

A Comparative Study of Criminalization Models of Rape: From the Perspective of the Evolution of Standards for Determining Sexual Consent

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Abstract

In European and American criminal law, the regulation of rape has revolved around the question of how to determine whether sexual activity is “against a woman’s will.” This debate has produced four distinct standards for identifying sexual consent. Under traditional rape law, consent turned on a woman’s physical resistance—a criterion that fails to capture what rape actually is. Driven by progressive feminist thought, the affirmative consent standard, which foregrounds women’s sexual autonomy, has gradually gained traction in academic circles and spurred a wave of rape law reform across the globe. Yet the affirmative consent standard cannot fully account for the new forms of gender relations that have emerged in contemporary society, and whether it can be applied in China’s judicial practice warrants careful scrutiny. At the same time, even among the countries that have adopted affirmative consent, most have softened the standard—whether by limiting its scope of application or by adjusting sentencing ranges. Drawing on this international experience, China should attend to the diverse trajectories along which these legal rules have developed and adapt progressive ideas to local culture and social conditions, to strike a balance between rights protection and judicial fairness.

Keywords

Standards of Sexual Consent; Rape; Affirmative Consent; “No means No” Standard; Sexual Autonomy.

1. Introduction

The reform of rape law is one of the most consequential developments in modern criminal law. As women have entered the public sphere in greater numbers, both their daily lives and their self-understanding have changed dramatically. Beginning in the 1960s, the rise of feminist movements prompted many countries to strengthen legal protections for women’s sexual rights. With feminist scholars at the forefront, the rules governing rape determination and sexual consent have undergone repeated transformation, shifting the inquiry from the patriarchal framework of “resistance” toward a gender-equality framework of “consent.” This global evolution of sexual consent rules has played a positive role in advancing women’s rights and gender equality. A growing number of jurisdictions have now restructured their rape law around the concept of “consent”, a move designed to capture more precisely what rape is: sexual activity without consent [1, 2]. As feminist theory and practice continue to develop both in China and abroad, China’s legal system has devoted increasing attention to women’s rights and has made significant progress on multiple fronts.

The transformation of sexual consent standards has been contentious. Its application has raised new legal and ethical questions, particularly around what “consent” means and how it can be identified. After a long period of evolution, rape law reform—led primarily by the United

States—has pushed the “affirmative consent” standard toward the mainstream. This standard demands that a woman clearly signal her consent throughout the entire sexual encounter [3]. The shift from “No Means No” to “Yes Means Yes” reflects a growing emphasis on positive, active consent. The European Union has strongly advocated for similar reforms, but its member states have been more cautious, adopting approaches that are more flexible in both legislation and practice.

As Chinese scholars have increasingly taken up the topics of rape myths and affirmative consent, the need to re-examine how sexual consent rules have developed—and how they might better protect women’s sexual autonomy—has become pressing. This article traces and evaluates the trajectory of sexual consent rules in rape law, analyzes the controversies surrounding the affirmative consent standard in light of judicial experience, and examines how several jurisdictions have handled the standard in legislation and case law. The aim is to draw lessons that might inform future reform of sexual consent standards in China, with a view to achieving both robust rights protection and judicial justice.

2. The Evolution of Sexual Consent Standards and the Determination of “Against Women’s Will”

Rape is treated as a serious crime in law because it violates a woman’s sexual autonomy and freedom of will, and because it inflicts severe harm on a victim’s physical and mental health and her personal dignity. From the traditional period to the present, from “resistance” to “consent”, European and American criminal law has undergone several shifts in how rape is criminalized, with the determination of what counts as “against a woman’s will” at the center of each shift.

2.1. Resistance-Centered Rules of Sexual Consent

2.1.1. The Utmost Resistance Rule

In traditional legal norms governing sexual offenses, “resistance” was the core element of rape. In the earliest periods, women were typically treated as male property, bound by ties of personal dependency; rape as a crime did not exist. Even when it first appeared as a legal concept, rape was confined to the defilement of virgins. The criminalization of rape rested entirely on the interests of a woman’s current or prospective husband—its purpose was to protect male property rights over female sexuality [2]. The earliest definitions of rape thus bore a deeply patriarchal imprint and reflected a fundamental distrust of women.

Traditional society maintained stereotyped views about sexual behavior: men were cast as active, aggressive initiators; women as passive recipients. Women in this era were not seen as possessing independent personhood. A woman’s chastity was valued above her life, and violations of her chastity were, to a significant degree, understood as violations of her husband’s or father’s rights [4]. Under this deeply unequal sexual stereotype, women bore a much heavier burden of proof to establish that rape had occurred; if they failed, they risked being accused of making false allegations.

Out of this deep distrust of women and the traditional understanding of sexual violence came the “utmost resistance rule”—the earliest criminal law standard for determining rape. It required victims to exert all their physical strength to resist sexual assault, and to do so sincerely, genuinely in defense of their honor [5]. Such resistance was to serve as proof that the woman did not consent. Former CUNY School of Law Dean Michelle J. Anderson identified two core elements of the utmost resistance principle. First, the woman must put up the fullest possible physical fight when encountering sexual assault. Second, even after the male’s penile insertion, her resistance must not diminish [5]. Under this principle, a woman who failed to resist with all her might was generally not recognized as a rape victim—and even a woman who struggled with everything she had and then stopped upon realizing her efforts were futile

would not be considered raped. Some lawyers proposed that rape should satisfy three conditions: the perpetrator disregarded the woman's refusal and used or increased force; the victim's non-consent could be inferred from obvious physical resistance; and the interplay between force and resistance made the woman's unwillingness apparent [6].

Under the social conditions of the time, the utmost resistance rule had a certain logic. First, limitations in technology and criminal investigation made proving rape extremely difficult. Relying solely on the parties' oral statements and evidence of minor physical altercations made it hard to distinguish adultery from rape. In an era of relatively conservative sexual attitudes, reading the absence of "violation of a woman's will" as the absence of "resistance behavior" yielded a comparatively low rate of erroneous judgments and helped separate adultery from rape. Because the definition of sexual consent was highly ambiguous at the time, the degree of resistance—and the blood, scars, and bruises it left—provided relatively objective, concrete criteria. In a legally underdeveloped age, such standards lent themselves more readily to making reasonable determinations. Second, the rule could, to a degree, protect women's right to life and sexual rights. The prevailing view held that when a normal, rational woman faced male violence or threats and was about to be forcibly subjected to sex, some form of resistance was indispensable. Strong resistance might deter the perpetrator, and even if he succeeded, the scratches, skin fragments, and other traces left behind could help identify him.

The defects of the utmost resistance rule were also plain. The overemphasis on physical resistance as proof of non-consent produced excessively high evidentiary standards for rape. Police and prosecutors routinely declined to bring cases when the victim lacked visible physical injuries. Even when a case reached court, judges and juries assessed whether the woman had resisted by looking for signs of physical struggle, bruises, and torn clothing—raising the bar for conviction to an unreasonable height [7].

2.1.2. The Reasonable Resistance Rule Under Feminist Influence

The mounting criticism of the utmost resistance rule—its unfairness, its bias—led the law's interpretation of sexual consent to shift, propelled by the feminist movement. In the 1960s, the United States, led by the academic community, embarked on a series of rape law reforms aimed at dismantling the utmost resistance requirement. It became widely recognized that "defending one's chastity" often came with the risk of serious physical harm. A woman who offered maximum resistance might reduce the chance of the rape being completed, but she might also suffer additional injuries; in extreme cases, the perpetrator might even kill the victim to conceal his identity or prevent her from reporting the crime. A victim should not be obliged to resist violence or threats to the utmost, nor should she be required to keep resisting once resistance proves futile. She needed to resist only to the extent reasonably necessary to make the defendant aware that she refused to consent [8]. Reflecting this shift in public attitudes and feminist thought, the New York State legislature amended its criminal law in 1977, providing that "when a rape victim resists her assailant, the possibility of serious injury during this period is greatly increased... therefore, the victim need only provide so much resistance as is reasonable under the circumstances" [7].

The shift from utmost resistance to reasonable resistance marked both an awakening of women's sexual autonomy and an advance in the criminal law's treatment of rape. Still, whether the standard demanded "utmost" or merely "reasonable" resistance, the analysis continued to center on how women could produce physical evidence to demonstrate that the male perpetrator had "compelled" them into unwanted sex. Both standards focused on the female victim's physical resistance, and the burden of proof they allocated between the parties was manifestly lopsided. The determination of rape should take multiple factors into account; zeroing in on the victim's resistance alone—however much resistance was demanded—was unreasonable. The establishment of legal facts and the assessment of their legal character are

different undertakings. Resistance-centered rules face particular difficulty with alcohol-facilitated rape, rape by abuse of a superior position, and acquaintance rape, because the particularities of the criminal context make it hard to establish “violation of a woman’s will.” Such rules not only fail to protect women adequately; in some cases, the victims themselves do not even register that rape has occurred. What is more, these rules are steeped in traditional patriarchal values—akin to the feudal ethic that held a woman’s chastity above her life—and bear the stamp of protecting male interests while ignoring women’s sexual autonomy and right to consent.

As women’s sexual autonomy has grown, women have gained greater freedom and agency in choosing sexual partners. They now have the right to actively consent to or refuse sex, rather than being limited to proving consent or non-consent through passive resistance alone. Women should be regarded as the authors of their own sexuality, not as appendages of others, and their sexual rights deserve respect and protection. For a woman who occupies the relatively weaker position in the crime of rape, the sudden terror of a violent or forcible sexual assault may strip her of the capacity to resist. Under the shadow of that fear, she may not dare to resist, and fighting back may invite even more severe injury or death. Even under the reasonable resistance rule, a resistance-centered approach to determining rape remains inadequate. The legal standards needed urgent updating to capture the full range of circumstances in which “violation of a woman’s will” occurs, and to offer women better protection.

2.2. Consent-Centered Rules of Sexual Consent

2.2.1. Negative Consent: Breaking the Rape Myth

How rape and other sexual offenses are determined involves not only the question of what standard to apply, but also questions of research paradigm and discourse. The terms “negative consent” and “affirmative consent” emerged in precisely this context. In the 1990s, as the feminist movement continued to develop, a second wave of rape law reform swept across the globe, and the “negative consent” rule was born. Its goal was to let “no” mean what it says—“no means no” [9]. A woman’s non-consent to sex is simply that: a clear refusal, carrying no ambiguity. When a woman verbally says “no” to sexual activity, she is refusing sex.

“Negative consent” arose in response to one strand of a set of sexual stereotypes captured by the label “rape myth.” In the debates surrounding rape, a stubborn prejudice has persisted—that women are duplicitous about sex, that their refusals may mask tacit willingness, that “no” can actually mean “yes,” that an expression of refusal amounts to a different kind of consent [10]. This view has found various expressions across legal systems. The classic manifestation appears in Anglo-American common law, where it was misleadingly termed “token resistance.” The stereotype holds that a woman’s “no” is a form of coyness; defendants have routinely invoked this idea to argue that the woman’s true intention was not refusal. This cultural residue has served as a ready defense for rapists for years, while women’s sexual non-consent has gone consistently unheeded.

It was against this backdrop—and under the pressure of advancing feminist thought—that the Berkowitz case became a catalyst for reform. The victim had consumed a martini before entering the defendant Berkowitz’s residence, where she was looking for her boyfriend, Berkowitz’s roommate. She remained in the room at Berkowitz’s request. Berkowitz then approached her, touched her breasts, and attempted to place his penis in her mouth. He removed her pants and underwear and penetrated her vaginally. Throughout the entire encounter, the victim repeatedly said “no” to Berkowitz. She did not try to leave the room, though she was fully capable of doing so—the door was ajar, and Berkowitz did nothing to restrict her movement. Nor did Berkowitz use any violence against her. On these facts, the Pennsylvania Supreme Court ruled that the rape charge could not stand, holding that the element of “forcible compulsion” was absent. The court acknowledged the victim’s expressions

of refusal but noted that the legislative definition of “forcible compulsion” demanded something beyond the mere absence of consent—implying that resistance was still required for a finding of “violation of a woman’s will.”

The Berkowitz case propelled rape law reform forward. Pennsylvania took the lead by adding a “no resistance required” provision to Title 18, Chapter 31 of its Consolidated Statutes, covering sexual offenses: “In a prosecution under this chapter, the victim need not resist the defendant’s sexual assault.” The resistance element was thus formally eliminated from rape law. Pennsylvania later enacted an explicit statutory provision on sexual consent: “A person commits a felony of the first degree when the person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant’s consent” [11, 12]. Illinois followed in 2003 with the Post-Penetration Rape Act, also known as the “no means no” law, which provided: if a woman consents to sexual insertion or sexual activity at the outset, but withdraws that consent during the encounter, any prior consent to the sexual relationship is invalidated. The law underscored a woman’s right to consent throughout the entire sexual encounter and made clear that her expression of “no” operates retroactively—once that “no” is communicated, the other party must stop [9]. In statutory form, the law confirmed that the decisive factor in determining “violation of a woman’s will” is not physical resistance. A key advantage of the negative consent rule is that men can no longer claim uncertainty about whether a woman consented; it also resolves the knotty question of how to treat withdrawal of consent during sexual activity.

2.2.2. Affirmative Consent: Strictly Guaranteeing Sexual Autonomy

Negative consent runs into trouble in situations involving intoxication, silence, or physical disability that prevents the victim from communicating. In these circumstances, the victim cannot say “no” and cannot readily indicate withdrawal of consent [13]. Feminist scholars have argued that if rape law treats women’s passive acceptance as consent, it leaves victims underprotected. The response was the more targeted, more demanding “affirmative consent” standard. Women and men enjoy equal sexual autonomy, and women’s expression of their sexual rights should not be confined to “refusal.” Even when a woman says “no,” she does so within a context where male dominance over women is already at play. A woman should possess an unambiguous “right to consent” before any sexual encounter begins. Put concretely: when a man seeks sex with a woman, he must obtain her clear “yes” before proceeding. If no affirmative response is obtained, or if the woman’s withdrawal of consent is ignored during the encounter, that constitutes “violation of a woman’s will” and therefore rape. This is the affirmative consent rule [14]. The slogan is “yes means yes”: even if a woman raises no objection and offers no physical resistance, rape occurs so long as her consent was not obtained before or during the sexual encounter.

The landmark case confirming this standard’s place in criminal law is *State in the Interest of M.T.S.* from New Jersey. The defendant, M.T.S., was a seventeen-year-old male who had lived for some time in the residence of the fifteen-year-old complainant, C.G., before the alleged rape. Although some facts were disputed, the court confirmed that kissing and intimate petting had occurred before the sexual encounter. M.T.S. used no force or threats against C.G., and C.G. did not explicitly refuse. The New Jersey Supreme Court nevertheless found M.T.S. guilty of second-degree sexual assault. Although New Jersey’s criminal code required an element of force for sexual assault, the court interpreted this to mean that an act of sexual penetration without the victim’s affirmative and freely given permission is itself criminal violence. For non-consensual sexual activity, the force the male exerts upon the female during the act is sufficient to constitute force; additional force is unnecessary. The court preserved the traditional statutory element of force within the criminal law framework while defining the force inherent in non-consensual sexual conduct as “violence” through judicial interpretation—effectively abandoning the resistance requirement and pushing the affirmative consent principle forward [15].

California became the first state to codify the affirmative consent rule in 2014: “Affirmative consent means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout the sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of affirmative consent” [14]. Wisconsin’s criminal code is more detailed still. In defining first-degree sexual assault—the equivalent of rape—it enumerates the following: “(a) 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) Has sexual contact or sexual intercourse with another person without 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. (c) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of force or violence...” The statute further specifies that “consent” 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” [16]. From these provisions, “violation of a woman’s will” can be established under two broad headings:

A. Direct non-consent. This category encompasses the traditional elements of rape—force, injury, coercion—as well as statutory scenarios in which the victim has not expressly or impliedly permitted the defendant to engage in sexual contact or intercourse.

B. Incapacity to consent. This includes persons below the age of consent, persons suffering from a mental illness or defect that substantially impairs their capacity to evaluate their own conduct, and persons who, by reason of unconsciousness or other physical condition, are unable to communicate a decision or to communicate it effectively.

The affirmative consent standard has also been incorporated into the criminal law of other countries. The United Kingdom’s Sexual Offences Act 2003 redefined sexual assault as occurring when a person engages in sexual activity without the other person’s consent, or without reasonable grounds for believing the other person consents. This rule shifts the focus from resistance to consent itself—to whether the woman freely chose to engage in sexual relations with a specific person in a specific situation. Only when the woman’s consent has been obtained in advance and not withdrawn during the encounter is rape excluded; the rule also eliminates the assumption that a woman’s silence amounts to acquiescence. Women are thus positioned as free, independent agents in sexual relations, possessing the same freedom as men to decide whether to engage in sex. This standard provides a workable solution for newer forms of sexual violation, such as drug-facilitated rape and stealthing—where a man exploits a woman’s intoxicated or unconscious state to extract sexual advantage. Because the woman lacks the capacity to consent, she cannot possibly give an affirmative signal, and these acts can properly be classified as rape.

Canada’s approach to affirmative consent is more operational and technical. Its basic logic treats sexual assault determinations as analogous to medical treatment, and sexual consent as a species of victim consent. The underlying assumption is that sexual activity is not permitted by the criminal law unless valid consent has been obtained; absent such consent, the conduct attracts criminal liability. To determine whether affirmative consent was given, the first step is to assess whether the complainant had the capacity to consent—using the same criteria as for victim incapacity described above. The second step is to determine whether consent was factually given. This requires the prosecution to gather evidence proving beyond a reasonable doubt that the sexual encounter took place without the complainant’s consent. The prosecution

must show both that the complainant made no direct, explicit expression of consent (through words or conduct) and that there were no manifestations of consent of the kind recognized by social convention or by a reasonable person [17]. The latter inquiry often turns on the specific context of the sexual encounter and the pattern of interaction between the parties. The third step is to determine whether the consent that was factually given is legally valid—that is, whether it was vitiated by force, threats, fraud, or abuse of authority. Even after establishing that the expression of consent was genuine, one more question remains: whether the defendant honestly but mistakenly believed the complainant had consented. In practice, a defendant may adduce evidence that he made reasonable efforts to obtain the complainant's consent, or may argue that he was mistaken about the absence of consent [18].

The shift in the criminal law's focus from "resistance" to "consent" thus represents both an elevation of women's sexual autonomy and a more robust legislative protection of women's sexual rights. Grounded in the recognition that consent is central, this shift discards the old resistance requirement, redefines sexual consent, and constructs a new standard for determining "violation of a woman's will"—placing women and men on relatively equal footing in sexual relations. The affirmative consent principle aims to dismantle the rape-myth misunderstanding of women's refusals, to overturn the traditional image of women as passive sexual recipients, and to grant women genuine autonomy of choice. Women's sexual autonomy is accorded central importance: only sexual relations that occur with a woman's free and ongoing consent are lawful. The core of the rule is that a woman has the right to decide whether to engage in specific sexual acts with specific persons under specific circumstances—distinguishing rape from non-rape at the most fundamental level. Both the "resistance" rules and the "consent" rules ultimately ask how a woman signals her non-consent. The resistance rules focus on her physical struggle; the affirmative consent rule focuses on how she expresses consent, rather than—as the negative consent rule does—on how she expresses refusal. Because the act of penetration itself can be defined as "violence" for the purposes of rape, the determination of whether rape has occurred must proceed from a gender-equality standpoint, defining the scope of a woman's will in terms of whether she has consented to the risks involved in the sexual activity. Sexual activity should be understood as a dynamic process in which the parties continuously negotiate the risks they assume. If the sexual activity materially increases the risk borne by the woman, and does so without her consent, the activity exceeds the bounds of her will, and the man, having violated her will, commits rape.

3. Analysis of the Affirmative Consent Standard

The foregoing has traced the development of criminalization models for rape in European and American countries. As this overview makes clear, criminal law rules grounded in the affirmative consent standard have gradually taken shape, but they have also generated unavoidable controversy.

3.1. The Focus of Controversy: Identifying and Ascertaining "Consent"

Sir Matthew Hale, the seventeenth-century Lord Chief Justice of England, famously observed that "rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." In many American jurisdictions, this statement was still being read to juries verbatim well into the twentieth century. After the *M.T.S.* decision, public reaction split sharply. Feminist organizations such as the National Organization for Women praised the ruling, while the defendant's attorney sardonically remarked that daters should henceforth carry condoms and consent contracts. The chair of the New Jersey State Bar Association's Criminal Law Section went so far as to say the decision meant parties would need to recite something like a *Miranda* warning before engaging in sexual activity. Even the Model Penal Code, the most influential template in American criminal law, encountered opposition to

revising its definition of affirmative consent; the American Law Institute declined for years to adopt the new definition. The resistance reflects a deeper problem: in the most contested rape cases, the central question is almost always whether the specific words or conduct that actually passed between the parties during the sexual encounter can be treated as evidence of affirmative, positive consent.

Sexual interactions in real life can be subtle. They can rest on tacit understanding, on cues that go unspoken. It is hard to expect every sexual interaction to leave behind a clear, verifiable record of positive consent. Even with an affirmative consent standard, criminal procedure does not change: police still conduct preliminary investigations to determine whether enough evidence exists to refer the matter to prosecutors. What shifts is the focus of the rape investigation—toward what evidence shows the presence or absence of affirmative consent. In the specific contexts of acquaintance rape and date rape, the signals the parties exchange—ambiguous physical movements, flirtatious remarks—are notoriously hard to read. In a date rape case, both parties may have sent positive sexual signals, or claim to have sent them, but some signals are clear invitations and others are just ambiguous flirtation. Whether verbal or behavioral signals are “clear” is never independent of cultural concepts, social conventions, and personal values. During a passionate kiss, a woman leaning back onto a bed could signal willingness to proceed further—but leaning back or tilting away could equally signal uncertainty, reluctance, or fear. Two people who have been exchanging flirtatious banter and are now nude with intimate bodily contact might be understood to be signaling affirmation. But rape occurs in private, hidden settings, and whether such conduct actually occurred is extraordinarily difficult to verify. When only competing testimony is available, and the parties’ accounts diverge sharply, the affirmative consent rule supplies no clear standard for deciding which account merits priority or greater credibility—and credibility itself remains a persistent problem. Social and cultural diversity further complicates matters. Some people genuinely prefer sex without explicit consent, or enjoy playing a submissive role in sexual relations; some are drawn to BDSM dynamics. The affirmative consent rule is plainly inadequate in these situations.

Beyond these practical difficulties, the academic debate has been intense. Some scholars argue that the standard is too idealistic and runs against the grain of social custom. The traditional model of female passivity and male dominance still carries weight, and expecting women to express active enthusiasm for sexual activity can seem unrealistic. Mutual agreement to engage in intercourse is not the kind of thing normally reduced to an explicit contract; sexual activity typically unfolds through contact, sensing, and exploration, not through contract-like markers and verbal declarations. Others frame the issue in terms of liberty: a defendant’s rights should not be sacrificed for the sake of public policy; protecting an individual woman’s autonomy is not more important than pursuing justice in a specific case. Some scholars have argued that while sex without a woman’s consent is improper, not every instance of improper sex amounts to rape—and that once the element of force is removed, the definition of rape becomes almost indistinguishable from the act of intercourse itself. Meanwhile, radical feminist scholars have pointed out that “consent” is a problematic concept in its own right. Even under the affirmative consent model, women can only say yes or no to men’s sexual invitations; they are not expected to take the initiative in sexual relations. The law still does not anticipate that women will boldly articulate their sexual desires or actively extend invitations, as men do. This, they argue, is a conservative, not a liberating, vision—one that is ultimately repressive and treats sex in an excessively negative light [18, 19].

The allocation of the burden of proof for “consent” raises a further institutional difficulty for the affirmative consent standard. Even under this standard, the basic architecture of a rape trial remains unchanged. Though the male defendant is disadvantaged in the criminal process, the female victim is not advantaged by that fact. She must first supply sufficient, detailed evidence

for the police to open a case and the prosecutor to bring charges; she must then withstand examination by the judge and defense counsel in an adversarial courtroom. Some have proposed shifting the burden of proving consent to the defendant—requiring the man to prove what the woman did or said to indicate affirmative, positive consent. Reversing the burden in this way could spare the victim from having to answer repeated questions at trial about her clothing, whether her body was exposed, her behavior, where she was, what she said, and how much she had drunk questions that compound the trauma of rape [19]. But a complete reversal would, in practice, mean requiring the defendant to prove his own innocence. If, after the prosecution establishes its case beyond a reasonable doubt, the defendant cannot show that the other party made an uncoerced, affirmative expression of consent before the sexual encounter, he would be convicted. Such an allocation of proof is manifestly unreasonable and has not been adopted. Wisconsin law is explicit: “The state must prove that the defendant sought to engage in sexual activity with the victim and the victim’s words or overt actions did not manifest voluntary consent” [16]. The burden rests entirely with the prosecution, to be satisfied beyond a reasonable doubt. If the defendant asserts that the other party gave affirmative consent, he too bears a heavy burden of proving that the victim expressed free, active, affirmative consent. In practice, then, the affirmative consent standard has been softened: the burden of proof has not been shifted wholesale to one side.

If the resistance-based standard is flawed in multiple ways, the consent-based standard has its own weaknesses. Every standard tries to draw a bright line between normal sex and rape, and that ambition has proven hard to realize. The uncertainty, complexity, contradiction, and risk built into sexual life cannot be eliminated entirely. Even feminists must concede that sexual ambiguity is inescapable. For this reason, most supporters of affirmative consent accept that consent can be expressed through conduct or acquiescence—yet this concession immediately blurs the line between consent and non-consent. Legal scholars and practitioners have been trying to draft black-and-white rules for the gray zones of sexual assault, hoping to sort sex into two neatly separated realms and render unassailable judgments. That goal remains, for now, elusive.

3.2. Softened Approaches: Scope of Application and Sentencing

Even in the United States, the jurisdiction that first championed the affirmative consent standard, its application has not been comprehensive across the criminal law. In American practice, the affirmative consent rule is most frequently applied in cases of sexual assault or harassment on university campuses—within the framework of education law, not criminal law. Canada, while possessing a more thorough and operationally detailed statutory scheme for affirmative consent, has seen its courts issue softened judgments as well. In one case involving homosexual sexual activity, the complainant and the defendant met on a secluded path in M Park, a location widely known as a meeting place for homosexual encounters. The two were alone on the path. After a long stretch of mutual eye contact, the defendant made a masturbatory gesture toward the complainant. The complainant saw this but neither moved away nor broke eye contact. The defendant then approached and touched the complainant, who continued to stare at him in silence, without fleeing. Sexual relations ensued, during which the complainant made no verbal statement of consent. Expert testimony indicated that in the homosexual community, mutual eye contact and prolonged staring often constitute a commitment to engage in sexual relations. Had the complainant not wished to establish a homosexual relationship, he should have moved away or averted his gaze when the defendant touched him and approached. The Canadian court held that the complainant had not proven beyond a reasonable doubt that he had not given sexual consent at the time, and also accepted that the defendant had honestly but mistakenly believed the complainant had communicated

positive consent. The court dismissed the complainant's appeal and upheld the defendant's acquittal [20].

Compared with the sustained legislative and judicial activity in North America, European countries have taken an even more softened and flexible approach to sexual consent rules. In a German case, a young couple had broken up and reconciled several times without finally separating. After a birthday party for a mutual friend, the defendant and the victim spent the night in his apartment bedroom. In bed, the defendant began to have sex with the victim, subsequently inserting his penis and ejaculating. The victim became angry: the two had agreed that the defendant would either use a condom throughout intercourse or take other appropriate contraceptive measures. The German court held that a woman's right to sexual self-determination includes the freedom to choose the time, manner, form, and partner of sexual activity. Sexual consent can thus be limited to specific sexual acts—here, intercourse only with a condom or with other contraceptive measures—while other acts are explicitly refused. But the court found that the victim had not withdrawn her objection before ejaculation. Given the dynamic character of sexual events, ejaculation must be regarded as a possible outcome of ongoing sexual activity. Even if the defendant's conduct may objectively have been contrary to the victim's wishes, it could not be established that he intentionally ignored the contraceptive condition, or that he intentionally failed to stop before ejaculation. The sexual assault charge was dismissed [21]. After Germany completed its reform of sexual consent rules in 2017, most scholars concluded that the country had not adopted the affirmative consent standard, opting instead for a softened approach closer to the negative consent standard in practice [22]. This case illustrates that German courts, while accepting "consent" as the core criterion for determining rape, impose a stricter evidentiary standard, seeking to ensure that neither party is haunted for life by a wrongful conviction.

Sweden has explicitly codified the affirmative consent rule in legislation, but has softened it through differentiated sentencing. Chapter 6, Section 1a of the Swedish Criminal Code creates a specific offense of "negligent rape," covering a person who is grossly negligent as to whether the other party is participating voluntarily in sexual activity. A Swedish Supreme Court case clarified the standard. A man spent the night at a woman's home after communicating with her only through social media. They slept in the same bed, and the man had sexual intercourse with the woman and inserted his fingers into her vagina. The woman behaved passively throughout and did not give the impression she wished to participate. The prosecution could not prove the man had the intent required for rape—that is, active intent or reckless indifference to whether the victim was participating voluntarily—so he could not be convicted of rape. The Supreme Court explained, however, that even if a woman consents to share a bed while wearing underwear, this does not mean she voluntarily participates in sexual activity. Passivity can be a sign of voluntary participation, but there are limits to how far passivity alone can establish consent. If consent is found absent, the court must assess whether the perpetrator knew or should have known the activity was not voluntary. In this case, although the woman may have appeared to participate voluntarily, the man demonstrated intentional negligence by persisting in sexual conduct despite her failure to consent—he deliberately overlooked her lack of consent. He was convicted of negligent rape and sentenced accordingly [23, 24]. The Swedish Supreme Court thus applied a strict affirmative consent standard: whenever sexual activity occurs without one party's clear, genuine expression of "consent," the other party commits rape. But the penalty for negligent rape is capped at four years' imprisonment, and where the conduct is not serious, the suspect bears no criminal liability. By contrast, the ordinary rape sentencing range in Sweden is three to six years' imprisonment, rising to five to ten years in aggravated cases. Even as it adopts affirmative consent for the purpose of establishing guilt, Sweden's legislation leaves room for ambiguous cases through its sentencing framework. With no mandatory minimum and a lower maximum than for ordinary rape—and with a residual clause

exempting non-serious conduct from punishment—the system ensures that even when a court finds a defendant guilty of negligent rape in a borderline or potentially false accusation case, the sentence will generally fall below the range for ordinary rape. This combination of strict liability and soft sentencing reflects a deliberate, considered legislative judgment.

The jurisdictions that have adopted the affirmative consent standard are not blind to its controversies. In actual judicial practice—whether through limiting the standard's scope of application, adopting stricter interpretive standards, or using more lenient sentencing ranges compared to ordinary rape—each approach reflects the careful, measured deliberation that different countries have brought to this difficult issue.

4. Conclusion

In rape cases, whether and how a woman's will was violated is the decisive question for determining guilt. Current judicial practice, however, is troubled by a range of problems. Sticking with resistance-centered rules of sexual consent not only leaves women in a disadvantaged, vulnerable position in sexual relations, but also loads an excessive burden of proof onto female victims during the criminal proceedings that follow rape. It may even sharpen conflict between the sexes and generate wider social problems. Consent-centered rules, especially the affirmative consent standard, have their own shortcomings, but they place women and men on equal terms in sexual relations and safeguard women's sexual autonomy. There is a strong case, then, for drawing on the affirmative consent framework and using whether a woman has made a clear, positive verbal or behavioral expression of sexual consent as the basis for determining whether her will has been violated.

What deserves emphasis is that although many European and American countries have completed the shift from "resistance" to "consent," they did not leap directly to the affirmative consent standard by amending their legislation overnight. They adopted more gradual, softened approaches. Whether through judicial practice that hews closer to the negative consent standard, or through creating specialized rape offenses with lower sentencing ranges for ambiguous cases, these are all conscientious efforts to find a workable middle ground between protecting women's rights and preserving judicial fairness.

Updating sexual consent rules is a reform that responds to the needs of the times and serves to better protect women's rights. Achieving this will require a fairer, more transparent judicial environment, and the cultivation of a measured, rational climate of public discourse. Victims' legitimate rights and interests must be protected; innocent parties must not be unfairly treated. All of this demands the combined efforts of lawmakers, judicial officers, legal educators, and society at large—toward a balance between the protection of rights and the maintenance of the rule of law.

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