

Trusting the Woman's Word: A Critique of the 'Sterling Witness Threshold' in Cases of Rape under Indian Criminal Law

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ABSTRACT:

Currently, in India, the testimony of a survivor in cases of sexual harassment and rape is admissible as evidence. However, their testimony is only admissible as that of a "witness" to the crime. In cases where the survivor is the only "witness" to the crime, their testimony is subjected to a rigorous test of admissibility called the "sterling witness threshold". This essay examines the sterling witness threshold, and attempts to make a case for why this test is not laid down with the survivor's reality kept in mind, and consequently, why the threshold needs to be lowered. Firstly, this essay goes on to examine the importance of sole testimonies of survivors, in light of how no other evidentiary piece can meaningfully conclude the presence or absence of consent during the act of rape. Secondly, the sterling witness test is critiqued in this essay as one that is created in the absence of a holistic understanding of a rape survivor's experiences and trauma, which can have lasting implications on victims including severe re-traumatization. In order to understand how this test cannot meaningfully provide justice, this essay also delves into the societal barriers acting on a survivor in cases of rape. Lastly, this essay proposes a solution and alternative to the sterling witness test in the form of an affirmative consent standard, in order to take the focus off from victims' testimonies and displacing it to have the accused prove that they obtained positive consent, which is in line with Article 114A of the Indian Evidence Act.

I. INTRODUCTION:

Feminism, as a movement, traces origins to an effort at amending the letter of the law. The history of modern versions of feminism began with the women's suffrage movement in the United States of America fighting for inclusion of sex in the text of the Fourteenth Amendment, which was also the first feminist change successfully achieved. In India too, emancipation of gendered oppression has used the tool of legislative change to target the elimination of societal atrocities, for instance, the movement pushing for the dowry to be outlawed, which led to the passing of the Dowry Prohibition Act in 1961. Another milestone was the creation of various gender specific legislation to combat other forms of violence, primarily sexual violence, like the Protection of Women from Domestic

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Violence Act, 2005, and The Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013 among other reforms in the Indian Penal Code.

The reason why feminist reform has been aimed at putting the State's legal apparatus under a microscope, is because law is a tool, both in the hands of pre-existing power structures to reinforce themselves, when created without social justice perspectives, as well as being one that has the capacity to create a rights-based protection regime accompanied by the enforcement of the same by the state required to correct the said social imbalances. However, even while the letter of the law has been successfully amended post various feminist rallies and calls for change, the ways in which law enforcement and the judiciary operate and apply those laws have largely still remained rooted in patriarchal ways of practice.

The importance of addressing the criminal procedure relating to sexual crimes is ever-growing, in proportion to the rise in these crime statistics. As per the latest National Crime Records Bureau (NCRB) report for the year 2021, an average of 86 rape cases were registered daily in India in 2021. Cases registered under "Crimes against women" rose by 15.3% relative to 2020.⁸⁶ With respect to these statistics, we must acknowledge that part of the increase could be attributable to a rise in the rate of reporting said crimes with time. Taking into account the reality of social construction, where men have greater agency and power and less accountability for their actions against women, this essay analyses the enactment of the Criminal Law Amendment that takes into account this reality and shifts the burden of proof on to the accused to prove that they had obtained consent instead of complainants having to prove the lack of consent.

The law relating to the testimony of the victim in rape cases has changed over time. Post the Nirbhaya case in 2012⁸⁷, the Parliament passed the Criminal Law Amendment Act, 2013 (hereinafter "The Amendment") that amended various provisions relating to gender-based violence in the IPC, CrPC, and the Evidence Act.⁸⁸ The Amendment substituted Section 114A of the Evidence Act that reverses the presumption of guilt in cases of rape. According to the amended section, if sexual intercourse is proven, the presumption is that consent was not given by the victim, and it would be the burden of the accused to prove then that they had obtained consent, and hence, are not guilty of the crime.⁸⁹ Despite this change in the letter of the law, its interpretation by Indian Courts has been barely

⁸⁶ *India lodged average 86 rapes daily, 49 offences against women per hour in 2021: NCRB data*, THE HINDU, (April 30, 2023, 11:00 AM), <https://www.thehindu.com/news/national/india-lodged-average-86-rapes-daily-49-offences-against-women-per-hour-in-2021-government-data/article65833488.ece#>; NCRB 2021 Data: India Sees 15% Jump in Crimes Against Women, Delhi Most Unsafe, THE QUINT, (April 30, 2023, 11:00 AM), <https://www.thequint.com/gender/ncrb-2021-data-india-sees-15-jump-in-crimes-against-women-delhi-most-unsafe#read-more>.

⁸⁷ *Mukesh & Anr. v. State for NCT of Delhi & Ors.*, (2017) 6 SCC 1.

⁸⁸ Criminal Law (Amendment) Act 2013, No. 13, Act of Parliament, 2013 (India). ["CLAA"]

⁸⁹ CLAA 2013, §26.

included these measures of social justice for the survivors.

The Amendment also inserted a provision to the effect of not questioning the complainant's past sexual activity, and it having no bearing on the question of whether they had provided consent for the alleged crime under investigation.⁹⁰ However, it has been observed that courts, even post the this Amendment, consider past sexual conduct of survivors, or any other indications of the survivor's lifestyle that seem to go against their idea of a morally upright way of life as having a bearing on whether consent was given by the survivor, among other practices that make meaningful access to justice difficult to access for survivors.⁹¹

A consideration to note here would be that India's rape laws are gendered such that only individuals assigned female at birth are recognized as potential victims of the crime.⁹² It is beyond the scope of this essay to critique the scope of application of rape laws; however, it is important to acknowledge that sexual violence cannot be envisaged merely as occurring between a man and woman, or where the victim can only be a cis-gendered woman. Feminist scholars have long stood by the fact that rape laws should not be gender neutral as then it would not take into account the gendered power dynamics which would be antithetical to the social reality of the crime.⁹³ However, this Essay does align itself with feminist advocacy that has called for recognizing that rape can occur between same-sex individuals, and the applicability must extend to trans-women as well, especially recognizing the extent of violence levied against transgendered individuals.⁹⁴

II. THE NEED FOR HIGHER ACCEPTANCE FOR SOLE WITNESS TESTIMONIES:

Although, as per the letter of the law, sole witness testimonies are not in and of themselves insufficient for prosecuting any accused,⁹⁵ they are in practicality juxtaposed with other evidence like medical evidence, and witness testimonies.⁹⁶ In terms of medical evidence, locating of the truth of

⁹⁰ CLAA 2013, §28.

⁹¹ State v. Tarunjit Tejpal, Sessions Case No. 10 of 2014, Additional Sessions Judge, Mapusa Goa, decided on May 21, 2021.

⁹² Rape laws do not currently recognize the distinction between sex and gender.; The Indian Penal Code, No. 45 of 1860, Act of Parliament, 1860 (India). ["the Code"] [Although § 375 of the Code reads "...rape is said to have been committed when a man has sexual intercourse with a woman." , which alludes to the gender and not sex of the victim and perpetrator under ordinary use of language, the Code in § 10 defines a man as a " male human being of any age" and a woman as a " female human being of any age", effectively erasing the distinction between sex and gender.]

⁹³ Flavia Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, 37 EPW 844 (2002); Nivedita Menon, *Gender Just, Gender Sensitive, Not Gender Neutral Rape Laws*, *Kafila* (April 26, 2023, 11 AM) <https://perma.cc/2GK7-KE4N>.

⁹⁴ National Legal Services Authority (NALSA) v. Union of India, AIR 2014 SC 1863 (per K.S. Panicker J., concurring) ¶ 55 ["Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation, rape, forced anal and oral sex, gangrape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities. Further, non-recognition of identity of Hijras/transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc... Since, there are no separate toilet facilities for Hijras/transgender persons, they have to use male toilets where they are prone to sexual assault and harassment."].

⁹⁵ Krishan Kumar Malik v. State of Haryana (2011) 7 SCC 130.

⁹⁶ Central Forensic Science Laboratory, *Guidelines for Forensic Medical Examination in Sexual Assault Cases*, 5-10 (2018); Candida L. Saunders, *Rape as 'One Person's Word against Another's': Challenging the Conventional Wisdom*, 22 TJEP 161 (2018).

rape in not oral testimony, but bodies have been a long-time colonial medical jurisprudential practice.⁹⁷ The kind of evidence collected by medical practitioners is wide in status quo. It includes testing for presence of bodily fluids of the accused, marks of resistance, and other specific markers of violence like scratches or bruises,⁹⁸ however they also extend to practices that attempt to assess the ‘trustworthiness’ of victims through the two-finger test.⁹⁹

Such reliance on external evidence is largely difficult, as rape is a unique crime, whereby there is a high unlikelihood of the presence of any witnesses, as it usually occurs in private places where no testimony remains available other than those by the victim themselves.¹⁰⁰ Even if witnesses exist, there is no witness protection reform in Indian Law Enforcement, which makes witnesses highly susceptible to turning hostile.¹⁰¹ In order to understand the extent of why these crimes occur in private, we must look at the data relating to acquaintance rapes. Approximately 95% of all rapes are acquaintance rapes, that is, by persons known to the victim, which include assault by their own partners, friends, and family members.¹⁰²

Additionally, material evidence like fluids, presence of semen and other biological evidence can determine the factum of sexual intercourse,¹⁰³ but cannot determine the presence of consent or lack thereof. Given this lacuna in medical assessment, the evidence that society, and as a consequence legal practitioners and courts have relied upon to determine lack of consent are usually the presence of marks of resistance and physical violence. The former, i.e., occurrence of marks of resistance, are based on the assumption that rape victims fight or engage in physical resistance against their perpetrators. Another stereotype regarding ‘working or labour class women’ is that because they have bodies that are accustomed to physical activity, they are “likely to engage in physical resistance”, a notion that has been problematically affirmed by medical practitioners.¹⁰⁴ However these notions are deeply unfounded, as sexual harassment, rape, or any non-consensual advances are perceived by the victim as a threat or trauma, and the most common response to such trauma has been seen to be a freeze response,¹⁰⁵ i.e. stupefying, or trying to negotiate with the perpetrator.¹⁰⁶

Another kind of problematic evidence standard applied in these cases, is assessing the “behaviour”

97 PRATIKSHA BAXI, PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA, 63 (Oxford University Press, 2014)

98 Central Forensic Science Laboratory, *Guidelines for Forensic Medical Examination in Sexual Assault Cases*, 5-10 (2018).

99 PRATIKSHA *supra* note 11, at 81.

100 Candida L. Saunders, *Rape as ‘One Person’s Word against Another’s’: Challenging the Conventional Wisdom* 22 *TJEP* 161 (2018).

101 HUMAN RIGHTS WATCH, EVERYONE BLAMES ME: BARRIERS TO JUSTICE AND SUPPORT SERVICES FOR SEXUAL ASSAULT SURVIVORS IN INDIA, 38-39 (2017).

102 Crime in India, Chapter 5: Crime Against Women, 85 (National Crimes Record Bureau, 2015).

103 Durba Mitra & Mrinal Satish, *Testing Chastity, Evidencing Rape Impact of Medical Jurisprudence on Rape Adjudication in India*, 41 *EPW* 51, 52-55 (2014).

104 PRATIKSHA *supra* note 12, at 68-69.

105 James W. Hopper, *Why Many Rape Victims Don’t Fight Or Yell*, Washington Post (June 23, 2015, 3:51 PM) <https://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell/>.

106 Martin Symonds, *The Rape Victim: Psychological Patterns Of Response*, 36 *THE AMER. J. PSYCH.* 27, 32 (1976).

of the victim post the act in order to determine if it was “an act likely for a victim to engage in”. This assumption that victims of sexual assault or rape “act a certain way”, and stereotyping of a rape victim plays into deeply alienating cultural norms about victims, and are unsupported by the psychological assessment and studies of sexual assault victims.¹⁰⁷ Not only do we see a range of responses from victims, but also, we see certain behaviour patterns that Courts hold as behaviour which is not “victim-like”. An example of this is that survivors often fall asleep after the assault occurred as a coping mechanism,¹⁰⁸ despite similar acts being seen as “unnatural” for a victim by the Bombay High Court.¹⁰⁹ As seen, these pieces of evidence usually have no way of determining consent, and often are in fact detrimental to justice that victims can access, given the implicit understanding Courts assign to certain acts as signalling a presence of consent.

Rape laws are not currently constructed in a manner truly inclusive of all subjective experiences of non-consensual sex, where non-tacit acceptance and lack of resistance is drawn out to be consent. This excludes the free will and exercise of personhood of women, while also simultaneously ignoring the social factors a woman experiences. The manner in which consent is framed within our social and legal spheres, makes women participate in sex, not as active individuals but as a passive, responsive objects in a primarily male performance of sex on her body—in this construction, sex is an act that the women assent to rather than engages in.¹¹⁰ In addition to a construction that sees women as passive receivers in sexual acts, laws actively ignore the gender-based power imbalance in society. What is seen as “consent” is often negotiated and coerced assent given to violent masculine sexual acts or undesirable intercourse because they lack an effective choice, and “consent” is safer than resistance. In the understanding of consent, these pieces of external evidence do not criminalize all “unwanted” forms of sex, that need to be categorised as rape due to the lack of positive consent,¹¹¹ which need to be criminalized for the want of protection of choice, autonomy, and bodily integrity which are to be protected as per the morality under which law itself is constructed, i.e., the social contract.¹¹²

Even in the case of *Bhoginbhai Hirjibhai v. State of Gujarat*,¹¹³ when the Apex Court recognized that

107 Lynn H. Schafran, Barriers to Credibility: Understanding and Countering Rape Myths https://www.nationalguard.mil/Portals/31/Documents/J1/SAPR/SARCVATraining/Barriers_to_Credibility.pdf

108 Martin, *supra* note 20, at 32.

109 Rakesh B. v. State of Karnataka, Criminal Petition No. 2427/2020, High Court of Karnataka, Jun. 26, 2020 (India).

110 LOUISE DU TOIT, THE CONDITIONS OF CONSENT, IN CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY, 61 (2007) [“This one-sidedness, this asymmetry with regard to sexual agency and subjectivity, the law assures us, is not the problem. It is, on the contrary, natural, and the normative background against which the deviation of rape has to be gauged. If heterosexual intercourse is something *men do*, then the other side of the coin is that sex is something that *women* naturally, or normally, undergo, passively experience, and *consent to*. Rape law thus both presupposes and naturalizes women’s consent to sex – ‘consent’ is the manner in which women ‘engage in’ sex, ‘have’ sex, and have *a sex*.”].

111 STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (Harvard University Press 1998).

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

113 *Bharwada Bhoginbhai Hirjibhai Vs State Of Gujarat*, 1983 AIR 753.

testimonies of victims must be accepted without corroboration, in the same was done in relation to some problematic narratives. In attempting to showcase believability of victims, the judges believed it came from the “Indianness” of their values.¹¹⁴ These values were connected to honour culture that locates the honour of societies in the “purity” of its women before marriage, and submission to their husband after, and sees rape as an event eroding that honour. The reason laid out by the court may provide backing for why women are unlikely to register false complaints, but on the flip side, it reinforces the shame and honour cultural feminists have tried to eradicate for ages. Although, it is not within the mandate of this essay to analyse the depth of the honour culture, it is important to note that the honour culture is the basis on which courts and law enforcement agencies assume certain behaviour on the part of victims, like resistance, because they believe victims would protect their honour at all costs. These assumptions, however, do not account for the individual interests of the victim or the nuances of the response to trauma in such cases.

III. THE LEGAL TEST FOR THE VALIDITY OF SOLE TESTIMONIES

Courts have in fact upheld that sole victim testimonies can be used to convict the accused, however the testimony must meet a specific standard which is the standard of the “sterling witness” test. This test was laid down by the Apex Court in a 2012 judgment,¹¹⁵ and was upheld as the standard for viable rape victim’s testimony in a 2020 judgment.¹¹⁶

The test has certain requirements to be met by the victim’s testimony-

- consistency of the statement from the first complaint to the final testimony in Court,
- the victim should withstand the cross-examination of any length and however strenuous it may be and should give no room for any doubt regarding the occurrence, the persons involved, as well as the sequence of the criminal act,
- it must correlate with every other piece of supporting material found, as well as any expert opinion,
- It should consistently match with the versions of other witnesses, and
- There should be no missing link in the chain of circumstances mentioned in the testimony.¹¹⁷

IV. THE THRESHOLD OF THE ‘STERLING WITNESS TEST’: CRITIQUE AND LACUNAE:

Firstly, the requirement of consistency in the statement from the police report up to testifying in the Court seems to be a threshold unlikely to be reached by any victim post a traumatic event. This in its

114 PRATIKSHA, *supra* note 12 at 32.

115 Rai Sandeep alias Deepu v State (NCT of Delhi) (2012) 8 SCC 21.

116 Santosh Prasad @ Santosh Kumar vs The State Of Bihar, in Criminal Appeal No. 264 of 2020 arising out of SLP (Criminal) No. 3780/2018.

117 *Supra* note 28, at ¶15.

conception seems to be blind to the traumatic reality of any rape or sexual assault survivor.¹¹⁸ Victims usually do not have average perceptibility during and after the incident. Research has shown that victims of rape and sexual assault are affected by PTSD that affects that their recollection of the event significantly.¹¹⁹ Often victims close their eyes, shut off perception, during the act, in response to the trauma they feel, and in furtherance of the freeze response, to make their mind believe they are safe.¹²⁰ Furthermore, recollection, for both ordinary and traumatic events, is such that their gist is usually more accurately remembered than their specific episodic details, and central information tends to be remembered better than peripheral details for both types of events.¹²¹ The standard to have no missing links is one that does not even see application in any other crimes, which makes it seem fairly unreasonable. If this standard is motivated by a fear of keeping any false complaints away, once again it seems driven by fear stemming from patriarchal loss of control, as false complaints in cases of rape are no more common than false complaints in the case of any other crime.¹²²

Secondly, this test risks re-traumatization of the victim. Re-traumatization is already pervasively present during litigation for most victims of gendered violence, due to the manner in which our legal system is structured. Our legal system is adversarial and allows for any “tactical” attack on the litigating parties by opposing counsels. This is present even in cases of gendered violence where the prosecution often harrowingly questions the victim about their past sexual activity and questions their character and morality.¹²³ Also, judges are often seen to not be compassionate to the victim, so as to be impartial. Compassionate judges often are described as having a “good-natured” behaviour that helps make survivors feel welcome in the Court to express the concern for their suffering, and to mobilize resources on their behalf.¹²⁴ On the contrary, the absence of compassionate judges that are bureaucratic, distant, condescending, and harsh, not only makes the victim feel unwelcome, but it is also not aligned with the presumption in favour of the victim as laid down by the law.¹²⁵ This approach exercised by judges, requires the victims’ testimonies to meet same standards as testimonies

118 B. J. CLING, RAPE AND RAPE TRAUMA SYNDROME, SEXUALIZED VIOLENCE AGAINST WOMEN AND CHILDREN A PSYCHOLOGY AND LAW PERSPECTIVE, 19 (The Guilford Press, 2004) [“Traumatic events that are experienced directly include, but are not limited to, military combat, violent personal assault (sexual assault, physical attack, robbery mugging)” (American Psychiatric Association, 1994, p. 424, emphasis added). The section continues, “The disorder [PTSD] may be especially severe or long lasting when the stressor is of human design (e.g., torture, rape)” (emphasis added). Further, explaining some of the typical symptomatology of PTSD, it states, “Intense psychological distress (criterion B4) or physiological reactivity (criterion B5) often occurs when the person is exposed to triggering events that resemble or symbolize an aspect of the traumatic event (e.g., . . . entering an elevator for a woman who was raped in an elevator)”]; at 22 [“In addition to the research on PTSD specifically, Frazier also reviewed studies of rape victims involving other psychological symptomatology, such as depression, fear, anxiety, social adjustment, general health problems, and substance abuse.”].

119 *Ibid.*

120 Martin, *supra* note 20, at 31.

121 Madelyn Simring Milchman, *From Traumatic Memory to Traumatized Remembering: Beyond the Memory Wars, Part 1: Agreement*, 5 *Psychol. Inj. and Law* 37, 45 (2012).

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

123 LOUISE DU TOIT, ‘THE CONDITIONS OF CONSENT,’ IN CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY, 65 (Rosemary Hunter & Sharon Cowan eds., Routledge-Cavendish, 2007) [“It is no wonder that, given the law as it stands, lawyers for the defense zoom in on the state of mind of the rape victim, since that provides a particularly vulnerable target: the ambiguous zone of female sexual subjectivity.”].

124 Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 *AM. U. J. GENDER SOC. POL’Y & L.* 567, 630 (2003) [citing James Ptacek, *Battered Women In The Courtroom: The Power Of Judicial Responses* 99, 106 (1999)].

125 James Ptacek, *Battered Women In The Courtroom: The Power Of Judicial Responses* 99, 145-48 (1999).

in other non-triggering experiences. Ideally, lower thresholds, as well as support to the victim by disallowing intense questioning, is required. In the absence of this, the scales are tipped in favour of the accused directly by making testifying and recollection in courtrooms traumatic and hence more difficult for the victims.¹²⁶

In addition to these two major forms of re-victimization, the formal and bureaucratic procedure is confusing and complex.¹²⁷ Duress in the procedural process is also caused as the victim is made to revisit the incident over and over through rounds of testifying and questioning by multiple officers, which can cause the victim to be re-traumatized.¹²⁸ This is especially true because of the lack of sensitivity, mental health and social justice training to our law enforcement.¹²⁹ Victims often then give distorted or fragmented testimonies as they aren't given the time or support to recollect the event compassionately.

Lastly, the requirement of an unfettered narration and stability to be maintained by the victim during cross examination needs to be taken in the context of how the defence often engages in tactics of humiliation and harrowing psychological questioning directed at the victim.¹³⁰ The victim is often also required to detail her body parts and what the accused did to each of them in excruciating detail, which requires not only revisit the traumatic event but also leaves her vulnerable for the defence, judges, and even the media to redraw the trauma in ways that sexualise her and draw her as a pornographic caricature.¹³¹ With these stressors present in the courtroom that retraumatize a victim, it puts her back in the shoes of the occurrence of the incident.

Hence, this test and its requirements fuel the already existing imbalance that creates a harrowing experience for survivors that step forward to register complaints. As a consequence, survivors don't wish to come forward and report their crimes as well.¹³² Conclusively, this test further equates victims of gender-based violence to witnesses in other crimes, applying the same standards of memory, which is an equation that is devoid of both fact and empathy. Even though courts have clarified, that victims

¹²⁶ *Ibid.*

¹²⁷ Alesha Durfee, *Usually it's Something in the Writing': Reconsidering the Narrative Requirement for Protection Order Petitions*, 5 U. MIAMI RACE & SOC.JUST. L.REV. 469, 471 (2015) ["[V]ictims must navigate a bureaucracy that uses specialized language and specific procedures—for example, they must know the definitions of 'petitioners,' 'respondents,' and 'service'—all at a time where they are traumatized, sleep deprived, and have more basic needs to meet such as shelter, food, clothing, and safe transportation to work, school, and/or court."; "Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control."].

¹²⁸ Negar Katirai, *Retraumatized In Court*, 62 ARZ. LAW REV. 81, 107 (2020) ["In Joan's experience, she gave her testimony on one day of trial, but was then cross-examined by Anthony's attorney on another day several weeks later due to the court's busy calendar. The spacing between her testimony was difficult on Joan, who also felt surprised to find herself, on cross-examination, having to explain the reasoning behind her decisions, when in her eyes the focus should have been on Anthony's bad behaviour"].

¹²⁹ HUMAN RIGHTS WATCH, EVERYONE BLAMES ME: BARRIERS TO JUSTICE AND SUPPORT SERVICES FOR SEXUAL ASSAULT SURVIVORS IN INDIA, 54 (2017).

¹³⁰ Amita Dhandu, *Psychologising Dissent: Psychiatric Labelling and Social Control*, in *ENGENDERING LAW—ESSAYS IN HONOUR OF LOTIKA SARKAR*, 321-38 (Eastern Book Company, 1999).

¹³¹ PRATIKSHA, *supra* note 12, at 344.

¹³² HUMAN RIGHTS WATCH, EVERYONE BLAMES ME: BARRIERS TO JUSTICE AND SUPPORT SERVICES FOR SEXUAL ASSAULT SURVIVORS IN INDIA, 15-17 (2017).

are not to be treated as witnesses or accomplices,¹³³ even today we see Courts placing the same burdens on victims for their testimonies to be admissible.

V. THE SOCIAL RESTRAINTS ON AGENCY AND JUSTICE:

We must also take into account the social construction of women's behaviour in light of Gender-based violence (hereinafter "GBV") that this test actively ignores. Michael Foucault, in his book *Discipline and Punish*, lays down the central idea that power is "visible and unverifiable". Power as described by Foucault, creates coercions that act upon bodies, which are calculated manipulations of their behaviour and gestures. It breaks down and rearranges bodies, creating the politics of anatomy, where individuals now act as the holder of power wishes, down to even the efficiency, speed and techniques one desires. Thus, power produces "docile" bodies.¹³⁴ The power in status quo extrapolates to the power cis-men and a largely patriarchal society hold on women and gender minorities. They are, as Foucault puts it, "[seeking] to transform the minds of those individuals who might be tempted to resist it, not merely to punish or imprison their bodies. This requires two things: a finer control of the body's time and its movements a control that cannot be achieved without ceaseless surveillance and a better understanding of the specific person...". This theory of patriarchal power can be seen in practice in multiple ways with respect to GBV and rape. First, women remain not merely objects of oppression, but simultaneously also a subject, self-policing themselves to adhere to patriarchal values.¹³⁵ Being controlled by patriarchal power, survivors' responses to rape are limited, and important to understand in the context of feminist agency.¹³⁶ They likely apply values of patriarchal honour culture and objectification, to themselves in times when they face GBV or crimes. Women's bodies are seen as that of a "guilty" pre-victim, where in their bodies and movements, the defence of the sexual offender are created- she was at a place or time she "should not" have been out, carrying herself in a free-spirited manner, hence conveying that she has let go of self-surveillance.¹³⁷ Thus, justifying her attack in the eyes of society, that applies negative connotations to non-compliant women during sex, to women who "raise their voices" as difficult women that have contexts of social shame attached to their behaviour. In the presence of these narratives, it is increasingly unlikely for women to stand up to their perpetrator, and supports the statistics relating to how few women actually fight back their oppressor. The more overt dilemma of women usually being smaller and feeling like they are unlikely to successfully fight back their larger, stronger perpetrators, also adds to the issue.

¹³³ State of Maharashtra Vs. Chandraprakash Kewalchand Jain (1990) 1 SCC 550.

¹³⁴ MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH*, 138 (New York Vintage, 1979).

¹³⁵ Sandra L. Bartky, *Foucault, Femininity and the Modernization of Patriarchal Power*, in *WRITING ON THE BODY: FEMALE EMBODIMENT AND FEMINIST THEORY* 129, 148 (Katie Conboy, Nadia Medina, and Sarah Stanbury (eds.), 1997).

¹³⁶ See Amy Allen, *Foucault, Feminism, and the Self*, in *FEMINISM AND THE FINAL FOUCAULT* 235, 243 (Dianna Taylor & Karen Vintges eds., 2004) [quoting Foucault and his definition of technologies of the self as "techniques that permit individuals to effect, by their own means, a certain number of operations on their own bodies, their own souls, their own thoughts, their own conduct..."].

¹³⁷ Ann J. Cahill, *Foucault, Rape, and the Construction of the Feminine Body*, 15(1) *Hypatia* 43, 52 (Winter ed., 2000).

Secondly, the State in its law enforcement and judiciary takes the place of this pervasive Panopticon. This theory was originally put forth by Foucault in respect of political power of the State, which makes this superimposition of patriarchal Panopticon on the state, makes it even more important, as it helps us understand how power of the State is used to apply and uphold larger social structures of oppression like Foucault's theory pondered.¹³⁸ The State in rape cases, turns its gaze on the victims to justify their responses, assesses their memory, and requires complete perfection in performance and compliance to this patriarchal standard of perfection that women have to adhere to in order to be seen as a victim worth being given justice.¹³⁹

Offenders try to assign any and every cue to meaning presence of women's consent, except explicit asking and receiving of affirmative consent by them.¹⁴⁰ The police and judiciary, seem to step into the offender's shoes, and also try to read these cues to find consent in these interactions, akin to an unseen power overlooking victims, despite a woman explicitly saying with words, that they do not consent, legitimizing such view of the offender. For example, as most rapes are acquaintance rapes in status quo,¹⁴¹ Courts rarely convict the accused, as they assume past relationships or sharing private space as manifestations of consent.¹⁴² If the function of the State is to correct social oppression, then the State occupying the place of the Panopticon is antithetical to the ends of justice. If justice is to be bestowed upon women in Gender Based Violence, the agents of the State, i.e. the Police and the judiciary, need to get outside the Panopticon, and apply the contexts of social realities in each case. The first thing the Courts must understand then in the context of GBV, is that its occurrence is more common than not. The assumption of innocence of men, is antithetical to the social realities of how men romantically and sexually interact with women. As stated earlier, men look for cues to assume consent in cases of date rapes, or in cases of partner violence believe in the liberty they have to access their partner's sexual being at all times. Even in cases of stranger rapes, which are the rarer occurrence, men tend to view clothing or presence of women in public at late hours as manifestations of consent, or mere disregard for personhood of women with the intent to control and assert power over her being, as reasons to engage in rape and sexual violence.¹⁴³

In support of this view, the earlier mentioned Section 114A of the Evidence Act shifts the assumption to be in favour of occurrence of rape in cases where sexual intercourse is proven. Even

¹³⁸ Stephen W. Sawyer, *Foucault and the State*, 36(1) *La Revue Tocqueville* 135, 140-41 (2015).

¹³⁹ PRATIKSHA, *supra* note 12.

¹⁴⁰ Ann J. Cahill, *Foucault, Rape, and the Construction of the Feminine Body*, 15(1) *Hyperia* 43, 55-56 (Winter ed., 2000).

¹⁴¹ Crime in India, Chapter 5: Crime Against Women, 85 (National Crimes Record Bureau, 2015).

¹⁴² Bahuli Sharma, *Ms X v Mahmood Farooq: A Dangerous Precedent for Interpreting Consent in Rape Cases in India*, Oxford Human Rights Hub (23 Apr. 2018), <https://perma.cc/8ZZD-RD3E>. ["In addition to the incorrect definition of consent, the High Court has asked for a higher threshold for 'lack of consent' in cases where the survivor knew the accused or is/was in a relationship with him."].

¹⁴³ Lani Anne Remick, *Read Her Lips: An Argument For A Verbal Consent Standard In Rape*, 141 *U.PENN LAW REV.* 1103, 1124-1125 (1993).

then, Courts have not applied this presumption in favour of assuming lack of consent. In the recent *Tarun Tejpal* judgment, the Goa Sessions Court even after the factum of sexual intercourse was proven, did not take question the accused as to evidence to prove he had taken the victim's consent, but rather went on to assess the victim's past behaviour as being morally reprehensible, and even the behaviour she elicited post the incident, as "not being one of a victim".¹⁴⁴

VI. AFFIRMATIVE CONSENT STANDARD: A SOLUTION

A potential solution for Courts would be the strict application of the burden of proof envisaged under Section 114A, and as a consequence apply an affirmative consent standard. An affirmative consent standard is one where the accused would have to establish the proof for the steps they took to ascertain the complainant's consent. This standard is envisaged in UN recommendations¹⁴⁵ and CEDAW's Communication in the case of *Vertido v. The Philippines*.¹⁴⁶ The affirmative consent standard has been documented in feminist legal research widely, and is seen as the *de jure* solution to the *de facto* problem of assumption of women's consent in spaces where there is a lacuna in understanding whether consent was given.¹⁴⁷ The benefits of applying the affirmative standard test include reducing the burden of scrutiny on women's subjective experiences and actions during and after the incident, protects complainants from assumptions made by judges to find consent where there is none established, and acknowledges female sexual autonomy.¹⁴⁸

As per the letter of the law, i.e., Section 375 of the IPC, does require "unequivocal voluntary agreement" in its definition of consent. However, as evidenced with the analysis in the rest of this essay, in practice, such affirmative agreement is not looked into by the Courts of the land. Critics of the affirmative consent standard have hypothesised it to fall short and not address the issue of power dynamics between perpetrators and survivors. That, coerced consent shall be extracted from victims and be held to be sufficient under rape laws.¹⁴⁹ This criticism seems to be unfounded, as the law, across substantive areas be it crimes or civil constructions, interprets consent to be valid only when freely given without any fraud or coercion.¹⁵⁰ In light thereof, if freely given consent is the standard

¹⁴⁴ *Supra* note 6.

¹⁴⁵ UN DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN, 26-28 (2010).

¹⁴⁶ Committee on the Elimination of Discrimination against Women [CEDAW], *Communication No. 18/2008 Vertido v. The Philippines*, 15-17 (2010) [CEDAW issued the determination and clarified guidelines in response to a Filipino national who reported that she was a victim of discrimination against women within the meaning of Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women and stated that the Philippines, a party to the Convention, violated her rights under the same].

¹⁴⁷ SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE, 97 (Columbia University Press, 2008)

¹⁴⁸ Anupriya Dhonchak, *Standard of Consent in Rape Law in India: Towards an Affirmative Standard*, BERK. J. GENDER, LAW & JUSTICE, 29, 69 (2019).

¹⁴⁹ Jozkowski K, *Barriers to Affirmative Consent Policies and the Need for Affirmative Sexuality*, 47 UNIVERSITY OF THE PACIFIC LAW REVIEW, 741, 750 (2017).

¹⁵⁰ Indian Contract Act, 1872, Section 14, No. 9, Act of Parliament, 1872 ["Consent is said to be free when it is not caused by—"] (1) coercion, as defined in section 15, or (2) undue influence, as defined in section 16, or (3) fraud, as defined in section 17, or (4) misrepresentation, as defined in section 18, or (5) mistake, subject to the provisions of sections 20, 21 and 22. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.]; The Code, § 375 [As highlighted earlier, consent must be "voluntary" and not influenced].

practically applied by the courts of the land, then the burden of proving that such consent has been obtained lies on the accused (being in line with Section 114A), therefore, alleviating to a certain degree, the psycho-social repercussions on the survivor of being retraumatized through the process of the trial.

VII. CONCLUSION:

This essay first explores why testimonial evidence of complainants are so important in the context of rapes, given the nature of the crime, and how even other forms of evidence like medical evidence are construed in a patriarchal light by our courts and law enforcement. Then, we move to examine the problems with the “sterling witness test” as applied by our Courts to rape complainant’s testimonies. The essay conclusively explains how the test is not unlikely to be passed by most complainants, and additionally also does not take into account the trauma victims of rape go through, and risks re-traumatization of victims through the components of the test. The essay suggests that in order to meaningfully move away from the Sterling witness threshold, and take into account the traumatic realities of rape victims in India in the creation of a fair judicial test, judicial practitioners, legislators, and judges need to understand the constraints on women’s freedom and agency that operate not just if they are a victim during the act, but in their day-to-day realities. Reversing the burden of proof under Section 114A as enacted by the Criminal Law Amendment 2013 is essentially important to take into account such material realities in the criminal law practice. Further, this essay attempts to deconstruct the various ways in patriarchal conditions superimpose themselves on women and limit their agency and responses to rape. Firstly, by women internalizing what actions are considered valid for women to participate in; Secondly, by the state organs like the law enforcement and courts applying certain tests and assumptions to find consent of women in situations that have no bearing on consent, and lastly, by perpetrators that seem to assume consent in non-verbal cues like the clothes women wear or any other actions or gestures, further legitimized by state organs in their approach towards prosecuting and investigating the matter. This essay finally concludes by reiterating the importance of strict practical application of 114A that would also complementarily require the application of an affirmative consent test that has been studied and advocated for widely by scholars of feminist jurisprudence.