

**Berkeley Center on Comparative Equality**  
**& Anti-Discrimination Law**

**POLICY PAPER ON AFFIRMATIVE CONSENT**

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## EXECUTIVE SUMMARY

This Policy Paper<sup>1</sup> delves into the evolving landscape of sexual assault laws across the world. The Paper particularly focuses on the emerging concept of “affirmative consent” and its significance in the present day. The definitions of sexual offence laws based on the three traditional predominant models (i.e., coercion-based, resistance-based, consent-based) reinforce gender stereotypes and unfairly shift the focus of the trial on the conduct of the victim.<sup>2</sup> This Paper argues that the adoption of the definition specifying an affirmative, voluntary, and unambiguous communication of consent offers a more realistic framework for evaluating sexual encounters.

The current penal laws against sexual offences in the United Kingdom follow an implied consent model where the perpetrator should determine whether he *“reasonably believed”* that consent was given based on *“all relevant circumstances”*, including the steps taken by him to ascertain the same. These abstract, imprecise terms and factors focus on whether the victim “implied” any resistance or consent rather than engaging in voluntary approval. Furthermore, the need to investigate “relevant circumstances” gives the jury wide discretion to look into the complainant’s behavior, the relationship between parties, gender roles, bias, prejudices, norms, and other wider social attitudes in a judicial test. To address this issue, the Paper comparatively analyzes various affirmative consent models in the United States (U.S.), United Kingdom (UK), Canada, Australia, and Europe to

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<sup>1</sup> This policy paper was produced by four LL.M. Candidates at University of California, Berkeley School of Law (Sriraksha V Srivatsav, Mona Zhuo, Ecenur Uyanik, Arzoo Karki) working under the Berkeley Center on Comparative Equality and Anti-Discrimination Law, upon being commissioned by the NGO Right to Equality. This Paper springboards on and builds upon the paper drafted by researchers from Oxford Pro Bono Publico at the University of Oxford, also commissioned by the NGO Right to Equality. You can access the paper here: Oxford Pro Bono Publico, *The Introduction of ‘Affirmative Consent’ in the Law of Sexual Offences in Commonwealth Jurisdictions, Third Draft (June 1, 2023)*.

<sup>2</sup> The terminology of “victim” and “survivor” throughout this Paper interchanges in accordance with how the terms appear in the law or commentary mentioned in its respective parts. We are conscious of the on-going debate as to the correct terminology and made the decision to use the terms based on context.

decide on a workable affirmative consent model that common law countries may adopt to better protect the victims and create an overall safer society.

The following recommendations are made to foster a culture of a clear “yes” in sexual activities:

- Sexual offences laws in the UK should move away from the current implied consent model to an affirmative consent one, which focuses on the presence of an *explicit, voluntary, and informed agreement by both parties about the particular sexual act involved*. This will shift the narrative from *what is not objected* to explicitly acknowledging *what is voluntarily agreed upon*.
- Sexual offence laws in UK must *include an affirmative consent definition* that is “voluntary agreement with knowledge of particular sexual acts involved between the parties regardless of the nature of relationship, and that lack of submission or resistance do not constitute consent.”
- Apart from including an affirmative consent definition, the UK must ensure that *all degrees of statutory sexual offences in criminal laws define the offences only through “consent.”* A pure affirmative consent model must be adopted, and other separate aggravating factors such as force, duress, resistance, lack of submission must NOT find place while defining the offences.
- A shift to an affirmative consent model should be *accompanied by necessary evaluation and oversight mechanisms to ensure its proper and intended implementation*, and to monitor its impacts on the judiciary and law enforcement procedures. The move to an affirmative consent model should be in line with the general principles of criminal law.

- *Appropriate measures must be taken to protect the identity of the victim and prevent secondary victimization* by ensuring that sexual offence cases are handled more efficiently through the law enforcement system and with respect to privacy.

## **METHODOLOGY**

To meet the objective of this Paper, the researchers were engaged in a comparative qualitative analysis of primary and secondary sources. The primary sources were statutes and case laws from different jurisdictions in the U.S., UK, Canada, Australia, and some European countries. The secondary sources include a wide range of journal articles, judicial commentaries, newspaper articles, survey reports, and other relevant materials. The research process was divided into three main stages: literature review, general study, and comparative analysis of case laws and legal studies. Some of the findings were color-coded and tabulated for easy understanding.

## **INTRODUCTION**

How does the law define sexual assault? This Paper explores different assault and consent-to-sex models across the world, with a focus on the newly emerging law of “affirmative consent.” The definition of affirmative consent varies across countries, thus making comparisons imprecise.<sup>3</sup> However, a comparison provides insight as to which countries seem to improve on traditional models of the law of sexual assault, that often requires the State to prove that the assailant used force and that the victim resisted. The Paper will conclude that a move to an affirmative consent model will make society a better and safer place to live.

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<sup>3</sup> Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J 15, 20 (2015).

## I. The Existing Models of Sexual Offences

In the statutory definitions of sexual offences, there are conceptual differences across jurisdictions especially in the judicial elements defining consent. Currently, the definition of sexual offences follows four models: 1) coercion-based model; 2) resistance-based model; 3) consent-based model and 4) affirmative consent model.<sup>4</sup>

### 1) Coercion-based model

In most civil law jurisdictions such as the Netherlands and France, sexual offences are defined following a coercion-based model. Under this model, there usually contains the element of sexual activity (i.e., sexual assault, penetration, harassment) and force to compel such sexual activity. For instance, the Netherlands penal code elucidates that “any person who by an act of violence, or any other act, or by the threat of violence, or threat of any other act compels a person to submit to acts comprising or including sexual penetration of the body shall be guilty of rape.”<sup>5</sup> France defines rape as “[a]ny act of sexual penetration...committed on the person of another by violence, constraint, threat or surprise.”<sup>6</sup> Likewise, New York state defines rape as “ sexual intercourse... by forcible compulsion;”<sup>7</sup>

Defining sexual assaults by coercion fails to criminalize sexual offences where there is a lack of force, thus undermining the sexual agency of the victims. It reinforces the traditional stereotype where the perpetrator is more physically powerful while ignoring the modern power dynamic of socio-economic influence. The problem with such a model is that it revolves around the arbitrary concept of “force to compel” which enhances the power hierarchy between the perpetrator and the victim. In

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<sup>4</sup> Deborah Tuerkheimer, *Sexual Violation without Law*, 76 N.Y.U. ANN. SURV. AM. L. 609, 622 (2021).

<sup>5</sup> Criminal Code §242 (Neth.).

<sup>6</sup> Criminal Code Art. 222-23 (Fr.).

<sup>7</sup> N.Y. Penal Law, §130.35(1).

return, it perpetuates the passive acquiescence of victims and diminishes female sex agency in sexual activities.<sup>8</sup> Feminist scholars have advocated that defining sexual assault using physical force rather than absence of consent ignored the harm caused by sexual assault.<sup>9</sup> The coercion-based model simply disregards victims' sexual autonomy and leaves sexual assault without using force unpunished.

## 2) Resistance-based model

Similar to the coercion-based model, statutory definitions adopting a resistance-based model normally include a force element that compels sexual activities but has an additional element of resistance. For instance, the Pennsylvania penal code defines rape as “sexual intercourse...by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.”<sup>10</sup> The “lack of resistance” has been repeatedly used to imply consent.<sup>11</sup> Courts have often interpreted lack of resistance as a lack of force. Courts have held it is not forcible compulsion due to the lack of resistance if the victim was asleep.<sup>12</sup> Studies also show that jurors continue to place importance on the presence of injuries and resistance in sexual offence trials.<sup>13</sup>

The main issue with the resistance-based model is the over-emphasize on resistance. It shifts the legal analysis from the sex agency of victims to the presence of force and acts to resist it. It perpetuates the gender stereotypes and sex myths and conveys the theory that victims are weaker individuals during sexual assaults.<sup>14</sup> It also largely retained the historical origin of sexual violence law from property law

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<sup>8</sup> Deborah Tuerkheimer, *supra* note 4.

<sup>9</sup> Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, 254 (1998) (“Under most existing criminal codes, the absence of consent does not by itself make intercourse illegal. Criminal penalties apply only when the sexual aggressor uses too much physical force. But respect for sexual autonomy requires a different view. Intercourse without consent should always be considered a serious offense”).

<sup>10</sup> 18 Pa. Cons. Stat. §3121.

<sup>11</sup> Catharine A. MacKinnon, *Rape Redefined*, 10 Harv. L. & POL’y REV. 431, 455 (2016).

<sup>12</sup> Commonwealth v. Thompson, 2 Pa. D. & C.4th 632, 633–34, 652 (Pa. C.P. 1989).

<sup>13</sup> See Louise Ellison & Vanessa Munro, *Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility*, British Journal of Criminology 49, 202-19 (2009).

<sup>14</sup> Catharine A. MacKinnon, *supra* note 11.

where women were deemed as properties of men in a patriarchal society.<sup>15</sup> It should be noted that in modern-day sexual violence, the power hierarchy compels victims to silently submit to sexual activities without resistance, without having the perpetrator to use force.<sup>16</sup> Therefore, the resistance-based model fails to capture sexual offences where the victim succumbs to assaults because of power dynamics between the parties.<sup>17</sup>

### 3) Consent-based model

The consent-based model has been widely discussed in scholarly research since the late 1990s<sup>18</sup> and started being adopted in common law jurisdictions such as England and Wales in 2003,<sup>19</sup> and New Zealand in 2005.<sup>20</sup> In International Law, several regional treaties on violence against women have been published from the late 1990s to 2010s urging their member states to adopt the consent-based model in statutory definition.<sup>21</sup> The consent-based model advanced its legal analysis to focus on the sex agency of victims. In the modern society where the body autonomy of both parties in sexual activities deserves to be equally considered and respected, this major shift from the prior models is indispensable. Generally, under the consent-based model, criminal sexual offences are defined as

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<sup>15</sup> Julia Quilter, *From Raptus to Rape: A History of the Requirements of Resistance and Injury*, 2 *Law & History* 89, 111 (2015).

<sup>16</sup> *Id.*

<sup>17</sup> See Tuerkheimer, *supra* note 4, at 624; see also *People v. Carlson*, 644 N.W.2d 704, 705 (Mich. 2002) (holding there was insufficient force when male and female engaged in car sexual intercourse without consent nor physical resistance).

<sup>18</sup> Lois Pineau, *Date Rape: A Feminist Analysis*, 8 *Law and Philosophy* 217 (1989).

<sup>19</sup> Sexual Offences Act, 2003, c.42, §74 (Eng.).

<sup>20</sup> Crimes Act 1961 §128 (N.Z.) (Defines rape as penetration of genitalia by penis without consent, while a general sexual violence as unlawful sexual connection without consent.).

<sup>21</sup> See The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence [Istanbul Convention], May 11, 2011, CETS No. 210, *entered into force* Aug.1, 2014; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women [Convention of Belem do Para], Jun. 9, 1994, I.L.M 1534, *entered into force* Mar. 5, 1995; Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa [Maputo Protocol], Jul. 11, 2003, CA/LEG/66.6, *entered into force* Nov. 25, 2005.

sexual activity (i.e. sexual assault, penetration, harassment) being perpetrated without the consent of the victims; consent is free and voluntary.<sup>22</sup>

Even within the consent-based jurisdictions, the definitions of consent vary. Some jurisdictions explicitly abandoned the force requirement and specified that lack of resistance does not mean consent.<sup>23</sup> Some jurisdictions only define consent without specifying whether “compelled by force” or “lack of resistance” will qualify as consent.<sup>24</sup> Others include force as a component of non-consent.<sup>25</sup> The inconsistency in legal definitions is primarily due to a lack of a universally agreed definition of consent.<sup>26</sup> When recommending a definition of consent, international and regional organizations usually specify that member states have discretion to adopt and modify such definitions.<sup>27</sup> Consent is critical as it illustrates the will that signifies the sex agency of the victims, however, including force and resistance in statutory definitions opens the door for the defense of “implied consent.”

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<sup>22</sup> See Western Australia Criminal Code Act Compilation Act 1913 The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence § 319(2)(b) (“an act would be [a sexual] offence if done without the consent of a person”); Western Australia Criminal Code Act Compilation Act 1913 s.319(2)(a) (“consent means a consent freely and voluntarily given.”).

<sup>23</sup> *Id.* at §319(2)(b) (“a failure by that person to offer physical resistance does not of itself constitute consent to the act”); UN Model Rape Law Art.2(b) (“While consent need not be explicit in all cases, it cannot be inferred from non-resistance, verbal or physical, by the victim”).

<sup>24</sup> See Sexual Offences Act 2003, c.4 § 74 (Eng.).

<sup>25</sup> See D.C. CODE § 22-3001(4) (“Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.”); DEL. CODE ANN. tit. 11, s.761(k)(1) (“Without consent means the defendant compelled the victim to submit by any act of coercion... or by force... It is not required that the victim resist such force or threat to the utmost... victim need resist only to the extent that it is reasonably necessary to make the victim's refusal to consent known to the defendant”).

<sup>26</sup> Amnesty International, *Right to be free from rape – overview of legislation and state of play in Europe and international human rights standards*, AI Index 1, [20] (Nov. 24, 2018), <https://www.amnesty.org/en/documents/eur01/9452/2018/en/>.

<sup>27</sup> See Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence [Istanbul Convention], 2011, CETS No. 210, ¶193. (specifies that contracting states shall decide their definition of “freely given consent.”); Paul Robinson and Markus Dubber, *The American Model Penal Code: A Brief Overview*, AI Faculty Scholarship. 131, 319 (2007), [https://scholarship.law.upenn.edu/faculty\\_scholarship/13](https://scholarship.law.upenn.edu/faculty_scholarship/13). (Specifies that the definition of consent acts as a guidance and that States can adopt, modify or reject it as they see fit).



As mentioned above, the modern power hierarchy dynamic normally leads to silent and submissive sexual offences without resistance or the use of force. Concentrating on an arbitrary concept of consent may ignore that pervasive hierarchies in society (such as force, power, and status) can erode will.<sup>28</sup> This is particularly true after many “pressured consent” cases were reported after the widespread movement of #MeToo.<sup>29</sup> The possibility of articulating “implied consent” will fail to charge powerful perpetrators and thus fail to protect the silent and submissive victims.

#### 4) Affirmative consent model

The reform of adopting an affirmative consent model in sexual offenses was widely discussed by feminist legal scholars, advocating that the coercion/resistance-based definition of rape is intrinsically embedded with gender stereotypes and passivity (e.g. sleep, intoxication, and fear). The traditional models ignore female sex agency and allows for a more realistic framework of evaluation of consent or its lack thereof.<sup>30</sup> It is suggested, “[t]he law of affirmative consent, on the books and in practice, provides a platform for engaging the normative facets of defining rape.”<sup>31</sup> This model goes further than the previously discussed consent-based model and removes the ambiguity in “silence and passive acquiescence.”<sup>32</sup> Here, a proactive and voluntary communication of consent is required. The consent can be affirmatively communicated verbally or by physical gestures.<sup>33</sup> Canada has long adopted an affirmative consent definition since 1992<sup>34</sup>; several states in Australia have amended their

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<sup>28</sup> Deborah Tuerkheimer, *supra* note 4, at 630.

<sup>29</sup> *Id.* at 613, 630-34.

<sup>30</sup> Deborah Tuerkheimer, *Affirmative Consent*, 13 Ohio State Journal of Criminal Law 441, 468 (2016); Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335, 345 (2017).

<sup>31</sup> Deborah Tuerkheimer, *supra* note 30.

<sup>32</sup> Stephen J. Schulhofer, *supra* note 30, at 344.

<sup>33</sup> *See, e.g.*, State ex rel. M.T.S., 609 A.2d 1266, 1277 (N.J. 1992) (“Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission...[p]ermission is demonstrated when ... a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.”).

<sup>34</sup> Canada Criminal Code, RSC 1985, C-46 §273.1

sexual offences to include affirmative consent definition since 2021.<sup>35</sup> In the U.S., the introduction of affirmative consent was initiated among universities in response to disciplinary failure to respond to campus rape reports back in 1991, defining consent as “the act of willingly and verbally agreeing to engage in specific sexual conduct,”<sup>36</sup> which has been translated to several penal codes.

## II. Research Questions

The differences in definitions of sexual offences based on the existing coercion and resistance-based model’s failure to criminalize silent-submissive sexual offences, along with the consent-based model’s failure to distinguish “implied-consent” suggest that a move towards affirmative consent model which better protects the victims by their affirming sexual agency. Given the discrepancies in implementation of affirmative consent across jurisdictions, this Paper looks into a workable definition of affirmative consent and its effective implementation by analyzing laws of the U.S., UK, Canada, Australia, and Europe. Specifically, the research questions are as follows:

- 1) What is the definition of affirmative consent?
- 2) What are the differences in definition across jurisdictions?
- 3) How has the case law evolved upon the implementation of affirmative consent?
- 4) Whether merely including affirmative consent is enough for penal laws to effectively protect sexual agency of parties involved and lessen the evidentiary burden to prove the lack of consent on victims?

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<sup>35</sup> Parliament of Austl. Senate Comm. Rep., *Current and Proposed Sexual Consent Laws in Austl.* (2023), [https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Freportsen%2FRB000074%2F0004%22;src1=sm1#\\_ftn1](https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Freportsen%2FRB000074%2F0004%22;src1=sm1#_ftn1).

<sup>36</sup>Antioch College, *The Sexual Offense Prevention Policy*, entered into force 1991.

## UK COMMON LAW & CONSENT

The Sexual Offences Act 2003 (SOA) is a special legislation dedicated to the prevention and protection of sexual offences in England and Wales (UK). The Act has four degrees of sexual offences:

- i. Section 1 – Rape
- ii. Section 2 – Assault by Penetration
- iii. Section 3 – Sexual Assault
- iv. Section 4 - Causing sexual activity without consent<sup>37</sup>

The primary difference between the offence of rape and assault by penetration lies in the gender of the perpetrator.<sup>38</sup> While rape has been engendered with regard to victims, it remains gendered as regards the perpetrator, who must be a male.<sup>39</sup> The other offences are gender-neutral both as regards the victim and the perpetrator.<sup>40</sup> The definition of consent is – “A person consents if he agrees by **choice**, and has the **freedom and capacity** to make that choice.”<sup>41</sup> The elements of the foregoing sexual offences require the victim to have not consented to the sexual activity and that the perpetrator “**reasonably believed**” that there was no consent given based on “**all relevant circumstances.**”<sup>42</sup>

Overall, three factors come into play while determining a sexual offence– choice, freedom and capacity to make that choice, and the perpetrator’s reasonable belief in the absence of consent. Each of them must be proven to be successful in a charge of sexual offences under the SOA.

Firstly, the determination of consent involves a two-prong test where the court sees whether the complainant had the capacity (i.e., age and understanding) to choose whether or not to participate in the sexual activity at the time in question, and secondly if that choice was freely made without any

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<sup>37</sup> Sexual Offences Act, 2003, c.42, §§1-4 (Eng.).

<sup>38</sup> See Oxford Paper, *supra* note 1, at 27.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Sexual Offences Act, 2003, c.42, §74 (Eng.).

<sup>42</sup> *Rape and Sexual Offences*, CROWN PROSECUTION SERVICE (May 21, 2021), <https://www.cps.gov.uk/legal/guidance/rape-and-sexual-offences-chapter-6-consent> (last visited at Dec.16, 2023).

constraints.<sup>43</sup> It is criticized that abstract terms like “freedom” and “choice” are undefined and are vague social concepts. Such imprecise and vague terms fail to define distinct crimes and rather introduce wider social attitudes toward sexual offences by emphasizing on the complainant’s behavior or conduct. It has also been criticized that these terms also raise “philosophical issues” that are “ill-suited” to the needs of the criminal justice system.<sup>44</sup>

Thereafter, is the **Reasonable Belief Test** – a guessing game. In this, the perpetrator should determine whether he “*reasonably believed*”<sup>45</sup> that consent was given based on “*all relevant circumstances*” including the steps taken by him to ascertain the same.<sup>46</sup> There is, once again, an objective and subjective element to this test:

1. The perpetrator’s ability to evaluate consent - Subjective element
2. The perpetrator’s reasonable belief to such consent (Jury decides this) – Objective element<sup>47</sup>

The common law system often leaves the issues of consent and capacity for the jury to determine in cases of alleged rape. They would have to approach the evidence relating to “choice”, and the “freedom” to make any particular choice must be approached in broad common sense.<sup>48</sup> In the case of *R v Olugboja*, it was held that the jury is to decide cases of consent by “applying their combined good sense, experience and knowledge of human nature and modern behavior to all the relevant facts of that case.”<sup>49</sup>

The perpetrator can rely upon a mistaken belief as long as it is deemed reasonable in all circumstances – and those circumstances presumably include the complainant’s conduct. The need to

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<sup>43</sup> *Rape and Sexual Offences*, Crown Prosecution Service (May 21, 2021), <https://www.cps.gov.uk/legal/guidance/rape-and-sexual-offences-chapter-6-consent> (last visited Dec.16, 2023).

<sup>44</sup> Caroline Derry, *Consenting to Sexual Activity*, 136, 140, <https://www.open.ac.uk/blogs/50YearsOfLaw/wp-content/uploads/2020/12/Caroline-Derry-Consenting-to-Sexual-Activity.pdf> (last visited Dec.14, 2023).

<sup>45</sup> Sexual Offences Act, 2003, c.42, §74 (c) (1) (Eng.)

<sup>46</sup> *Id.* at §§ 1-3.

<sup>47</sup> CROWN PROSECUTION SERVICE, *supra* note 42.

<sup>48</sup> *The Queen (on the app of F) v DPP* [2013] EWHC 945 (Admin) 26.

<sup>49</sup> *R v Olugboja* [1981] EWCA Crim 2.

investigate “relevant circumstances” gives the jury wide discretion to look into the complainant’s behavior, the relationship between parties, gender roles, bias, prejudices, norms, and other wider social attitudes in a judicial test.<sup>50</sup> That being the case, a decade after it came into force, the SOA Act continues to promote an implied consent model which seldom protects victims.

## **INTERNATIONAL HUMAN RIGHTS LAW & CONSENT**

In 2003, The European Court of Human Rights was the first to embrace consent rather than the traditional force element in the landmark case of - *M.C. v. Bulgaria*, where it held that “any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy.”<sup>51</sup>

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) Committee recognizes that gender-based violence is a crucial way in which inequality between women and men is entrenched, however, does not have any reference to sexual violence or a standard for consent.<sup>52</sup> In 2017, the Committee recommended that States take measures to criminalize sexual violence, including marital and date rapes as “against the right to personal security and physical, sexual and psychological integrity” based on **the lack of freely given consent and takes into account coercive circumstances.**<sup>53</sup> Even though the recommendation does not explicitly conform to the principles of affirmative consent as it does not address the explicit presence of it, the Committee established a consent-focused definition of rape following a case that was brought before it. In the

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<sup>50</sup> Derry, *supra* note 44, at 143.

<sup>51</sup> *M.C. v Bulgaria*, No. 39279/98, ECHR 2203XII, (2004) ¶¶ 169-187.

<sup>52</sup> Oxford Paper, *supra* note 1, at ¶56, *See* U.N Committee for the Elimination of All Forms of Discrimination against Women, ‘General Recommendation No. 19: Violence Against Women’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ U.N. Doc HRI/GEN/1/Rev.1 (29 July 1994), ¶¶ 6-7.

<sup>53</sup> U.N. CEDAW/C/GC/35 (July 26, 2017), ¶29(e).

case of *Karen Tayag Vertido v. Philippines* (2010), the CEDAW Committee established the precedent of defining rape based on consent within its legal framework.<sup>54</sup> In this case, the Committee urged the Philippines to review its laws on rape to ensure that lack of consent is the central criterion, as well as eliminating any requirement of proving penetration and the necessity of force or violence for sexual assault in the legislation.<sup>55</sup> The Committee further touched upon the need to reduce secondary victimization by enacting a definition of sexual assault that requires the existence of an “unequivocal and voluntary agreement”, which comes closest to the language of affirmative consent.<sup>56</sup> The Committee also requires proof by the accused of the steps taken to ascertain whether the survivor was consenting or not.

However, the Committee did not explicitly require a consent-model coming close to affirmative consent as a sole option, but also stated that State parties could choose to require occurrence within coercive circumstances with a broad interpretation of what constitutes coercion.<sup>57</sup> Although the fact that CEDAW uses the language of affirmative consent in its jurisprudence is a significant step forward in international human rights law which can guide national legislation towards adopting consent-based definitions of rape, the Committee does not seem to be taking a strong stand as it still gives an option to states to keep a coercion-based definition as well.

On the other hand, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) defines consent in a clear affirmative sense.<sup>58</sup> While laying down legislative measures to tackle sexual violence, it recommends that consent “must be given **voluntarily as the result of the person’s free will assessed in the**

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<sup>54</sup> UN Committee on the Elimination of Discrimination against Women, *Tayag Vertido v Philippines* (2008) CEDAW/C/46/D/18/2008.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See *supra* note 21, Article 36.

**context of the surrounding circumstances.**<sup>59</sup> Additionally, it states that the non-consensual sexual acts must be carried out “intentionally” by the perpetrator, and leaves the interpretation of such intentionality to the States.<sup>60</sup>

## **REGIONAL LAWS ON AFFIRMATIVE CONSENT**

### **I. THE UNITED STATES**

Rape is generally defined in Western countries as sexual intercourse by force or without consent or both.<sup>61</sup> The force and resistance components in sexual offences reinforce traditional sexual scripts that depict men as sexual initiators and women as sexual gatekeepers and create a “sexual double standard.”<sup>62</sup> In reality, the woman feels a lack of agency to express her discomfort or enthusiasm, or the man refuses to take no for an answer. Unfortunately, these gender norms are often being translated into legal frameworks as standards of consent or elements of sexual offences. The different consent models in the U.S. states can be grouped into the following three categories.

#### **1. States without a consent definition**

Some U.S. states do not have a consent definition, like the State of North Dakota. The Supreme Court of North Dakota in the case of *State v. Vantreece*<sup>63</sup> reversed a rape conviction on the reasoning that the complainant “never asked him to stop and she did not attempt to resist or flee from the situation”<sup>64</sup> even though it found the defendant’s conduct “reprehensible” and that he may have willfully taken advantage of a vulnerable person.<sup>65</sup> The complainant was a person with a developmental disability, and the State had failed to charge the defendant under the provision for “engaging in a

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<sup>59</sup> Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe Treaty Series – No.210, ¶189.

<sup>60</sup> *Id.*

<sup>61</sup> Catharine A. MacKinnon, *supra* note 11, at 436.

<sup>62</sup> Kristen N. Jozkowski et al, *College Students’ Sexual Consent Communication and Perceptions of Sexual Double Standards*, 49 *Perspect. on Sexual and Reprod. Health*, 237 (2017).

<sup>63</sup> *State v. Vantreece*, 2007 ND 126.

<sup>64</sup> *Id.* at P21.

<sup>65</sup> *Id.* at P27.

sexual act with a person who suffers from a mental disease or defect,” but was charged for engaging in sexual conduct by force. The court rejected the argument that the victim froze and pretended to continue to sleep to avoid further harm. It concluded that the State had failed to show “[defendant] exerted force upon the complainant which compelled her to submit to having sex with him,”<sup>66</sup> and in the absence of such force, there was no crime.

The court relied upon similar cases in Texas<sup>67</sup> and Michigan<sup>68</sup> where the prosecution had failed to charge under appropriate sections, which led to acquittal as there was no intentional force that made the victims submit for sex. The presence of a requirement of consent would have better protected the victims, as courts would have been required to look at the element of willfulness rather than force even if the accused was charged incorrectly.

## 2. States with “Lack of Consent” definition

In some States, consent is defined through its lack thereof by force and resistance requirements. Arizona recognizes a lack of consent only if there is coercion because of the use of force against the person.<sup>69</sup> The State of Nebraska, for example, though it does not explicitly contain force, requires a “demonstration of unwillingness to engage in sexual conduct or some sort of verbal resistance.”<sup>70</sup> New

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<sup>66</sup> *Id.* at P21.

<sup>67</sup> *Jiminez v. State*, 727 S.W.2d 789.

<sup>68</sup> *People v. Patterson*, 428 Mich. 502.

<sup>69</sup> ARIZ. REV. STAT. ANN. § 13-1406.

“Without consent” includes any of the following:

- (a) The victim is **coerced** by the **immediate use or threatened use of force** against a person or property.
- (b) The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. For the purposes of this subdivision, "mental defect" means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.
- (c) The victim is intentionally deceived as to the nature of the act.
- (d) The victim is intentionally deceived to erroneously believe that the person is the victim's spouse.

<sup>70</sup> NEB. REV. STAT. ANN. §28-318(8). **Lack of consent** - 1. Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without consent of the victim.

2. Lack of consent results from:

- (a) **Forcible compulsion**; or
- (b) Incapacity to consent; or



York, which has an affirmative consent definition as part of its Education Code, however, requires a lack of consent threshold to be met by proving “forcible compulsion” or “incapacity to consent.”<sup>71</sup>

The presence of a consent definition makes it no different from those States without a consent provision. The use of ‘force or coercion’ in a sexual act tends to focus on the evidence of force rather than on the presence of consent.<sup>72</sup> These requirements unfairly shift the focus of criminal trials from the accused to the conduct of the victim.<sup>73</sup>

### 3. States with Affirmative Consent definition

Affirmative consent is popularly known as ‘yes means yes’ - an antithesis to ‘no means no’, which aims to bring about a cultural and jurisprudential shift in understanding consent as an active agreement. Across the U.S., 10 States that have defined consent in an ‘affirmative sense’ in their penal codes were analyzed.<sup>74</sup> Free will/freely/voluntary was found to be the dominant characteristic of affirmative consent in all States, followed by consent as an ‘agreement’ between the parties by 6 States. Around 4 States<sup>75</sup> have explicitly stated that lack of submission and/or resistance does not constitute consent. California and Colorado confirm that the burden of proof does not change. However, in

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(c) Where the offense charged is sexual abuse or forcible touching, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

<sup>71</sup> N.Y. PENAL LAW § 130.05.

#### **Lack of consent**

1. Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without consent of the victim.

2. Lack of consent results from:

(a) **Forcible compulsion;** or

(b) Incapacity to consent; or

(c) Where the offense charged is sexual abuse or forcible touching, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

<sup>72</sup> Deborah Tuerkheimer, *supra* note 30, at 448.

<sup>73</sup> Nate Summers, *From Common Law to Affirmative Consent: Reforming Minnesota's Criminal Sexual Conduct Laws*, 47 MITCHELL HAMLINE L. REV. 1, 7 (2020).

<sup>74</sup> See Table B of the Appendix.

<sup>75</sup> Colorado, Florida, Illinois, and Washington D.C.

Colorado, affirmative consent seems to apply only to low-degree offences such as sexual contact, which does not require force or penetration.<sup>76</sup> Vermont explicitly says the consent is revocable.

New Jersey does not have a statutory definition, while it has been recognized by the court in case law.<sup>77</sup> The consent definition in the States of Minnesota, Wisconsin, and Washington D.C allows for “overt actions”, that specific and observable actions can signify consent, which is akin to the Model Penal Code’s definition, which might be difficult to determine and prove during trials and might require the courts to look at “reasonable belief” of consent by the perpetrators.

Overall, the best characteristics of affirmative consent can be summed up as “voluntary agreement with knowledge of particular sexual acts involved between the parties regardless of the nature of the relationship, and that lack of submission or resistance do not constitute consent.”

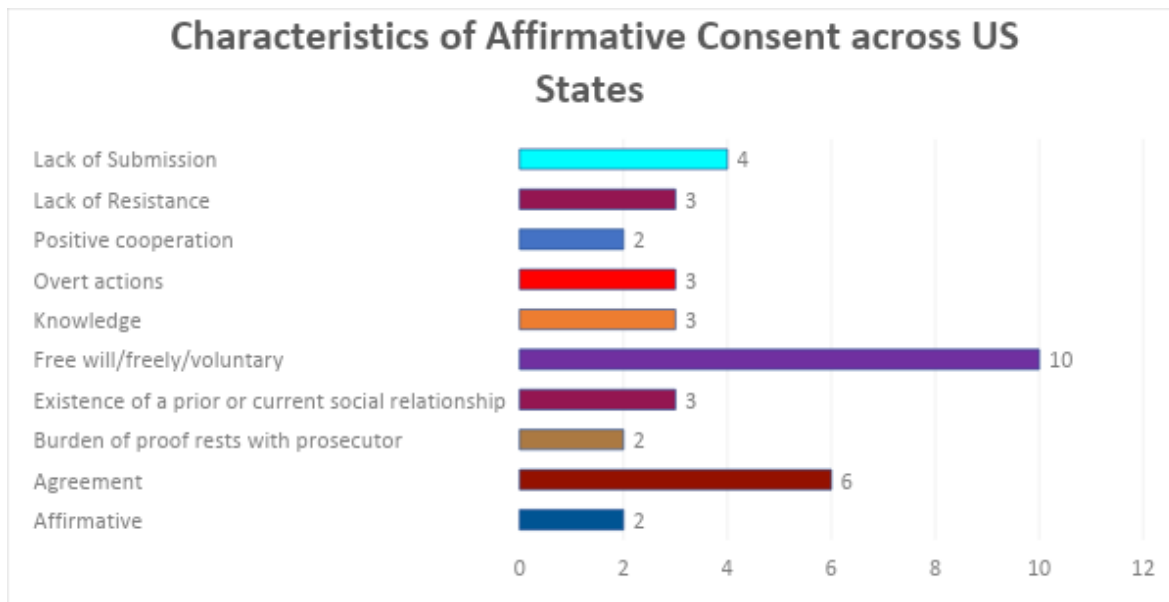
**Some examples of affirmative consent definitions:<sup>78</sup>**

State	Definition
California	<p><b>CAL. PENAL CODE §261.6</b></p> <p>(a) In prosecutions under Section 261, 286, 287, or 289, or former Section 262 or 288a, in which consent is at issue, “consent” means <b>positive cooperation</b> in act or attitude pursuant to an exercise of <b>free will</b>. The person must act <b>freely</b> and <b>voluntarily</b> and have <b>knowledge</b> of the nature of the act or transaction involved.</p> <p>(b) <b>A current or previous dating or marital relationship</b> is not sufficient to constitute consent if consent is at issue in a prosecution under Section 261, 286, 287, or 289, or former Section 262 or 288a.</p> <p>(c) This section shall not affect the admissibility of evidence or the <b>burden of proof</b> on the issue of consent</p>
Colorado	<p><b>COLO. REV. STAT ANN. §18-3-401(1.5)</b></p> <p>“Consent” means <b>cooperation</b> in act or attitude pursuant to an exercise of <b>free will</b> and with <b>knowledge</b> of the nature of the act. A <b>current or previous relationship</b> shall not be sufficient to constitute consent under the provisions of this part 4. <b>Submission</b> under the influence of fear shall not constitute consent. Nothing in this definition shall be construed to affect the admissibility of evidence or the <b>burden of proof</b> in regard to the issue of consent under this part 4.</p>

<sup>76</sup> Deborah Tuerkheimer, *supra* note 16, at 448.

<sup>77</sup> *State ex rel.* M.T.S 609 A.2d 1266, 1277 (N.J 1992).

<sup>78</sup> See Table B of the Appendix.



## **PURE VS. DILUTED AFFIRMATIVE CONSENT**

### **Pure Affirmative Consent**

The statutory offences of rape in the foregoing 10 States were analyzed, and only about three States have both - an affirmative consent definition and statutory offences defined through consent. These three States - Vermont, Wisconsin, and New Jersey, whose statutory offences are defined through affirmative consent, fall under the category of *pure affirmative consent*.<sup>79</sup> Rendering the verdict in *Sprague v. Sprague*<sup>80</sup>, where the husband jumped in the shower with his wife and touched her vagina and anal area without an explicit ‘yes’ from her, the Supreme Court of Vermont held that there was no as there was no affirmative, unambiguous, and voluntary agreement to engage for the said act. To ascertain the lack of explicit consent, the Court took into consideration the Plaintiff’s testimony mentioning that it hurt her, her uneasiness about the act, and sharing it with family members about how it affected her. Similarly, in *State v. Desautels*,<sup>81</sup> the Vermont Supreme Court held that “some

<sup>79</sup> Deborah Tuerkheimer, *supra* note 16, at 451.

<sup>80</sup> *Sprague v. Sprague* [2024] 23-AP-184.

<sup>81</sup> *State v. Desautels* [2006] 180 Vt. 189.

cooperation” by the victim during her second sexual encounter with the Defendant and that does not qualify as consent as it was only to avoid any violence being inflicted. These cases would have failed before the court of law if not for the affirmative consent model adopted, and this implies that it criminalizes sexual conduct that often falls through the cracks.

State	Consent definition	Statutory definition of rape
Vermont	“Consent” means the affirmative, unambiguous, and voluntary agreement to engage in a sexual act, which can be revoked at any time. <sup>82</sup>	<b>Sexual assault</b> <sup>83</sup> (a) No person shall engage in a sexual act with another person: (1) <b>without the consent of the other person</b> ; (2) by threatening or coercing the other person; (3) by placing the other person in fear that any person will suffer imminent bodily injury; or (4) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring.
Wisconsin	“Consent”, as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. <sup>84</sup>	<b>First-degree sexual assault</b> <sup>85</sup> (1) First-degree sexual assault. Whoever does any of the following is guilty of a Class B felony: (a) <b>Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.</b> (b) Has sexual contact or sexual intercourse with another person without the consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon
New Jersey	Permission to engage in sexual penetration must be affirmative and it must be given freely, but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances. <sup>86</sup>	<b>Sexual assault</b> c. An actor is guilty of sexual assault if the actor commits an act of sexual penetration with another person under any one of the following circumstances: (1) The actor commits the act using coercion or <b>without the victim's affirmative and freely-given permission</b> , but the victim does not sustain severe personal injury;

<sup>82</sup> VT. STAT. ANN. Tit. 13, §3251(3).

<sup>83</sup> 13 V.S.A. § 3252.

<sup>84</sup> WIS. STAT. ANN. §940.225(4).

<sup>85</sup> WIS. STAT. ANN. § 940.225.

<sup>86</sup> *State ex rel. M.T.S* 609 A.2d 1266, 1277 (N.J 1992).

## Diluted Affirmative Consent

On the other hand, in the State of California, though the consent definition in the educational code and penal code has been defined in an affirmative sense, the penal offence of sexual offence for rape does not contain consent but whether the act has been accomplished against the person's will through "force, violence, duress, and menace." To prove charges of rape, the aspect of force will be the dominant element to be proved, vitiating the purpose of defining consent affirmatively. However, the court does not require a sign of struggle to demonstrate the existence of force. In *People v Giardino*<sup>87</sup>, California Appeal Court emphasized that "a victim's mere submission to an act out of fear of bodily injury does not amount to actual consent." Court further states that "such a submission is hardly an exercise of free will." The weakening of affirmative consent requirement by a separate requirement of force is termed ***diluted affirmative consent***.<sup>88</sup>

Wisconsin's actual definition of consent is similar and does not differ greatly from the Minnesota definition of consent.<sup>89</sup> The effectiveness of the Wisconsin statutory framework lies in its straightforward application of defining and criminalizing nonconsensual sexual contact and intercourse, without the incorporation of additional distinct aggravating elements making it easier for the victim during trial.<sup>90</sup> Whereas, in Minnesota, only the fifth degree of nonconsensual sexual offence defines it through conduct without consent while other degrees are defined through separate aggravating factors. This vitiates the purpose of an affirmative consent model, and researchers find

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<sup>87</sup> *People v. Giardino* (2000) 82 Cal.App.4th 454, 460 [98 Cal. Rptr. 2d 315].

<sup>88</sup> Deborah Tuerkheimer, *supra* note 30, at 450.

<sup>89</sup> MINN. STAT. ANN. §609.341(4).

"Consent" means words or **overt actions** by a person indicating a **freely given present agreement** to perform a particular sexual act with the actor. Consent does not mean the **existence of a prior or current social relationship** between the actor and the complainant or that the complainant failed to resist a particular sexual act.

(b) A person who is mentally incapacitated or physically helpless as defined by this section cannot consent to a sexual act.

(c) Corroboration of the victim's testimony is not required to show lack of consent.

<sup>90</sup> Nate Summers, *supra* note 73, at 12.

the same to work. It is important that the definitions of statutory offences be defined only through consent and do not involve any other factors and apply to all degrees of sexual crimes.

## II. THE EUROPEAN UNION AND EUROPEAN CIVIL LAW JURISDICTIONS

The primary focus of this Paper is to analyze common law jurisdictions to determine the most feasible definition of affirmative consent to be adopted in UK law, however, it is also important to consider how consent-based definitions of rape and sexual offences have played out in European civil law jurisdictions, as there have been important recent developments in various European countries. This section will first briefly introduce the current developments and main challenges of adopting consent-based models in the European Union (EU) in general, and then analyze its adoption on the national level, with examples from Spain, Sweden, and Denmark. It aims to shed light on the process and outcomes of adopting an affirmative consent-based model for countries that have adopted it or have started amending their laws to move away from coercion-based or implied consent models towards an affirmative consent one.

### **1. EU-wide criminalization of sex without consent as rape, or the lack thereof**

The challenges of combating gender-based violence in the EU are complex, with the main issue being that a delicate balance is required between respecting the sovereignty of member states and establishing a common EU-wide framework to protect women's rights and promote a safer and healthier society for all.

Although all twenty-seven EU countries consider rape to be a crime, **they do not have a common definition as to what amounts to rape.**<sup>91</sup> Currently, only fourteen EU countries have laws

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<sup>91</sup> Mariam Gigani, *Defining Consent in Europe*, EURANET PLUS NEWS AGENCY (Sept. 22, 2023), <https://euranetplus-inside.eu/defining-consent-in-europe/>.

that explicitly define rape on the basis of lack of consent; with many member states still requiring the victims to prove the traditional use of force or threat to criminalize the involuntary sexual act as rape.

During the annual State of the Union address in Strasbourg on 13 September 2023, Ursula von der Leyen, President of the European Commission, called for widespread support for the criminalization of non-consensual sex and the establishment of a common definition of rape within the EU.<sup>92</sup> Upon this development, a bill started being negotiated within the EU, which would address a number of issues relating to gender-based violence. However, as the European Parliament and the Council reached a deal on the first-ever EU-wide directive on combating gender-based violence in early February 2024, the inclusion of rape without consent as a crime among the offences listed in the legislation proved to be one of the main points of disagreement between the European Parliament and some member states.<sup>93</sup> Therefore, despite the original draft of the bill including a definition of rape as sex without consent, the final version of the bill that has come out of negotiations in early February 2024 does not include criminalization of non-consensual sex as rape across the bloc.<sup>94</sup> It has been excluded despite a vast majority of member states being parties to the Istanbul Convention, which mandates the absence of consent as the definition of rape.

The main obstacle before the adoption of the consent-based language into the legislation was put forward as an argument of purely legal grounds.<sup>95</sup> Given that criminal law is a competence of the Member States, the argument goes that how rape will be criminalized should be determined nationally. This stems from the principle of legal competence in EU law, which mandates that competence be

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<sup>92</sup> Ursula von der Leyen, *State of the Union Address 2023*, EUROPEAN COMMISSION (Sept. 13, 2023), [https://state-of-the-union.ec.europa.eu/state-union-2023\\_en](https://state-of-the-union.ec.europa.eu/state-union-2023_en).

<sup>93</sup> France and Germany are criticized for blocking the adoption of the consent element, as backing from either one of them would have been enough to get the language in the legislation.

<sup>94</sup> Mared Gwyn Jones, *EU agrees first-ever law on violence against women. But rape is not included*, EURONEWS (Feb. 7, 2024), <https://www.euronews.com/my-europe/2024/02/07/eu-agrees-first-ever-law-on-violence-against-women-but-rape-is-not-included>.

<sup>95</sup> *Id.*

shared between the Union and the member states regarding different areas of law, but once the EU has adopted an act, the Member States lose their competence.<sup>96</sup>

Therefore, the challenge of balancing Member States' legal competence and sovereignty in deciding their own criminal laws with the need to protect women's rights on an overarching regional level throughout the EU system is ongoing. This conundrum highlights the crucial importance of implementing national legislation that criminalizes non-consensual sex as rape in combating gender-based violence. In accordance with this, despite the lack of EU-wide consensus, a recent and growing shift towards the adoption of even an affirmative-consent model can be observed in individual Member States throughout the Union as a result of successful campaigns.<sup>97</sup> This section will now briefly turn towards the adoption of consent-based models that come closest to affirmative consent within individual Member States of the EU, trumping the lack of success of an EU-wide legislation to address this issue and thus filling the gap in EU law through the adoption of national legislation.

## **2. Member States' Shift Towards Affirmative Consent-Based Models**

### **a. Spain**

In 2019, the Spanish government declared its plans to amend the law to classify non-consensual sex as rape, following extensive protests triggered by a prominent gang rape case where the legal system did not adequately support the victims.<sup>98</sup> Before its amendment, like many others, the Spanish criminal law did not consider sex without consent as rape if there was no evidence of physical violence or intimidation, which would fall under the category of sexual abuse, a lesser crime.<sup>99</sup>

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<sup>96</sup> See generally THEODORE KONSTADINIDES, *The Competences of the Union*, in OXFORD PRINCIPLES OF EUROPEAN UNION LAW: THE EUROPEAN UNION LEGAL ORDER: VOL. 1 (Robert Schütze & Takis Tridimas eds., 2018).

<sup>97</sup> Amnesty International, *Right to be free from rape – overview of legislation and state of play in Europe and international human rights standards*, AI Index 1, [20] (Nov. 24, 2018), <https://www.amnesty.org/en/documents/eur01/9452/2018/en/>.

<sup>98</sup> *Let's talk about "yes": Consent laws in Europe*, AMNESTY INTERNATIONAL (Dec. 17, 2020), <https://www.amnesty.org/en/latest/campaigns/2020/12/consent-based-rape-laws-in-europe/>

<sup>99</sup> CÓDIGO PENAL [C.P.] [Criminal Code], art. 178-179 (Spain), [https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal\\_Code\\_2016.pdf](https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf)



The new law that was passed in 2021 implements multiple important changes.<sup>100</sup> First of all, it requires “specific” and “positive” sexual consent. In the context of this law, sexual consent would be defined as voluntary expression through actions that unmistakably convey a person's will, considering the circumstances of the situation. Consequently, victims no longer need to demonstrate resistance or the presence of violence for the perpetrator's actions to be classified as sexual assault. This also excludes implied consent, as it requires positive actions and does not classify situations of silence and previous agreement as consent, which brings it closest to the inherent meaning of affirmative consent.<sup>101</sup>

Secondly, the legislation also eliminates sexual abuse as a crime and classifies any type of sexual act without consent as sexual assault, or rape. In other words, it removes the distinction between sexual abuse and rape by making consent the deciding factor. This serves the purpose of ensuring that perpetrators of non-consensual sex are prosecuted under one type of crime and get a serious-enough punishment accordingly, as the reason why this law was adopted in Spain was the failure of the state to ensure satisfactory punishment to the perpetrators of the gang rape case of 2016.

Spain is a stark example of one of the first countries in Europe to adopt not only a consent-based model, but one that comes closest to affirmative consent. The results of the new law are primarily positive regarding victim's access to justice and the prevention of secondary trauma, as victims now do not have to prove in court that they tried to resist the offender.<sup>102</sup>

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<sup>100</sup> Ley Orgánica 10/2022, de garantía integral de la libertad sexual, BOLETÍN OFICIAL DEL ESTADO (Official Gazette) B.O.E., (Organic Law 10/2022 on the Comprehensive Guarantee of Sexual Freedom), Sept. 6, 2022, (Spain). Also called: “Only Yes Means Yes” (“Solo Si Es Si”) Law. <https://www.boe.es/buscar/pdf/2022/BOE-A-2022-14630-consolidado.pdf>

<sup>101</sup> Graciela Rodriguez-Ferrand, *Spain: Bill on Comprehensive Guarantee of Sexual Freedom Approved for Congressional Debate*, LIBRARY OF CONGRESS (July 29, 2021), <https://www.loc.gov/item/global-legal-monitor/2021-07-29/spain-bill-on-comprehensive-guarantee-of-sexual-freedom-approved-for-congressional-debate/>.

<sup>102</sup> Emma Bubola & Jose Batista, *Spain Passed Law Requiring ‘Freely Expressed’ Consent for Sex*, N.Y. TIMES (Aug. 25, 2022), <https://www.nytimes.com/2022/08/25/world/europe/spain-rape-consent-law.html#:~:text=Advocates%20of%20the%20new%20law,approach%20to%20rape%20and%20consent.>

However, there was one unintended consequence of the new law that stemmed from a principle on the application of the criminal code in Spain, which foresees that if a change in the penal law benefits offenders, it can be applied retroactively.<sup>103</sup> As the new law included some alteration to maximum and minimum person sentences, this resulted in some previous sexual offenders getting reduced sentences on appeal.<sup>104</sup> UN experts and other officials expressed concern over this result that could potentially undermine the many benefits of the new law, which could have been avoided if the law was accompanied by resources and evaluation mechanisms to ensure and oversee its proper, intended implementation.<sup>105</sup>

#### **b. Sweden**

In Sweden, the legislation criminalizing rape was amended on 1 July 2018, switching to a consent-based model from a coercion-based one.<sup>106</sup> The law is now based upon the absence of consent instead of the presence of violence, threats, or a particularly vulnerable situation of the victim.

A review of the results conducted by The Swedish National Council for Crime Prevention (Brå) shows that there has been a significant increase in the number of prosecutions and convictions, as new types of cases have reached the courts.<sup>107</sup> After the new law was implemented, rape conviction rates were reported to have risen by 75% between 2019 and 2020.<sup>108</sup> The increase in the report rates is due to the fact that the new law is more broadly-tailored to catch all non-consensual sexual activities,

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<sup>103</sup> CÓDIGO PENAL [C.P.] [Criminal Code], Art. 2(2) (Spain).

<sup>104</sup> J. Henley, *Spanish PM apologizes for loophole in new sexual consent law*, THE GUARDIAN (Apr. 16, 2023), <https://www.theguardian.com/world/2023/apr/16/spanish-pm-apologises-loophole-sexual-consent-law>.

<sup>105</sup> *Spain: UN expert calls for stronger protection for victims of sexual violence*, UN HUMAN RIGHTS OFFICE (OHCHR) PRESS RELEASE, (June 6, 2023), <https://www.ohchr.org/en/press-releases/2023/06/spain-un-expert-calls-stronger-protection-victims-sexual-violence>.

<sup>106</sup> The Swedish National Council for Crime Prevention (Brå), *The new consent law in practice: An updated review of the changes in 2018 to the legal rules concerning rape* (English summary of Brå report 2020:6), (2020) [https://bra.se/download/18.7d27ebd916ea64de53065cfff/1614334312744/2020\\_6\\_The\\_new\\_consent\\_law\\_in\\_practice.pdf](https://bra.se/download/18.7d27ebd916ea64de53065cfff/1614334312744/2020_6_The_new_consent_law_in_practice.pdf)

<sup>107</sup> *Id.*

<sup>108</sup> Dearbhla Crosse, *Anything less than yes is rape: the campaign for a consent-based rape law in Sweden*, INTERNATIONAL PLANNED PARENTHOOD FEDERATION, (November 24, 2022) <https://europe.ippf.org/stories/anything-less-yes-rape-campaign-consent-based-rape-law-sweden>.

which would not have legally amounted to the crime of rape before the adoption of the new consent-based model.<sup>109</sup>

The results in Sweden demonstrate a positive improvement regarding victims' access to justice, as the shift from force-based models to consent-based ones cover broader sexual activities that constitute rape, such as situations where the victim "freezes" or is taken by surprise and does not have time to react.<sup>110</sup>

### **c. Denmark**

The long-awaited shift in the criminal law of Denmark from a coercion-based model to a consent-based one came into force on January 1st, 2021. According to the new law, sex without consent is automatically considered rape, and it is required that both parties give consent before sexual intercourse.<sup>111</sup>

Previously, the Danish Criminal Code defined rape on the basis of physical violence or threat, the presence of duress, or the victim's inability to resist the act.<sup>112</sup> According to the research done by Amnesty International on this topic before the adoption of the new consent-based law, survivors that were interviewed within the scope of the report stated that it was significantly important for them that the Danish criminal law be amended to adopt a consent-based definition of rape.<sup>113</sup> The adoption of the new law heeded these calls for reform.

The results of the reform have been described as being "used as intended"<sup>114</sup>, and the Deputy Director of Public Prosecutions of Denmark stated in a press release that during the time in the past

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<sup>109</sup> *Id.*

<sup>110</sup> Amnesty International, *supra* note 98.

<sup>111</sup> *Danish Parliament passes rape law requiring sexual consent*, THE LOCAL DK, (December 17, 2020) <https://www.thelocal.dk/20201217/danish-parliament-passes-rape-law-requiring-sexual-consent>.

<sup>112</sup> Criminal Code, Consolidated Act No. 977 (2017), Art. 216, (Den.).

<sup>113</sup> Amnesty International, "Give us respect and justice!" *Overcoming barriers to justice for women rape survivors in Denmark*, AI Index EUR 18/9784/2019, 1, 6, (March 5, 2019).

<sup>114</sup> *Denmark's sexual consent law 'used as intended' in first two years*, THE LOCAL DK, (March 17, 2023) <https://www.thelocal.dk/20230317/denmarks-sexual-consent-law-used-as-intended-in-first-two-years#:~:text=The%20law%2C%20which%20requires%20both,considered%20rape%20in%20legal%20trials.>

couple years that the law has been in effect, they have seen convictions in cases where the victim was passive during sexual assault, which falls within the newly criminalized area of the law, therefore achieving its intended purpose.<sup>115</sup>

### **3. Findings and Recommendations**

The failure to arrive to an EU-wide consensus on criminalizing non-consensual sex as rape due to legal competency and sovereignty issues highlights the importance of individual national proactivity to amend national legislation to bring it on par with international human rights standards. The successful public campaigns in specific Member States leading to the adoption of consent-based models demonstrate how states can take the lead to implement laws towards the formation of a safer, healthier society with a consent culture. In implementing these new laws, necessary care must be taken to ensure they are accompanied by resources and oversight mechanisms for their proper implementation, to avoid unwanted consequences such as that of Spain.

### **III. CANADA**

The federal criminal code in Canada adopted affirmative consent in its definition in 1992, defining consent as “voluntary agreement of the complainant to engage in sexual activity.”<sup>116</sup> And “no consent is obtained, where the complainant expresses, by words or conduct, a lack of agreement to engage in the activity.”<sup>117</sup> Case law has also set up comprehensive precedents on the adoption and interpretation of consent. In *R. v. Park*,<sup>118</sup> the Court emphasized “any analysis of consent must consider what...was actually communicated, as well as whether the communication was voluntary.” In *R. v. Ewanchuk*, the Court reaffirmed that consent should be “affirmatively communicated” and

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<sup>115</sup> Jessika Auken, *Collection on focus area: consent-based rape provision (Press Release)*, THE DANISH PUBLIC PROSECUTION AUTHORITY, (March 16, 2023), <https://anklagemyndigheden.dk/da/opsamling-paa-fokusomraade-samtykkebaseret-voldtaegtsbestemmelse>.

<sup>116</sup> Criminal Code, RSC 1985, C-46 s.273.1(Can.).

<sup>117</sup> *Id.* at s.273.1(2) (d) (Can.).

<sup>118</sup> *R. v. Park* [1995] 2 S.C.R. 836 (Can.).

further held that there is no defense of “implied consent.”<sup>119</sup> In 2004, the Court further decided in *R. v. Sazant* that evidence of non-consent can be found in “complainant's state of mind” instead of requiring clear evidence of words or conduct indicating refusal.<sup>120</sup>

Throughout the legislative process and judicial interpretation for over decades, the Canadian sexual consent law has developed an unambiguous definition and interpretation of affirmative consent.<sup>121</sup> Yet, as research noticed, many decision-makers at the grassroots level do not fully understand the practical significance of such laws and exercise their discretion which can easily result in misleading the portrait of the law in the general public and deter law enforcement from assisting complainants.<sup>122</sup> Thus, it is to be noticed that even when there is a comprehensive legal framework in sexual consent laws, there should also be an oversight mechanism that facilitates the enforcement of such rules in the executive and judicial branches.

#### **IV. AUSTRALIA**

In Australia, New South Wales (NSW), the Australian Capital Territory (ACT), Victoria, Queensland and Tasmania have amended their sexual consent laws since 2021.<sup>123</sup> Specifically, the law reform in NSW after the Supreme Court of NSW acquitted the perpetrator in an alleged rape case held that he had “no reasonable grounds for believing that the complainant was not consenting.”<sup>124</sup> This case led the NSW Attorney General to request the NSW Law Reform Commission review Crimes Act 1900 (NSW) to remove the judicial requirement of “reasonable grounds” (i.e. implied consent) to

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<sup>119</sup> *R. v. Ewanchuk*, [1999] 1 S. C. R. 330, 355 (Can.).

<sup>120</sup> *R. v. Sazant*, 2004 SCC 77, [2004] 3 S.C.R. 635 (Can.).

<sup>121</sup> Lucinda Vandervort, *Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory*, 23 *COLUM. J. GENDER & L.* 395,439 (2012) (“the present Canadian sexual assault law ... requires affirmative communication by words or conduct of valid consent or voluntary agreement to sexual contact”).

<sup>122</sup> *Id.* at 440-41.

<sup>123</sup> Parliament of Austl. Senate Comm. Rep., *supra* note 35.

<sup>124</sup> *R v Lazarus* [2017] NSWCCA 279 (N.S.W.).

better protect victims.<sup>125</sup> Currently, Tasmania, ACT, Victoria and NSW have adopted affirmative consent in their criminal law. Specifically, the definitions of consent under these affirmative consent states are as follows:

State	Definition of Consent
ACT <sup>126</sup>	“[I]nformed agreement... <b>freely and voluntarily</b> given and <b>communicated</b> by <b>saying or doing</b> something”
NSW <sup>127</sup>	“[A]t the <u>time</u> of the sexual activity, the person <b>freely and voluntarily agrees</b> to the sexual activity.” “A person does not consent to a sexual activity if the person does not <u>say or do anything to communicate</u> consent”
Victoria <sup>128</sup>	“ <b>[F]ree and voluntary agreement</b> ” “A person does not consent to an act if the person does not <u>say or do anything to indicate</u> consent to the act.”
Tasmania <sup>129</sup>	“ <b>[F]ree agreement</b> ” “[A] person does not freely agree to an act if the person does not <u>say or do anything to communicate</u> consent.”

Given that the legal reform in Australia is relatively recent, there is little empirical evidence on the impacts of implementing an affirmative consent standard.<sup>130</sup> As of January 2024, The Australian Law Reform (ALRC) has begun its inquiry into the justice system’s response to sexual violence including the law of consent.<sup>131</sup>

<sup>125</sup> Tamsin Rose, *NSW affirmative consent laws: what do they mean and how will they work?*, THE GUARDIAN, (June 1, 2022), <https://www.theguardian.com/australia-news/2022/jun/01/nsw-affirmative-consent-laws-what-do-they-mean-and-how-will-they-work>.

<sup>126</sup> Crimes Act 1900 s 50B (Austl. Cap. Terr.).

<sup>127</sup> Crimes Act 1900 ss 61HI, 61HJ(1)(a) (N.S.W.).

<sup>128</sup> Crimes Act 1958 ss 36, 36AA(1)(a) (Vict.a).

<sup>129</sup> Criminal Code 1924 sch 1, ss 2A(1), (2)(a) (Tas.a).

<sup>130</sup> Parliament of Austl. Senate Comm. Rep., *supra* note 35, at vii.

<sup>131</sup> Austl. Law Reform Comm’n, *Justice System’s Response to Sexual Violence Inquiry Begins*, (Jan. 23, 2024), <https://www.alrc.gov.au/news/justice-systems-response-to-sexual-violence-inquiry-begins/>.

## V. AFFIRMATIVE CONSENT ON CAMPUS

Contrasting to the reluctance in criminal law to adopt an affirmative consent model, affirmative consent is more prevalent in civil standards, especially for university policies codifying affirmative consent as a disciplinary standard for campus sexual violence.<sup>132</sup>

In the U.S., the adoption of the affirmative consent model springs from the federal statutory provision in Title IX of the Higher Education in 1972 ensuring all U.S. citizens an equal opportunity to access education programs free from gender-based discrimination.<sup>133</sup> Following Title IX and Department of Education requirements,<sup>134</sup> several U.S. states' education codes explicitly require educational institutions receiving state funding to include affirmative consent in their sexual violence policy.<sup>135</sup> Although there is no unified definition of affirmative consent on the federal level, state education codes define affirmative consent for institutions. U.S. universities thus widely adopt affirmative consent in their sexual violence policies.<sup>136</sup> For instance, California and Washington state education codes and university policies define affirmative consent as follows:

State	Affirmative Consent Definition	University	Affirmative Consent Definition
California <sup>137</sup>	“[A]n <b>affirmative, unambiguous, and conscious decision</b> by each participant to	University of California,	“[C]onsent to sexual activity requires each person to express an <b>affirmative, conscious, and</b>

<sup>132</sup> Deborah Tuerkheimer, *supra* note 4.

<sup>133</sup> 20 U.S.C. § §1681-1688, (“[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”).

<sup>134</sup> 34 CFR §106.44 (2020), (“universities receiving federal fundings are obligated to respond, resolve promptly and supportively of sexual harassment allegations.”).

<sup>135</sup> See e.g. Cal. Ed. Code §67386 (“Postsecondary institutions shall adopt a policy concerning sexual assault, domestic violence, dating violence, and stalking, involving a student, both on and off campus.” “The policy shall include an affirmative consent standard in the determination of whether consent was given by both parties to sexual activity.”); Chapter 28B.112 RCW §005 (“In order to complement federal policy and ensure the safety of all our students, the legislature finds it necessary to establish minimum standards for all institutions pertaining to campus sexual violence policies and procedures.”).

<sup>136</sup> Deborah Tuerkheimer, *supra* note 3, at 24.

<sup>137</sup> Cal. Ed. Code §67386(1).

	engage in <b>mutually agreed-upon</b> sexual activity.”	Berkeley <sup>138</sup>	<b>voluntary agreement</b> to engage in sexual activity. ”
Washington <sup>139</sup>	“‘[C]onsent’ means that <u>at the time of and throughout</u> the sexual contact, there are <b>words or conduct that reasonably communicate freely given agreement.</b> ”	University of Washington <sup>140</sup>	Consent is “ <u>at the time of and throughout</u> the sexual contact, there are <b>words or conduct that reasonably communicate freely given agreement.</b> ”

Canada has no federal or state-level education code that requires educational institutions to adopt the affirmative consent definition in their campus policies. But as mentioned before, the federal criminal code adopted affirmative consent in 1992.<sup>141</sup> Canadian universities’ sexual violence policy generally adopts an affirmative consent standard. For instance, the University of Toronto defines consent as “the voluntary agreement of an individual to engage in a sexual act. Consent is positive, active and ongoing, and can be revoked at any time.”<sup>142</sup> The University of British Columbia defines consent as “voluntary agreement to engage, or continue to engage, in sexual activity must be affirmatively communicated through words or actively expressed through conduct.”<sup>143</sup>

Unlike U.S. and Canada, where there are federal or state legislations that mandate the implementation of affirmative consent in university policies, in the U.K., the Department of Education mandates the incorporation of Equality Act 2010<sup>144</sup> into the institutional decision-making process, but institutions may independently decide their disciplinary procedures and policies.<sup>145</sup> The

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<sup>138</sup> UC SVSH Policy II.A.  
<sup>139</sup> WAC 478-121 §150.  
<sup>140</sup> UW Student Policies Chapter 210 s.7. G.2.  
<sup>141</sup> Criminal Code s.273.1 (Can.). *supra* note 116.  
<sup>142</sup> University of Toronto, *Policy on Sexual Violence and Sexual Harassment, entered into force*, (Jan. 1, 2023), <https://governingcouncil.utoronto.ca/secretariat/policies/sexual-violence-and-sexual-harassment-policy-january-1-2023>.  
<sup>143</sup> UBC Sexual Misconduct and Sexualized Violence Policy §4.1.  
<sup>144</sup> Equality Act of 2010 (c. 15) s 196(1)(a) (U.K.) (universities, as a public authority, have “due regard to eliminate discrimination, harassment, victimization and any other conduct that is prohibited by or under this Act.”).  
<sup>145</sup> Department of Education, *Sexual violence and sexual harassment between children in schools and colleges Advice for governing bodies, proprietors, headteachers, principals, senior leadership teams and designated safeguarding leads*, (Sept. 2021),



discretion each institution has in developing its sexual violence policies leaves a huge conceptual gap between the definitions of consent compared to their North American counterparts. For instance, Oxford University simply defines sexual harassment as “unwanted and unwarranted conduct” without using consent.<sup>146</sup> Furthermore, British universities are notoriously known for requiring victims who report sexual offences to sign Non-Disclosure Agreements (NDAs). Since 2016, nearly a third of universities have used NDAs in student grievance disputes including sexual assault.<sup>147</sup> The universities use NDAs to deter complainants from disclosing details of their cases to law enforcement, and they are often encouraged to settle their reports under the NDAs.<sup>148</sup> The other two-thirds of the universities not using NDAs may still use similar confidential strategies to restrain disclosures. For example, a former complainant of sexual harassment at the University of Cambridge was bound by confidentiality to not disclose details to anyone and had been threatened with a possible charge of harassment if she did.<sup>149</sup> The use of NDAs contradicts the Equality Act’s objective since it discriminates against the complainants in limiting their freedom to discuss case details. Such confidential legal strategies not only fail to protect victims of sexual offences but also deter them from seeking help.<sup>150</sup> Although the U.K. government initiated a pledge in 2022 of asking more than 150 universities not to use NDAs, the future of the U.K. disciplinary procedure for campus reports of sexual harassment is still unclear.<sup>151</sup> An overall move towards an affirmative consent model by the UK

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[https://assets.publishing.service.gov.uk/media/630f86b8d3bf7f2a30277e08/WITHDRAWN\\_Sexual\\_violence\\_and\\_sexual\\_harassment\\_between\\_children\\_in\\_schools\\_and\\_colleges.pdf](https://assets.publishing.service.gov.uk/media/630f86b8d3bf7f2a30277e08/WITHDRAWN_Sexual_violence_and_sexual_harassment_between_children_in_schools_and_colleges.pdf).

<sup>146</sup> Oxford University, Statute XI: University Discipline s.1(e), Gazette, Vol.152, 221, 221-22 (2022) <https://governance.admin.ox.ac.uk/legislation/statute-xi-university-discipline-0#collapse1556036>.

<sup>147</sup> Danielle Bradford, *I learned firsthand how British universities are silencing abuse survivors*, THE GUARDIAN (Feb.18, 2020), <https://www.theguardian.com/commentisfree/2020/feb/18/universities-silencing-abuse-survivors-students>.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See Rianna Croxford, *Universities pledge to stop silencing sex-assault victims*, BBC NEWS (Jan.18, 2022) <https://www.bbc.com/news/education-60039733>.

<sup>151</sup> Can’t Buy My Silence, *Campus Pledge Update*, <https://www.cantbuymysilence.com/uni-pledge> (last visited on Mar. 1, 2024).

will also ensure that vulnerable sections of the society will benefit and such NDAs do not find place in allegations of sexual offences.

### **COMMON ARGUMENTS AGAINST AFFIRMATIVE CONSENT**

Two of the most popular arguments against affirmative consent is that (i) **it shifts the burden of proof to the accused**<sup>152</sup> and (ii) **it will increase the case of false rape allegations.**<sup>153</sup> These claims however have no legal basis. First, in terms of the burden of proof, the prosecution must still prove the charges beyond a reasonable doubt through the rigorous ordeal of trial; the defendant is not required to prove anything.<sup>154</sup> As seen earlier, Wisconsin, a State which has adopted affirmative consent in its true sense, reads affirmative consent in the context of sexual offences as sexual acts “without the consent” of the other person.<sup>155</sup> The Wisconsin Supreme Court in the case of *State v. Grunke*,<sup>156</sup> while deciding the requirement of lack of consent in a case involving sexual assault against a corpse, held that the State needs to prove beyond reasonable doubt that there was no affirmative consent.<sup>157</sup> On the contrary, traditional consent places an unfair focus on the victim’s conduct to prove separate elements of force and resistance.<sup>158</sup>

Secondly, there are arguments that the affirmative consent model will make it easier for alleging **false rape claims.**<sup>159</sup> However, there is no empirical research to corroborate this claim. Although there is a commonly cited argument that 5 to 10% of the rape allegations are found to be

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<sup>152</sup> *NACDL Opposes Affirmative Consent Resolution ABA Resolution 114*, <https://www.nacdl.org/getattachment/7e0ec516-a34a-487a-a7fc-51d4e54a48c9/nacdl-position-on-aba-resolution-114.pdf> (last visited at Dec.16, 2023); see also KC Johnson and Stuart Taylor Jr. *Activists push a resolution that would redefine sexual consent and convict innocent men of assault*, WSJ (Aug.11, 2019, 5:33 pm ET), <https://www.wsj.com/articles/will-the-aba-reject-due-process-1156559212>.

<sup>153</sup> Nate Summers, *supra* note 73, at 24.

<sup>154</sup> Nate Summers, *supra* note 73, at 22.

<sup>155</sup> WIS. STAT. ANN. § 940.22; see Nate Summers, *supra* note 73, at 22.

<sup>156</sup> *State v. Grunke*, 2008 WI 82, ¶28.

<sup>157</sup> *Id.* at ¶ 25.

<sup>158</sup> Nate Summers, *supra* note 73, at 7.

<sup>159</sup> Nate Summers, *supra* note 73, at 24.

false<sup>160</sup>, these data seem faulty as it disregards the cases of rape that go unreported. Under the affirmative consent model, only the **“type” of evidence produced** is different which is also required to be proved beyond reasonable doubt by the State. Even in the context of disciplinary proceedings, the University ought to have a preponderance of evidence confirming that there’s at least a 51% chance that the sexual assault occurred.<sup>161</sup> The allegations of sexual assault thus have to withstand the ‘screening mechanism’ of procedural justice.<sup>162</sup> However, the misperception that women often lie about sexual assaults brings about a gender narrative of sexual violence perpetuating victim blaming and rape myths, acting as barriers for survivors to seek justice.<sup>163</sup>

Furthermore, publicly circulated statistics on false rape allegations largely undermines the fact that more than 90% of the cases of sexual assaults go unreported.<sup>164</sup> It also undermines how falsely accusing a person of sexual assault is as despicable as sexual assault itself. Such an act inflicts familial, reputation, professional and psychic harms that can last a lifetime to the person who makes false claims.<sup>165</sup> A recent research study done in England and Wales has demonstrated that in 2021-2022, only 3% of the 70,000 cases of recorded rape led to a charge.<sup>166</sup> As only those cases reported in the first place can be considered for false claim assessment, the data could never be exhaustive and will always underestimate the number of rape cases that go unreported.

Additionally, rape claims are declared to be false or made-up for various reasons.<sup>167</sup> For example, cases are often declared false if a woman who initially filed the complaint withdraws it.

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<sup>160</sup> Katie Heaney, *Almost no one is falsely accused of rape*, THE CUT (Oct. 5, 2018) <https://www.thecut.com/article/false-rape-accusations.html>.

<sup>161</sup> Dana A. Weiser, *Confronting Myths About Sexual Assault: A Feminist Analysis of the False Report Literature*, *Family Relations*, 66 Special Issue on Feminist Framings of Sexual Violence on College Campuses 46, 48 (2017).

<sup>162</sup> Nicholas J. Little, *supra* note 71, at 1357.

<sup>163</sup> *See* Dana A. Weiser, *supra* note 73, at 48.

<sup>164</sup> Katie Heaney, *supra* note 160.

<sup>165</sup> *Id.*

<sup>166</sup> Ebani Dhawan & Patrick Haggard, *Neuroscience evidence counters a rape myth*, 7(6) NATURE HUMAN BEHAVIOUR 835-838 (May 22, 2023).

<sup>167</sup> Katie Heaney, *supra* note 160.

Government statistics disclosed by labor party revealed that 69.2% of the victims of sexual assault in England and Wales withdraws the cases from investigating owing to the court delays, low police conviction rates and fears over the trauma of reliving the crime in court.<sup>168</sup> Similarly, Police might declare the claim to be false if they do not find details incriminating on the part of the accuser. Just because law enforcement officials couldn't gather evidence, it will later be deemed as a false claim. This also includes the cases where the victims are sexually abused by police personnel themselves. Thus, there is little to no supporting evidence to substantiate that adoption of an affirmative consent model would increase the cases of false rape allegations.

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<sup>168</sup> Rajeev Syal, *Nearly 70% of the rape victims drop out of investigation in England and Wales*, THE GUARDIAN (May 30, 2023), <https://www.theguardian.com/society/2023/may/30/nearly-70-of-victims-drop-out-of-investigations-in-england-and-wales>.

## CONCLUSION

In summary, there is a growing trend across jurisdictions towards the adoption of an affirmative consent model for sexual offences. States tend to adopt this trend first by abolishing the force and coercion requirements in their consent definition, and including an affirmative consent definition that bars the defense of “implied consent,” or “lack of resistance.” International human rights law, through the Istanbul Convention and CEDAW, emphasizes on the implementation of a consent-based model in the affirmative sense. However, there seems to be no universal definition of such type of consent. Despite this, individual jurisdictions adopt affirmative consent through their own definitions and implementations in line with the general purpose and intent set out in international human rights law.

The important elements of affirmative consent observed across jurisdictions are elements of “voluntariness,” “agreement,” “knowledge [of the particular sexual act],” “mutual” and “affirmative.” It was a common observation that even in the case of jurisdictions where consent was defined in the affirmative sense, their statutory offences still included the traditional elements of “force” and “resistance.” This dissonance between the definitions of consent and statutory sexual offences is termed as “diluted affirmative consent model.” Conversely, where such dissonance does not exist, it is termed as “pure affirmative consent model.” The disparity among the penal codes’ definition of sexual offences and definition of consent as seen in some of the States in the U.S. is likely to undermine the effectiveness or the legislative intention of adopting an affirmative consent model, thus the pure affirmative consent model is preferred. It is also important to specify in consent definitions that “silence” and “passive acquiescence” do not implicate consent.

In the civil standard, university policies are more inclined to adopt affirmative consent compared to their penal code counterparts and reflect a common trend to protect college students who are regarded as more vulnerable to sexual violence. But more importantly, the differences also

illustrate a pressed concern in jurisdictions like the U.K., where a lack of affirmative consent in both criminal and education codes could result in universities using their discretions to silence reports on sexual violence. A move to an affirmative consent model in the penal codes will result in ensuring that educational institutions uphold similar standards in their policies as well to protect vulnerable students.

In sum, legislative developments in several jurisdictions across the world show that the affirmative consent model and definitions of sexual offences were adopted and enforced by upholding international human rights principles of the right to sexual autonomy. This seems to be the better model to mitigate sexual and gender-based violence, ensure effective access to justice for victims, and promote a safer society for all.

## **RECOMMENDATIONS**

Our research and findings demonstrate that the affirmative consent model establishes a more robust foundation for promoting healthy relationships, mutual respect, sexual agency, and protection for survivors in legal proceedings. We believe that the following recommendations are crucial to adopt an affirmative consent model:

- It is recommended that sexual offences laws in the UK move away from the current implied consent model to an affirmative consent model which focuses on the presence of an *explicit, voluntary, and informed agreement by both parties about the particular sexual act involved*. This will shift the narrative from *what is not objected to* to explicitly acknowledging *what is voluntarily agreed upon*.
- It is recommended that sexual offence laws in UK must *include an affirmative consent definition* that is “voluntary agreement with knowledge of particular sexual acts involved between the parties regardless of the nature of relationship, and that lack of submission or resistance do not constitute consent.”

- It is recommended that apart from including an affirmative consent definition, the UK must ensure *all degrees of statutory sexual offences in criminal laws define the offences only through "consent."* A pure affirmative consent model must be adopted and other separate aggravating factors such as force, duress, resistance, lack of submission must NOT be used while defining the offences.
- It is recommended that a shift to an affirmative consent model should be *accompanied by necessary evaluation and oversight mechanisms to ensure its proper and intended implementation,* and to monitor its impact on the judiciary and law enforcement procedures. The move to an affirmative consent model should be in line with the general principles of criminal law.
- It is recommended that *appropriate measures must be taken to protect the identity of the victim and prevent secondary victimization* by ensuring that sexual offence cases are handled more efficiently through the law enforcement system and with respect to privacy.

The implementation of these recommendations will bring the UK on par with its obligations under international human rights law and will promote a culture of consent, creating an overall safer society for all.

**APPENDIX**

**Table A: Some examples of U.S. States that have force as part of their consent definition - “lack of consent” states**

S.No	State	Consent Definition
1.	Arizona	<p><b>ARIZ. REV. STAT. ANN. § 13-1406</b>  <b>"Without consent"</b> includes any of the following:</p> <p>(a) The victim is <b>coerced</b> by the <b>immediate use or threatened use of force</b> against a person or property.</p> <p>(b) The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. For the purposes of this subdivision, "mental defect" means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.</p> <p>(c) The victim is intentionally deceived as to the nature of the act.</p> <p>(d) The victim is intentionally deceived to erroneously believe that the person is the victim's spouse.</p>
2.	New York	<p><b>N.Y PENAL LAW § 130.05</b>  <b>Lack of consent</b></p> <p>1. Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without consent of the victim.</p> <p>2. Lack of consent results from:</p> <p>(a) <b>Forcible compulsion</b>; or</p> <p>(b) Incapacity to consent; or</p> <p>(c) Where the offense charged is sexual abuse or forcible touching, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct</p>
3.	Nebraska	<p><b>NEB. REV. STAT. ANN. §28-318(8)</b>  <b>Lack of consent</b></p> <p>1. Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without consent of the victim.</p> <p>2. Lack of consent results from:</p> <p>(a) <b>Forcible compulsion</b>; or</p> <p>(b) Incapacity to consent; or</p> <p>(c) Where the offense charged is sexual abuse or forcible touching, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct</p>



**Table B: Compilation of U.S. States that have “affirmative consent” as part of penal code definitions:**

S.No	State	Consent Definition
1.	California	<p><b>CAL. PENAL CODE §261.6</b></p> <p>(a) In prosecutions under Section 261, 286, 287, or 289, or former Section 262 or 288a, in which consent is at issue, “consent” means <b>positive cooperation</b> in act or attitude pursuant to an exercise of <b>free will</b>. The person must act <b>freely</b> and <b>voluntarily</b> and have <b>knowledge</b> of the nature of the act or transaction involved.</p> <p>(b) <b>A current or previous dating or marital relationship</b> is not sufficient to constitute consent if consent is at issue in a prosecution under Section 261, 286, 287, or 289, or former Section 262 or 288a.</p> <p>(c) This section shall not affect the admissibility of evidence or the <b>burden of proof</b> on the issue of consent</p>
2.	Colorado	<p><b>COLO. REV. STAT ANN. §18-3-401(1.5)</b></p> <p>“Consent” means <b>cooperation</b> in act or attitude pursuant to an exercise of <b>free will</b> and with <b>knowledge</b> of the nature of the act. A <b>current or previous relationship</b> shall not be sufficient to constitute consent under the provisions of this part 4. <b>Submission</b> under the influence of fear shall not constitute consent. Nothing in this definition shall be construed to affect the admissibility of evidence or the <b>burden of proof</b> in regard to the issue of consent under this part 4.</p>
3.	Florida	<p><b>FL. ST. §794.011</b></p> <p>“Consent” means intelligent, <b>knowing</b>, and <b>voluntary</b> consent and <b>does not include coerced submission</b>. “Consent” shall not be deemed or construed to mean the failure by the alleged victim to offer <b>physical resistance</b> to the offender.</p>
4.	Illinois	<p><b>ILL. COMP. STAT. §5/11-0.1, 1.70(a)</b></p> <p>"Consent" means a <b>freely given agreement</b> to the act of sexual penetration or sexual conduct in question. Lack of verbal or <b>physical resistance</b> or <b>submission</b> by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent.</p>
5.	Minnesota	<p><b>MINN. STAT. ANN. §609.341(4)</b></p> <p>"Consent" means words or <b>overt actions</b> by a person indicating a <b>freely given present agreement</b> to perform a particular sexual act with the actor. Consent does not mean the <b>existence of a prior or current social relationship</b> between the actor and the complainant or that the complainant failed to resist a particular sexual act.</p> <p>(b) A person who is mentally incapacitated or physically helpless as defined by this section cannot consent to a sexual act.</p>

		(c) Corroboration of the victim's testimony is not required to show lack of consent.
6.	New Jersey	<b>State ex rel. M.T.S 609 A.2d 1266, 1277 (N.J 1992)</b> Permission to engage in sexual penetration must be <b>affirmative</b> and it must be <b>given freely</b> , but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances.
7.	Vermont	<b>VT. STAT. ANN. Tit. 13, §3251(3)</b> “Consent” means the <b>affirmative</b> , unambiguous, and <b>voluntary agreement</b> to engage in a sexual act, which can be revoked at any time.
8.	Washington	<b>WASH. REV. CODE ANN. §9A.44.010(7)</b> "Consent" means that <b>at the time</b> of the act of sexual intercourse or sexual contact there are actual words or conduct indicating <b>freely given agreement</b> to have sexual intercourse or sexual contact.
9.	Washington D.C	<b>D.C. CODE §22-3001(4)</b> “Consent” means words or <b>overt actions</b> indicating a <b>freely given agreement</b> to the sexual act or contact in question. Lack of verbal or <b>physical resistance</b> or <b>submission</b> by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.
10	Wisconsin	<b>WIS. STAT. ANN. §940.225(4)</b> Consent. “Consent”, as used in this section, means words or <b>overt actions</b> by a person who is competent to give informed consent indicating a <b>freely given agreement</b> to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of sub. (2) (c), (cm), (d), (g), (h), and (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11 (2): (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct. (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

**Table C : Examples of States that have affirmative consent but have a force requirement in their statutory offence definitions :**

S.No	State	Consent Definition	Statutory offense definition
1.	California	<b>positive cooperation</b> <b>free will</b> <b>Knowledge</b>	<b>CAL.PENAL CODE §261 - rape</b> (2) If it is accomplished against a person’s will by means of <b>force, violence, duress, menace, or fear of</b>

		A current or previous dating or marital relationship burden of proof	immediate and unlawful bodily injury on the person or another
2.	Colorado	Cooperation free will Knowledge current or previous relationship Submission under the influence of fear shall not constitute consent.	(1) Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if: (a) The actor knows that the victim <b>does not consent</b> ; or (b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or (c) The victim is physically helpless and the actor knows that the victim is physically helpless and the victim has not consented; or (d) The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission;
3.	Florida	“Consent” means intelligent, knowing, and voluntary consent and does not include coerced submission. “Consent” shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender.	<b>§799.011 – Sexual battery</b> (3) A person who commits sexual battery upon a person 12 years of age or older, without that person’s consent, and in the process thereof: (a) <b>Uses or threatens to use a deadly weapon; or</b> (b) <b>Uses actual physical force likely to cause serious personal injury,</b>
4.	Illinois	freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission  <b>The manner of dress</b> of the victim at the time of the offense shall not constitute consent.	<b>720 ILL.COMP. STAT. 5/11-1.20 - Criminal Sexual Assault</b> (a) A person commits criminal sexual assault if that person commits an act of sexual penetration and  (1) uses <b>force or threat of force</b> ; (2) knows that the victim is unable to understand the nature of the act or is unable to give knowing consent;

5.	Minnesotainnesta	<p>overt actions  freely given present  agreement  existence of a prior or  current social relationship</p>	<p><b>MINN. STAT. § 609.342 – criminal conduct in the first degree</b></p> <p>A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:</p> <p>(a) circumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;</p> <p>(c) the actor causes personal injury to the complainant, and any of the following circumstances exist:</p> <p>(i) the actor uses coercion to accomplish the act;</p> <p>(ii) the actor uses force, as defined in section 609.341, subdivision 3, clause (2); or</p> <p>(iii) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;</p> <p>(d) the actor uses force as defined in section 609.341, subdivision 3, clause (1); or</p> <p>(e) the actor is aided or abetted by one or more accomplices within the meaning of section 609.05, and either of the following circumstances exists:</p> <p>(i) the actor or an accomplice uses force or coercion to cause the complainant to submit; or</p> <p>Subd. 3. Force. "Force" means either: (1) the infliction by the actor of bodily harm; or (2) the attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which causes the complainant to reasonably believe that the actor has the present ability to execute the threat.</p>
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6.	New Jersey	Affirmative given freely	<p><b>N.J. Stat. Ann. § 2C:14-2 – sexual assault</b></p> <p>c. An actor is guilty of sexual assault if the actor commits an act of sexual penetration with another person under any one of the following circumstances:</p> <p>(1) The actor commits the act using coercion or <b>without the victim's affirmative and freely-given permission</b>, but the victim does not sustain severe personal injury;</p>
7.	Vermont	Affirmative voluntary agreement revoked	<p><b>13 V.S.A. § 3252 – sexual assault</b></p> <p>(a) No person shall engage in a sexual act with another person:</p> <p>(1) <b>without the consent of the other person;</b></p> <p>(2) by threatening or coercing the other person;</p> <p>(3) by placing the other person in fear that any person will suffer imminent bodily injury; or</p> <p>(4) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring.</p>
8.	Washington	at the time freely given agreement	<p><b>WASH. REV. CODE. ANN. § 9A.44.040 - Rape in the first degree</b></p> <p>Rape in the first degree.</p> <p>(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person <b>by forcible compulsion</b> where the perpetrator or an accessory:</p> <p>(a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or</p> <p>(b) Kidnaps the victim; or</p> <p>(c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or</p>

			(d) Feloniously enters into the building or vehicle where the victim is situated. (2) Rape in the first degree is a class A felony.
9.	Washington D.C	<p><b>overt actions</b> <b>freely given agreement</b></p> <p>Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.</p>	<p><b>D.C. § 22–3002 – First degree sexual abuse</b></p> <p>First degree sexual abuse.</p> <p>(a) A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in <a href="#">§ 22-3571.01</a>, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner:</p> <p>(1) By using <b>force against that other person;</b></p> <p>(2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping;</p> <p>(3) After rendering that other person unconscious; or</p> <p>(4) After administering to that other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct.</p>
10.	Wisconsin	<p><b>overt actions</b> Competent Informed consent <b>freely given agreement</b></p>	<p><b>WIS. STAT. ANN. § 940.225 – first degree sexual assault</b></p> <p>(1) First degree sexual assault. Whoever does any of the following is guilty of a Class B felony:</p> <p>(a) <b>Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.</b></p> <p>(b) Has sexual contact or sexual intercourse with another person without consent of that person by use</p>

			or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.
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