

139. Sandoval, *supra* note 134, at 470 (“In this policy, the University of Minnesota defines affirmative consent as freely and affirmatively communicated words or actions given by an informed individual that a sober reasonable under the circumstances would believe communicate a willingness to participate in the sexual contact”).

140. Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, fn. 32–33, 35 (2016).

141. See Dougherty, *supra* note 131, at 102 (explaining that the Behavioral View often requires consent to be public to provide the consent-receiver with access to the consent).

142. See Dana Difilippo, *N.J.’s top court strengthens consent standard in sex assault cases*, N.J. MONITOR (Sept. 28, 2021, 9:33 PM) <https://newjerseymonitor.com/2021/09/28/n-j-s-top-court-strengthens-consent-standard-in-sex-assault-cases>; N.J.S.A. 2C:14-2 Sexual Assault (noting that New Jersey in 2021 formally incorporated into statute an affirmative consent standard that was first recognized by the New Jersey Supreme Court in 1992).

143. *State ex rel. M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992).

144. *Id.* at 1278. “No one, neither spouse, nor a friend, nor an acquaintance, nor a stranger, has the right or the privilege to force sexual contact.” *Id.*

145. *Id.* at 1279.

146. *Id.*

147. *Id.* at 1277, 1279.

necessary for penetration.¹⁴⁸ Neither the complainant's subjective state of mind nor the reasonableness of her actions is relevant to the offense.¹⁴⁹ The complainant bears "no burden" to express her lack of consent, so she may not be questioned as to her state of mind or lack of resistance.¹⁵⁰ She may, however, be questioned about her behavior to assess whether the defendant's belief that she consented was reasonable.¹⁵¹

India should not model its affirmative consent standard after a "reasonableness" standard because reasonableness is malleable and excuses defendants who successfully establish there was ambiguity around the communication.¹⁵² Adopting this model of affirmative consent would do little to reform the standard set out in *Farooqui* because it defines consent solely by the complainant's conduct which would allow the defendant's subjective expectations about women in India to dictate the analysis.¹⁵³ A reasonableness model in India runs the risk of continuing to compare a complainant's communication to what is expected of her and minimizes her internal willingness or lack thereof.¹⁵⁴ Though India like New Jersey could refrain from requiring the complainant to express unwillingness or resistance, this is an insufficient safeguard.¹⁵⁵ A defendant would still be permitted to offer evidence of a complainant's lack of resistance or stereotypes of a woman's behavior to defend his perception that she consented which is exactly what India must reject.¹⁵⁶

B. A Defendant Should Take Reasonable Steps to Obtain Consent

A second approach to defining valid consent is to treat the communication of consent as a "shared obligation" and assess the presence of consent by the defendant and complainant's behavior.¹⁵⁷ Under this approach, the prosecution must show that

148. *State ex rel. M.T.S.*, 609 A.2d at 1277.

149. *Id.* at 1279.

150. *Id.*; see also *C.R. v. M.T.*, 259 A.3d 830, 841 (N.J. 2021) (explaining New Jersey Supreme Court's opinion that the Court in 2021 cannot and should not revert to a time where it was normal to "shame, blame, and prosecute victims").

151. *State ex rel. M.T.S.*, 609 A.2d at 1279.

152. See Tuerkheimer, *supra* note 140, at fn. 35 (explaining how the reasonable person standard is assessed in the context of the surrounding circumstances and the complainant's behavior).

153. See Narayan, *supra* note 50, at 181–82 (explaining how focusing on the defendant's subjective perspective of the complainant's behavior defeated her complaint that she did not consent).

154. See *supra* Part II.A (discussing the High Court's negative treatment of the complainant's "no" and action of pulling up her underwear).

155. *State ex rel. M.T.S.*, 609 A.2d at 1279.

156. Cf. Narayan, *supra* note 50, at 182 (quoting Carol Smart that "the law is always governed by the existing power structure . . . [and] [i]f the existing power structure is in favour of the male, then the female sexuality is also governed by the cultural values of the patriarchy.").

157. Helen Mary Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* 22–23 (2012) (Ph.D. Dissertation, University of Tasmania) (Google Scholar); see also Dougherty, *supra* note 131, at 101 ("If X needs Y's consent to perform action A, then X has a duty of due diligence owed to Y regarding X's performance of A. X avoids breaching this duty if and only if either (i) X refrains from performing A; [o]r (ii) X has adequately investigated that Y has decided that they are willing

(a) the complainant did not affirmatively communicate permission and, that if the defendant asserts a mistaken belief in consent, then (b) the defendant failed to take steps to obtain the complainant's consent.¹⁵⁸ The following will model this approach through Tasmanian law since Tasmania, an early-adopter of affirmative consent, employed the approach after reforming its consent laws in 2004.¹⁵⁹

Under Tasmania's law, rape is a "voluntary and intentional" act of sexual intercourse performed without another's consent.¹⁶⁰ The Tasmanian Criminal Code (Amendment) Consent Act 2004 defines consent as free agreement and provides a non-exhaustive list under Section 2A of when a person does not freely agree to an act.¹⁶¹ Notably, under Section 2A(2)(a), a person does not freely agree to an act if the person "does not say or do anything to communicate consent."¹⁶² Additionally, the legislature added Section 14A to the Code which recognizes a mistaken belief for whether the complainant consented but only if it is honest and reasonable.¹⁶³ A defendant's mistaken belief in consent is neither honest nor reasonable if the defendant "did not take reasonable steps, in the circumstances known to him . . . at the time of the offence, to ascertain that the complainant was consenting to the act."¹⁶⁴ Together, these provisions redirect the focus from evaluating the defendant's subjective interpretation of the complainant's behavior to an objective assessment of the defendant's actions.¹⁶⁵

The law aims to impose a "shared obligation" and standard of mutuality on parties engaging in sexual conduct so that they may respect each other's "sexual autonomy."¹⁶⁶ However, the Code's statutory language has been interpreted in ways that dilute that purpose. In one case, the defense argued that Section 2A does not require a positive communication of consent, even though the statute expressly states that "free agreement" is absent when the complainant "does not say or do anything to communicate consent."¹⁶⁷ The defense relied on Section 14A, arguing that a

for X to perform A.").

158. Cockburn, *supra* note 157, at 22–24.

159. Cockburn, *supra* note 157, at 5, 17 (revealing that Tasmania's reforms in rape law were amongst the "most progressive" in the common law world). Tasmania with an affirmative consent standard sought to protect women's sexual agency, affirming their right to choose when to engage in sex and with whom. Cockburn, *supra* note 157, at 24.

160. Cockburn, *supra* note 157, at 30–31.

161. Cockburn, *supra* note 157, at 18, 22. A person does not freely agree to an act if the person 1) does not say or do anything to communicate consent, 2) submits by force or reasonable fear of force, 3) by threat, 4) by unlawful detainment, 5) to another by nature or position of the accused, 6) by fraud, 7) by a reasonable mistake of the act's purpose or accused's identity, 8) by being asleep, unconscious, or affected by drugs, or 9) by being unable to understand the nature of the act. *Criminal Code* (Tas) s 2A(2)(a)–(i).

162. Cockburn, *supra* note 157, at 23; *Criminal Code* (Tas) s 2A(2)(a).

163. Cockburn, *supra* note 157, at 24, 30; *Criminal Code* (Tas) s 14A.

164. Cockburn, *supra* note 157, at 24; *Criminal Code* (Tas) s 14A(c).

165. Cockburn, *supra* note 157, at 20.

166. Cockburn, *supra* note 157, at 22–23; *see also* Cockburn, *supra* note 153, at 24 (explaining the provisions disallow a defendant's reliance on prejudicial assumptions about female sexuality to justify a mistaken belief in consent).

167. Cockburn, *supra* note 157, at 155–57 (discussing the operation of Section 2A(2)(a) during trial).

mistaken belief in consent can be based on evidence that falls short of a positive communication of consent since the defendant is only required to take “reasonable steps.”¹⁶⁸ The Crown as the trier of fact accepted the defense’s broader interpretation of Section 14A but did not endorse the view that Section 2A(2)(a) does not require affirmative communication of consent.¹⁶⁹ The Crown held that silence does not amount to free agreement but also held that verbal communication of consent is not required for free agreement.¹⁷⁰

India should look to Tasmania’s affirmative consent standard as a model for reform.¹⁷¹ Indian law assesses the phrase “without her consent” by looking at whether the complainant’s conduct, viewed through the defendant’s subjective lens, adequately communicated her unwillingness to participate.¹⁷² This approach places the burden on the complainant’s conduct and reinforces a pervasive male entitlement to sex.¹⁷³ By contrast, Tasmania requires an objective evaluation of the defendant’s actions in addition to evaluating the complainant’s communication of her *willingness*.¹⁷⁴ India should adopt a similar framework which enforces this “shared obligation” of consent.¹⁷⁵ Under this framework, the prosecution bears the burden of proving (a) the complainant did not affirmatively communicate her permission and, if the defendant asserts a mistaken belief in consent defense, then (b) the defendant failed to take reasonable steps to obtain that consent.¹⁷⁶

Indian law defines consent as 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.”¹⁷⁷ Interpreting this definition in light of Tasmania’s Sections 2A(2)(a) and 14(A) would mean two things. First, a complainant does not unequivocally and willingly participate if she “does not say or do anything to communicate consent.”¹⁷⁸ Second, a mistaken belief defense in consent is reasonable only if the defendant took reasonable steps to obtain consent.¹⁷⁹ While this latter portion deviates from Section 14(A)’s language, such an interpretation could mitigate the shortcomings of Section 14(A) in Tasmania and better promote a standard of mutuality between parties in India.¹⁸⁰

168. Cockburn, *supra* note 157, at 156.

169. Cockburn, *supra* note 157, at 157.

170. Cockburn, *supra* note 157, at 157.

171. *Criminal Code* (Tas) s 2A(2)(a) and 14A(c).

172. See Narayan, *supra* note 50, at 181 (explaining the court evaluated “without her consent” from the accused’s subjective vantage, effectively requiring the complainant to communicate non-consent sufficiently to negate his claimed belief).

173. Dhonchak, *supra* note 2, at 59.

174. Cockburn, *supra* note 157, at 20, 22–24.

175. See Cockburn, *supra* note 157, at 22–23, 24 (explaining the provisions disallow a defendant’s reliance on prejudicial assumptions about female sexuality to justify a mistaken belief in consent).

176. Cockburn, *supra* note 157, at 23–24; *Criminal Code* (Tas) s 2A(2)(a) and 14A(c).

177. BNS, § 63.

178. *Criminal Code* (Tas) s 2A(2)(a).

179. See Kulshreshtha, *supra* note 14, at 1448 (arguing a defendant should not be afforded a mistake of fact defense if the defense fails to establish the defendant took steps to secure consent).

180. See *Criminal Code* (Tas) s 14A; Cockburn, *supra* note 157, at 141–47 (providing

Recognizing this kind of mistaken belief defense would also clarify the *mens rea* requirement under Indian law. Under India's current framework, the offense of rape requires at least a general intent to engage in sexual activity knowing that the complainant does not consent when a prior relationship is involved.¹⁸¹ By adopting this kind of defense, a defendant cannot escape liability solely by arguing the complainant's conduct was ambiguous, but he must also show that he took reasonable steps to obtain the complainant's permission.¹⁸² This shift reinforces the principle that consent is a shared obligation that must also be actively and positively communicated.¹⁸³

C. *A Defendant Must Negligently Perform Sexual Activity with Another*

A third approach to implementing an affirmative consent standard is recognizing a lesser mental culpability for committing rape such as *negligence*.¹⁸⁴ Under this approach, prosecution must show that, with respect to consent, the defendant (a) should have recognized a substantial, unjustifiable risk that the complainant did not consent, and (b) his failure to perceive that risk was a gross deviation from the standard of care that a reasonable person in the same circumstances would observe.¹⁸⁵ Sweden recognizes negligent rape.¹⁸⁶ This approach will be factually modeled through Swedish law because Sweden is also considered most aligned to the affirmative consent standard,¹⁸⁷ given its laws' focus on "clearer communication" and "greater accountability."¹⁸⁸

examples of where the Crown failed to emphasize the mutual obligation to communicate where prosecution reverted to establishing absence of consent rather than relying on a positive communication standard); see also Cockburn, *supra* note 157, at 154–58 ("The Crown position was that silence does not amount to free agreement but that equally, the provision does not require verbal communication of consent[.]").

181. See *supra* Part II (suggesting India's legal standard requires a mental element for rape despite the lack of clarity).

182. Cockburn, *supra* note 157, at 22–24.

183. Cockburn, *supra* note 157, at 80 (implementing this standard precludes arguments that submission equates with consent).

184. See Dougherty, *supra* note 131, at 94–95 (explaining the debate over whether liability should attach to negligent conduct and, if so, which form of negligence is most appropriate). Cf. Noah Hilgert, *The Burden of Consent: Due Process and the Emerging Adoption of the Affirmative Consent Standard in Sexual Assault Laws*, 58 ARIZ. L. REV. 867, 892–94 (2016) (limiting criminal liability to when a person engages in sexual activity and knows, or is reckless, about whether the other party consented undermines affirmative consent's core value of individual autonomy by focusing on the defendant's subjecting understanding).

185. *Id.* at 894 (citing the Model Penal Code's definition of negligence in footnote 167).

186. Dearbhla Crosse, *Anything Less than Yes is Rape: The Campaign for a Consent-Based Rape Law in Sweden*, INT'L PLANNED PARENTHOOD FED'N (Nov. 24, 2022), <https://europe.ippf.org/stories/anything-less-yes-rape-campaign-consent-based-rape-law-sweden>. In 2018, Sweden reformed its rape laws after mass protests erupted in 2013 over the acquittal of three men alleged to have raped a 15-year-old girl with a glass bottle. *Id.*

187. WESNET, *Affirmative Consent*, The Women's Services Network, <https://wesnet.org.au/wp-content/uploads/sites/3/2023/02/Affirmative-consent-policy-position-paper.pdf> (last visited Jan 13, 2026).

188. *Sweden's Consent Law: A New Standard for Sexual Offences*, SWEDISH GENDER EQUAL. AGENCY (Nov. 29, 2024), <https://jamstalldhetsmyndigheten.se/en/gender-equality-in->

Section 1 of the Swedish Criminal Code defines rape as when a person performs sexual intercourse or a comparable sexual act with a person who is not participating voluntarily.¹⁸⁹ Voluntariness is understood as an active voluntary participation that is communicated by either words, behavior, or some other way.¹⁹⁰ Negligent rape, in comparison, is when a person commits an act referred to in Section 1 and is “grossly negligent” about whether the other person is not participating voluntarily.¹⁹¹ If, under the circumstances, the sexual act itself is less serious, then the person is not held responsible.¹⁹² The Supreme Court of Sweden interpreted “grossly negligent” in its decision on July 11, 2019.¹⁹³ The facts involve the defendant spending the night at the complainant’s home where they shared a bed in which the complainant was only wearing underwear.¹⁹⁴ The parties previously communicated via social media during which the complainant messaged the defendant that she did not want to have sex with him.¹⁹⁵ Even so, the defendant inserted his fingers into the complainant’s vagina during the night.¹⁹⁶ The defendant was unsure whether she wanted to have sex with him or whether she was awake and the defendant noticed the complainant was “passive” throughout the act.¹⁹⁷

The Supreme Court on appeal addressed whether the defendant should be convicted of rape or negligent rape.¹⁹⁸ The Court found the defendant did not have the active intent to commit rape, meaning an intent of indifference to whether the victim was participating freely of her own free will.¹⁹⁹ The Court in reference to consent for negligent rape proceeded to evaluate two questions: (1) whether the complainant participated freely and (2) whether the defendant knew or should have known the act was not consensual.²⁰⁰ The facts supported the complainant did not

sweden/sweden-s-consent-law.

189. *Criminalization and Prosecution of Rape in Sweden*, AMNESTY INT’L, <https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR4224262020ENGLISH.pdf>.

190. Lisa Wallin et al., *Capricious Credibility – Legal Assessments of Voluntariness in Swedish Negligent Rape Judgements*, 22 NORDIC J. CRIMINOLOGY 3, 4 (2021). “However, a person is never seen as participating voluntarily if: (1) participation is a result of assault, violence or threat, (2) the defendant improperly exploits that a person is in a ‘particularly vulnerable situation’ or (3) induces a person to participate by seriously abusing her/his position of dependence on the perpetrator.” *Id.*

191. *Criminalization and Prosecution of Rape in Sweden*, AMNESTY INT’L, <https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR4224262020ENGLISH.pdf>. (citing Section 1a).

192. *Id.*

193. Elin Hofverberg, *Sweden: Supreme Court Defines Negligent Rape*, LIBR. OF CONG.(Sept. 17, 2019), <https://www.loc.gov/item/global-legal-monitor/2019-07-17/sweden-supreme-court-defines-negligent-rape>.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. Elin Hofverberg, *Sweden: Supreme Court Defines Negligent Rape*, LIBR. OF CONG.(Sept. 17, 2019), <https://www.loc.gov/item/global-legal-monitor/2019-07-17/sweden-supreme-court-defines-negligent-rape>.

200. *Id.*

consent since (a) she was passive throughout the sexual acts, (b) she previously messaged the defendant that she did not want to have sex, and (c) she later informed two persons close to her about the incident.²⁰¹ The Court explained that agreeing to sleep in the same bed only in underwear did not also mean agreeing to participate in sexual acts.²⁰²

When evaluating the defendant's mental culpability, the Court differentiated between deliberate negligence and subconscious negligence.²⁰³ The Court found the defendant had the former because he understood there was a risk the complainant was not participating freely but was indifferent to the risk.²⁰⁴ The Court reasoned the complainant's previous online message gave the defendant a reason to believe she was not interested in sex.²⁰⁵ Though parties can change their mind about their willingness to participate, the fact the defendant was unsure of the complainant's state of mind suggested he understood there was a risk.²⁰⁶ This was further supported by the fact that the defendant himself questioned whether the complainant was awake and noticed the complainant pulled away from him during the act.²⁰⁷

India should look to Sweden's affirmative consent framework as a model for reform. If India adopts a negligent rape offense, the law will punish a defendant when the facts show that (a) the defendant understood a risk existed to whether the complainant unequivocally and willingly agreed to participate, and (b) the defendant ignored that risk.²⁰⁸ The defendant does not need to know whether the complainant consented, but he only needs to be aware that a risk of non-consent existed.²⁰⁹ In *Farooqui*, the complainant said, "no" and pulled up her underwear multiple times, but the court still found those actions insufficient to sustain a rape conviction.²¹⁰ Under a negligent rape framework, the defendant in *Farooqui* arguably could have been convicted since he continued to perform oral sex when he should have recognized from the complainant's conduct that there was a risk that she was not consenting.²¹¹

This framework rejects the notion that rape results from a woman's failure to adequately reject sexual activity, and it demands men be responsible for their own

201. *Id.*

202. *Id.* Passivity can be a sign of voluntary participation, but the "window for finding that passivity alone constitutes consent is limited." *Id.*

203. *Id.* (defining subconscious negligence as when the actor should have understood there was a risk that the other person was not participating freely and failed to inquire about the risk); see Wallin, *supra* note 190, at 4 (suggesting the minimal negligent rape convictions reveal the unclear definition of gross negligence versus the defined reckless intent required for ordinary rape).

204. Elin Hofverberg, *Sweden: Supreme Court Defines Negligent Rape*, LIBR. OF CONG. (Sept. 17, 2019), <https://www.loc.gov/item/global-legal-monitor/2019-07-17/sweden-supreme-court-defines-negligent-rape>.

205. *Id.*

206. *Id.*

207. *Id.*

208. See BNS, § 63 (defining consent as an unequivocal and voluntary communication of willingness).

209. Wallin, *supra* note 190, at 4.

210. *Farooqui*, CrI. A. 944 of 2016 at paras. 2, 17, 102.

211. *Id.*

behavior.²¹² It creates an incentive for men to inquire whether a woman is willing to participate. A defendant becomes vulnerable to punishment if a court finds that he should have questioned the existence of consent, failed to do so, and continued the sexual act.²¹³ By shifting the focus from proving that a woman did not consent to showing that the defendant understood there was a risk she had not consented, the prosecution's burden is reduced which may raise the likelihood of convictions.²¹⁴ Consequently, this may incentivize men to seek consent in ambiguous circumstances to avoid criminal liability.

D. India Should Adopt an Affirmative Consent Standard

The affirmative consent standard is gaining popularity and India should not fall behind.²¹⁵ Adopting an affirmative consent standard requires answering two questions: (1) what constitutes evidence of internal or external consent²¹⁶ and (2) what level of mental culpability the defendant must have.²¹⁷ Critics of the affirmative consent standard argue that the proposals intended to answer the two questions can produce unjust results when a woman's internal willingness conflicts with the evidence of her external communication.²¹⁸ Consider a situation in which a complainant did not want to engage, or felt compelled to engage, but the defendant maintains that the surrounding circumstances were, at best, ambiguous and that he reasonably believed she had consented.²¹⁹ Some argue that, in such cases, defendants

212. Cf. Wallin, *supra* note 190, at 4 (explaining Sweden adopts the view that a body is never available unless its owner expresses her will to engage in sexual interaction); Dhonchak, *supra* note 2, at 40 (arguing without an affirmative standard a woman's experience is invalidated and the responsibility of the assault improperly shifts from the perpetrator onto her).

213. Elin Hofverberg, *Sweden: Supreme Court Defines Negligent Rape*, LIBR. OF CONG. (Sept. 17, 2019), <https://www.loc.gov/item/global-legal-monitor/2019-07-17/sweden-supreme-court-defines-negligent-rape>

214. *But see* Stina Holmberg, *Application and Consequences of the Consent Law* (Apr. 8, 2025), <https://bra.se/english/publications/archive/2025-04-08-application-and-consequences-of-the-consent-law> (explaining that negligent rape is not the prosecutor's preferred charge though all 26 negligent rape cases to date have resulted in convictions).

215. Kimberley Bond, *Campaigners Want to Change Consent Law to Require a Clear 'Yes' to Sex*, COSMOPOLITAN (Mar. 4, 2024), <https://www.cosmopolitan.com/uk/reports/a60073018/affirmative-consent-campaign> (listing Sweden, Portugal, Iceland, Spain, Denmark, Canada, and some states in America and Australia as adopters of affirmative consent).

216. *See* Gruber, *supra* note 128, at 687–90 (discussing the debate over what is sufficient for valid consent).

217. Cf. Dougherty, *supra* note 131, at 94–95 (discussing the debate over whether knowingly, negligence, or recklessness are grounds of culpability when engaging in nonconsensual sex).

218. *See* Halley, *supra* note 32, at 264–70 (examining scenarios where the complainant communicated ambiguously or acted ambivalently through the lens of California's affirmative consent law).

219. *See* Halley, *supra* note 32, at 265–70 (exemplifying the risk to defendants when a woman internally agrees to something because they perceive it as better than the realistic alternatives but still does not positively and unambiguously want it); cf. Gruber, *supra* note 128, at 286 (referencing Catherine MacKinnon's view that women rarely choose sex freely because of the oppressive patriarchy).

are relying on common “scripts” for sexual behavior, yet they still risk conviction.²²⁰ Critics then contend that proposals to resolve cases like this, such as requiring a party to explicitly seek and receive consent for a sexual act, over-police sexual behavior and provide an insufficient solution, since such explicit communication of consent is not common.²²¹

Despite these concerns, India should, at a minimum, adopt an affirmative consent standard that (a) assesses whether the complainant communicated her willingness to engage and (b) allows for a mistaken belief in consent defense only if the defendant took reasonable steps to obtain that consent.²²² Either as an alternative or in addition, India should also recognize criminal liability for a defendant who performs a sexual act with a woman with *gross negligence* as to ascertaining her consent.²²³ Although sentencing is beyond the scope of this Article, it is worth acknowledging that adopting an affirmative consent framework would require a review of sentencing guidelines to ensure that punishments remain proportionate.²²⁴

This framework will challenge ordinary scripts for sexual behavior, but that challenge is necessary when ordinary scripts infringe on a woman’s bodily integrity, dignity, and safety.²²⁵ While rape *can* involve force and resistance, the dividing line between rape and sex *is* choice.²²⁶ Under an affirmative consent framework, prosecution maintains the burden to prove beyond a reasonable doubt that the

220. Gruber, *supra* note 128, at 692.

221. See e.g., Gruber, *supra* note 128, at 690–92 (explaining how consent to sex is often expressed through a fluid series of actions and understood through ambiguous statements and context).

222. See *infra* Part III.B for a discussion on the shared obligation approach to affirmative consent; see also Dhonchak, *supra* note 2, at 62 (advocating Indian law to strengthen the “unequivocal and voluntary agreement” standard by requiring proof of the defendant taking steps to obtain the complainant’s consent).

223. See *infra* Part III.C for an application of negligent rape under the affirmative consent framework.

224. See Upadhyay & Upadhyay, *supra* note 125, at 954–55 (noting studies that show severity of punishment is not the primary factor that prevents people from committing crime, but rather the likelihood of getting caught and certainty of punishment); Samiksha Kandya, *Sentencing in Rape Cases in India: An Analysis*, 26 SUPREMO AMICUS 411 (2021) (advocating for more research on rape sentencing to address unwarranted disparity in sentencing); cf. *Criminalization and Prosecution of Rape in Sweden*, AMNESTY INT’L, <https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR4224262020ENGLISH.pdf>. (showing Sweden’s sentencing for negligent rape is at most four years).

225. Kulshreshtha, *supra* note 14, at 1445 (“Articulating an affirmative standard of consent through judicial discourse challenges a dominant (hetero)sexual script built upon forceful seduction.”); see generally, Dhonchak, *supra* note 2 (documenting how sexual relations informed by regressive and misogynistic aspects of Indian culture harm women); Bhat, 2021 SCR at para. 20–25 (explaining the harmful effect of sexual violence on women when aggravated by social and cultural norms).

226. But see Gruber, *supra* note 128 at 686 (suggesting structural inequality renders choice as an “illusion” and as a tool that “preserves hierarchy”). Catharine MacKinnon argues women “rarely” have sex freely because of the oppressive patriarchy. Gruber, *supra* note 128, at 686. MacKinnon further urges a woman’s consent is “descriptively and morally meaningless” given a woman almost always consents under “pervasively coercive conditions of male domination.” Halley, *supra* note 32, at 259.

defendant engaged in sexual activity without the complainant's voluntary indication, explicit or implicit, that she had affirmatively agreed with the sexual activity.²²⁷ Neither the lack of protest, lack of resistance, or silence alone would mean "yes," and nor would the existence of a prior sexual or intimate relationship alone mean a "yes."²²⁸ Some scholars worry that an affirmative consent standard could impose an unreasonable risk on defendants in ambiguous situations,²²⁹ but this concern falls disproportionately on defendants rather than victims and overlooks procedural safeguards that already protect defendants.²³⁰ Adopting this framework will not remove the "he-said, she-said" conundrum common in rape cases, but it would encourage recognizing a woman's autonomy when examining sexual exchanges.²³¹

IV. IMPLEMENTING AN AFFIRMATIVE CONSENT STANDARD EFFECTIVELY

A final but important critique against implementing an affirmative consent standard in India is that the standard will "remain toothless" unless it is preceded by a mass cultural shift.²³² The argument goes that an affirmative consent standard without a cultural shift will continue to result in faulty consent applications that consider prejudicial stereotypes about women and consent.²³³ While the risk is real, as evidenced by the current consent interpretation, Indian law cannot wait for a mass cultural shift. If the law waits for society to change first, then the law ignores the realities of rape in India today and fails to provide legal justification to dismiss those actively pleading for change.²³⁴ For an affirmative consent standard to be effective, Indian law should address the parts of the culture perpetuating rape against women to mitigate the risk to affirmative consent.²³⁵ The following discussion will draw on normative policies to argue for India to implement comprehensive sex education curricula and gender-informed legal education and training.²³⁶ It will also identify sources that India can use as guidance for these initiatives, highlighting how they support affirmative-consent policies.²³⁷

227. Diehl, *supra* note 120, at 448–49.

228. Diehl, *supra* note 120, at 507.

229. *Supra* note 219.

230. *Cf.* Diehl, *supra* note 120 (explaining how performing a prosecutor's duty under an affirmative consent standard can benefit victims and defendants).

231. Shree, *supra* note 65, at 230.

232. Kulshreshtha, *supra* note 14, at 1450.

233. *See* Bhat, 2021 SCR at para. 22 (quoting Joanne Conaghan ("[R]emoving the "doctrinal debris of a legally instituted gendered hierarchical order does not necessarily get rid of deeply ingrained social and cultural attitudes which law has long endorsed and which continue to infuse the criminal justice process, albeit in more covert, less accessible forms.")).

234. *See supra* note 119 (demanding India adopt an affirmative consent standard).

235. *Cf.* Gruber, *supra* note 128, at 691–92 (challenging the belief that criminal law is a justifiable means to reform behavioral norms for sex if the law just gives notice of the proscription).

236. *See infra* Part IV.A (arguing for sex education in India); *see infra* Part IV.B (encouraging continued gender-informed training and education for judges).

237. *See infra* Part IV.A (highlighting UNESCO's 2018 Technical Guidance for sex education); *see infra* Part IV.B (highlighting India's former Supreme Court Justice's 2021 mandate for gender-informed training and education).

A. *India Should Develop Comprehensive Sex Education Curricula*

Indian culture tends to be conservative regarding sexual activity and discourages openly discussing or teaching about sexual activity.²³⁸ Many parents and leaders in India oppose sex education in schools because they presume that sex education is “immoral”²³⁹ and fear that it would prematurely expose adolescents to sexual behavior.²⁴⁰ Consequently, adolescents learn information about sex from other peers, media, and the internet which can convey inaccurate or harmful information.²⁴¹ Despite the concerns, sex education does not increase sexual initiation or risk-taking,²⁴² but it delays sexual engagement and encourages safer practices.²⁴³ Sex education also does not prematurely expose adolescents to sexual activity since, for example, women in India are already entering marriages, having pregnancies, and at risk of sexual violence from a young age.²⁴⁴ Opposers to sex

238. See generally Niharika Tripathi & T.V. Sekher, *Youth in India Ready for Sex Education? Emerging Evidence from National Surveys*, 8 PLOS ONE 1,1 (2013), <https://doi.org/10.1371/JOURNAL.PONE.0071584>; Mithi Shukla et al., *Prevailing Need for Sex Education in the Indian Education Setting*, 1 INT'L J. SCI. ADVANCES 17, 18 (2021), <https://doi.org/10.51542/ijscia.spi1.04>; Nelufer Nazrul, *Quantitative Approaches to Sex Education in South Asia: The Cases of Bangladesh and India*, 2 INT'L SOC. SCI. EDUC. J. 46, 47 (2024), <https://doi.org/10.61424/ISSEJ.V2I1.71> (studying the need for, reaction to, and implementation of sex education in India in the face of cultural hinderances).

239. See David Whiteley & Sanjana Ramachandran, *India's Rape Culture: Can Education Stop Sexual Violence?*, THRIVE (Mar. 8, 2022), <https://thrivabilitymatters.org/indias-rape-culture-can-education-stop-sexual-violence> (noting people in India believe sex education is considered a “western” practice that will “corrupt” the youth and that this opposition to sex education led to the ban of the Adolescent Education Program in at least 12 states).

240. Jithin T. Joseph, *Comprehensive Sexuality Education in the Indian Context: Challenges and Opportunities*, VIEWPOINT, Dec. 22, 2022, at 295. But see Tripathi & Sekher, *supra* note 238, at 3 (highlighting sexual activity persists in India even without sex education and arguing how misinformation and lack of information on sexual activity has contributed to India's HIV and Aids pandemic).

241. See Whiteley & Ramachandran, *supra* note 239 (explaining the lack of education pushes young adults to learn from unreliable sources that promote “regressive, gender biased, and heteronormative” beliefs about sex, violence, and gender equality); see also Shruthi Basavaraj & Indrani Chakraverty, *Comprehensive Sexuality Education: The Way Forward*, ARROW, (Feb. 2017), at 3 (revealing 43% of students who underwent a curriculum limited to non-sexual relationships believed spousal abuse was circumstantially justifiable).

242. United Nations Educ., Soc., & Cult. Org [UNESCO], *International Technical Guidance on Sexuality Education: An Evidence-Informed Approach* (2017), <https://unesdoc.unesco.org/ark:/48223/pf0000260840>.

243. Joseph, *supra* note 240, at 294; see Eun Joo Kim et al., *A Meta-Analysis of the Effects of Comprehensive Sexuality Education Programs on Children and Adolescents*, 11 HEALTHCARE 1, 14 (2023), <https://doi.org/10.3390/healthcare11182511> (concluding CSE positively affects sexual health, knowledge, and attitudes though effectiveness depends on method and content); Ana Rodríguez-García et al., *Effectiveness of Comprehensive Sexuality Education to Reduce Risk Sexual Behaviors Among Adolescents: A Systematic Review*, 6 SEXES 1, 2, 9–11 (2025), <https://doi.org/10.3390/sexes6010006> (supporting CSE does not increase sexual activity, behaviors, or the prevalence of STIs but promotes better safety and healthier sexual behaviors); see also *supra* note 238 (supporting sex education would benefit India).

244. See Basavaraj & Chakraverty, *supra* note 241, at 2 (citing that 47% of girls are married below the legal age of 18 and 37.2% of married women have experienced spousal violence); Joseph, *supra* note 240, at 293 (explaining that one third of girls married between the ages of 15 and 24

education claim to be protecting young minds yet they unabashedly perpetuate norms that encourage male entitlement and female subservience.²⁴⁵ For example, while young women are taught to monitor their behavior around all men, young men are given privileges and freedom to behave as they wish.²⁴⁶

Despite this cultural reluctance to sex education, there are established efforts in India to enforce and expand sex education in schools.²⁴⁷ Majority of Indian states that have sex education or “life skills” programs, however, teach adolescents about sexual health, contraception, and prevention of sexually transmitted diseases.²⁴⁸ There are scarce examples of sex education curricula in India that teach adolescents about positive relationships, gender discrimination, and violence in relationships.²⁴⁹ To address this gap, India should adopt a nationally mandated Comprehensive Sexuality Education (CSE) curriculum modeled on UNESCO’s 2018 International Technical Guidance.²⁵⁰ Notably, the Population Foundation of India, which is a national non-profit organization that performed an expanded review of a CSE

given birth to a child before turning 19-years-old).

245. See Bhat, 2021 SCR at para. 21 (“The causes and factors of violence against women include entrenched unequal power equations between men and women that foster violence and its acceptability, aggravated by cultural and social norms, economic dependence, poverty and alcohol consumption, etc.”); see generally Upadhyay & Upadhyay, *supra* note 125 (studying rape culture in India and highlighting how gender inequality, patriarchal views, and improper education contributes to the prevalence of rape); Dhonchak, *supra* note 2, at 32, 42–55 (contextualizing consent within India’s culture and explaining the culture’s negative influence on consent interpretation).

246. See Madhumita Pandey, *How to tackle India’s sexual violence epidemic – it starts with sex education*, THE CONVERSATION (May, 15, 2019 8:05 AM), <https://theconversation.com/how-to-tackle-indias-sexual-violence-epidemic-it-starts-with-sex-education-114381> (describing how most convicted rapists in Delhi did not understand what consent meant and had a sense of entitlement over the victim); Whiteley & Ramachandran, *supra* note 239 (explaining how boys in India internalize they are “naturally violent” and women invite rape by their own behavior). See also Pandey, *supra* note 246 (explaining how women endure more restrictions upon reaching adolescence and risk being withdrawn from school); Whiteley & Ramachandran, *supra* note 239 (stating the fear of violence and “staying out after dark” has contributed to lower female workforce participation).

247. See Population Foundation of India, *Comprehensive Sexuality Education in India* 1, 13–14 (Apr. 2022), <https://www.populationfoundation.in/wp-content/uploads/2022/07/A-review-of-government-and-civil-society-led-CSE-curricula-and-strategies-in-India-1.pdf> (noting the development of India’s Adolescence Education Program, School Health Program, and Rashtriya Kishor Swasthya Karyakram); see also Pandey, *supra* note 246 (advocating for a comprehensive sex education program that includes topics such as sexual intimacy, consent, gender roles, gender identity); Upadhyay & Upadhyay, *supra* note 125, at 946–47, 953, 959 (calling to challenge existing beliefs that sexual education promotes sexual activity to create curriculum that teaches about healthy relationships, consent, and gender equality).

248. Joseph, *supra* note 240, at 294–95.

249. Joseph, *supra* note 240, at 295 (stating 5,002 schools in Punjab, Orissa, Karnataka, Maharashtra, and Madhya Pradesh poorly implemented a curriculum covering violence, positive relationships, and gender-based discrimination).

250. Cf. UNESCO, *supra* note 242, at 4; *supra* note 183 (highlighting that Sweden, who is considered most aligned to the affirmative consent standard, funded support for UNESCO’s 2018 Guidance).

program in India, also recommended relying on UNESCO's Guidance.²⁵¹

Adopting UNESCO's Guidance could better equip adolescents with the knowledge, attitudes, and values needed to communicate and obtain consent.²⁵² While a comprehensive evaluation of curricula design, implementation, and monitoring that addresses cultural demands exceeds the scope of this Article, the following supports that adopting a UNESCO-aligned CSE curriculum is a necessary first step toward creating an active-consent culture in India.²⁵³ A CSE is a curriculum-based process of teaching aimed at:

[Equipping] children and young people with knowledge, skills, attitudes and values that will empower them to: realize their health, well-being and dignity; develop respectful social and sexual relationships; consider how their choices affect their own well-being and that of others; and, understand and ensure the protection of their rights throughout their lives.²⁵⁴

Under a UNESCO-aligned CSE curriculum, adolescents in India can learn about consent, communication, and bodily integrity in a manner that aligns with the goals of an affirmative consent standard.²⁵⁵ Teaching consent specifically would involve expanding a student's knowledge, attitudes, and skills about the body, the rights to privacy and bodily integrity, and the communication of boundaries.²⁵⁶ By the age of fifteen, students would be taught how to give, refuse, and recognize consent in a context that acknowledges how "power dynamics" can impact one's ability to communicate consent.²⁵⁷ These teachings would need "contextual examples" alongside clear definitions so consent becomes a behavioral practice rather than a mere concept.²⁵⁸ Simultaneously, young men may need special or separate curriculum to teach them, for example, how to cope with rejection since teaching affirmative consent in India also would mean challenging the societal entitlement young men are taught culturally.²⁵⁹

251. See Population Foundation of India, *supra* note 247, at 10 ("Develop a curriculum framework based on the UNESCO ITGSE 2018 Guidelines and include key learning outcomes that incorporate essential life-skills for each key concept.").

252. *Comprehensive Sexuality Education*, WORLD HEALTH ORGANIZATION [WHO] (May 18, 2023), <https://www.who.int/news-room/questions-and-answers/item/comprehensive-sexuality-education>.

253. See generally Nazrul, *supra* note 238 (discussing the gaps and challenges in implementing CSE curricula in India); Rodríguez-García, *supra* note 243 (reviewing 25 studies to evaluate the effectiveness of CSE among adolescents).

254. Population Foundation of India, *supra* note 247, at 12.

255. See Population Foundation of India, *supra* note 247 (explaining key recommendations for a national CSE based on an assessment of existing programs in India).

256. See UNESCO, *supra* note 242, at 56 (explaining the learning objectives for teaching consent which become more complex with age).

257. UNESCO, *supra* note 242, at 56.

258. Population Foundation of India, *supra* note 247, at 39–40.

259. See Population Foundation of India, *supra* note 247, at 31 (explaining boys struggle with rejection and often react with aggression to maintain their image as a "real man"); Population Foundation of India, *supra* note 247, at 69 (finding different strategies for teaching consent may better meet goals for boys and girls).