

# Failing to Achieve the Goal: A Feminist Perspective on Why Rape Law Reform in Taiwan Has been Unsuccessful

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## ABSTRACT

*It has been more than ten years since feminists and legal scholars drove the first wave of rape law reform in Taiwan. Reform in the 1990s included the passage of the Anti-Rape Act and significant amendments to the Taiwanese Criminal Code that changed the definition of rape. This Article uses empirical data and case law analysis to show that the reform has not yet reached its goals. Two factors have led to its failure. First, the legal framework is poorly designed and does not adequately protect sexual autonomy. Second, the culture of rape trials in the Taiwanese courtroom is conservative and patriarchic. The requirement of utmost resistance no longer exists in law but is still alive in judges' holdings. In light of feminist legal theories and rape law reform in the United States, this Article argues that rape is a crime against personal sexual autonomy as well as a crime against women as a group. A new reform is proposed to focus on the protection of sexual autonomy and to take into account the unequal power between perpetrator and victim. By shifting from the traditional focus on the "physical compulsion model" toward the "affirmative consent model" and recognizing unequal power in the sexual relationship in the substantive criminal code, the new law would ensure women's sexual autonomy and reduce judicial bias and stereotypes in rape trials.*

## I. INTRODUCTION

It was a hot, humid afternoon. I was fourteen years old, and I was almost home from school. As usual, I got in the elevator to go to my apartment on the eleventh floor. On the way up, the elevator stopped on the third floor and a workman got in. I told him that the elevator was going up and he replied that he was going up as well. When the door closed and the elevator started again, the workman suddenly reached his hand under my skirt. Although I cannot recall what I had been doing at that moment, I do clearly remember becoming frozen, motionless. Only after a few seconds could I move again, quickly pushing every button. When the door finally opened, he left in a hurry. I was not physically injured. I did not scream at the time, nor did I mention it to anyone afterwards. Yet this was sexual assault.

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Since I was young, I have always been told that women need to be careful because they could be raped at any time and any place. As a result, I was forbidden to come home late or travel alone. Despite graduating from law school in Taiwan and working as an attorney, which provide me with power and influence in my professional life, whenever I am alone in an enclosed space such as an elevator or a taxi I still feel powerless. Professional knowledge does not guarantee my physical safety. I worry that somebody might hurt me and nobody will be around to help.

I am not the only person who worries about falling victim to the crime of rape. We women are often reminded or warned:

*"You should be careful."*

*"Don't dress too sexy."*

*"Don't be alone at night"*

We receive these cautionary messages from our families, our schools, and the general public.<sup>1</sup> We then identify ourselves as a "rape-vulnerable" group, and this identification is an essential factor that distinguishes women from men.<sup>2</sup> The fear associated with self-identifying as a potential rape target becomes a consideration in a woman's daily life, which may control her schedule and influence her choices.<sup>3</sup> The fear of being raped transcends nation-state boundaries. As a result, attempts have been made throughout the world to better support rape victims and to increase the prosecution and conviction rate of rapists.<sup>4</sup>

Rape law reform in the United States has strong ties to the second wave feminist movement.<sup>5</sup> Through works such as Susan Griffin's classic 1971 article, "Rape: The All-American Crime,"<sup>6</sup> and books such as Susan Brownmiller's *Against Our Will*<sup>7</sup> and Diana Russell's *The Politics of Rape*,<sup>8</sup> rape became the point of departure for an ongoing investigation of the subordination of women and

1. See Women & Children Protection Brigade, Hsinchu City Police Bureau, *Hsinchu City, Taiwan, Women Self-Protection Guideline*, [http://www.hccp.gov.tw/hccp/ladysafe/attack\\_more.asp?id=43](http://www.hccp.gov.tw/hccp/ladysafe/attack_more.asp?id=43) (last visited Jan. 7, 2011); Women & Children Protection Brigade, Yunlin County Police Department, *Yunlin County, Taiwan, Women Self Protection Guideline*, <http://w3.ylhp.gov.tw/tyhp72/000805.jsp> (last visited Jan. 7, 2011); see also Jaelyn Friedman, *Combating the Campus Rape Crisis*, THE AM. PROSPECT (Sept. 9, 2009), [http://www.prospect.org/cs/articles?article=combating\\_the\\_campus\\_rape\\_crisis](http://www.prospect.org/cs/articles?article=combating_the_campus_rape_crisis).

2. For example, while 6037 women were raped in 2007, the number of male rape victims was only 303. MINISTRY OF THE INTERIOR (TAIWAN), STATISTICS AND ANALYSIS ON DOMESTIC VIOLENCE AND RAPE CRIME 20-21 (2008), <http://sowf.moi.gov.tw/stat/sex/genderstat9704.doc>; see generally Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials* 49 HASTINGS L.J. 663 (1998).

3. See Orenstein, *supra* note 2, at 672.

4. See generally NANCY A. MATTHEWS, *CONFRONTING RAPE: THE FEMINIST ANTI-RAPE MOVEMENT AND THE STATE* (1994).

5. Both radical and traditional feminists supported the idea that rape and abortion were issues that needed to be addressed by the women's movement. See OLIVE BANKS, *FACES OF FEMINISM: A STUDY OF FEMINISM AS A SOCIAL MOVEMENT* 235 (1981).

6. See generally Susan Griffin, *Rape: The All-American Crime*, RAMPARTS, 26 (1971).

7. See generally SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

8. See generally DIANA E. H. RUSSELL, *THE POLITICS OF RAPE* (1975).

their experiences of sexual victimization.<sup>9</sup> Reform of states' rape laws was a key item on the feminist agenda across the United States throughout the 1970s.<sup>10</sup> During this period of time, rape cases such as *State v. Alston* and *State v. Rusk* were decided, and virtually every state had considered (and most states had passed) some form of rape reform legislation.<sup>11</sup> Even though different states adopted different legal models of rape law reform—for example, the state of Michigan focused on the use of force, and the state of Wisconsin focused on the victims' consent—their common purpose remained to establish laws that ensured greater gender equality in the legal system.<sup>12</sup>

Taiwan's rape law reform was similar to rape law reform in the United States in that it was deeply influenced by the advocacy of feminists. Feminist movements in both countries were able to shape the course of legislation surrounding rape. Under the continental legal system, Taiwanese rape law had not been amended for fifty years since the Kou Ming Tang (KMT) government brought the law to Taiwan in 1949.<sup>13</sup> The Taiwanese feminist movement gained strength alongside broader protests of general social discontent that grew out of the rapid social and economic changes occurring in the late 1990s.<sup>14</sup> In response to these women's voices, the Legislative Yuan of Republic of China (Taiwanese Congress) finally made significant amendments to reform the rape statutes in the Taiwanese Criminal Code in 1999.<sup>15</sup>

Thirty years after significant rape law reform in the United States, many scholars, through either theoretical or empirical studies, have argued that the goal of rape reform legislation has not been fully realized. Scholars in the United States still seek to improve the effectiveness of the legal system and its ability to achieve just results. In contrast, ten years after implementing Taiwan's rape law reform, there is no legal scholarship looking into its effects and virtually no information available about how the Taiwanese judiciary has interpreted and applied the law. The Anti-Rape Act, which Taiwan's Congress passed in 1996 to prevent rape crimes and provide more support to rape victims, prohibits the disclosure of the details of rape cases to the public via the Internet or other means. The original purpose of this policy was to protect the reputation

9. PATRICIA SEARLES & RONALD J. BERGER, *RAPE AND SOCIETY*, at xi (Patricia Searles & Ronald J. Berger eds., 1995).

10. SUSAN ESTRICH, *REAL RAPE* 80 (1987).

11. *Id.*; *State v. Alston*, 312 S.E.2d 470 (1984); *State v. Rusk*, 424 A.2d 720 (1981). In *Alston*, the Supreme Court of North Carolina reversed a conviction for kidnapping and second-degree rape because the State failed to demonstrate "substantial evidence of either actual or constructive force." *Alston*, 312 S.E.2d at 476. In *Rusk*, the Court of Appeals of Maryland reversed and remanded the lower court's decision, concluding that "the jury could rationally find that the essential elements of second degree rape had been established." *Rusk*, 424 A.2d at 728.

12. Concerning the evolution of rape law in the United States, see generally GENDER AND LAW 790-91 (Katharine T. Bartlett & Deborah L. Rhode eds., 4th ed. 2006).

13. KMT means Kou Ming Tang, which established the Republic of China in Mainland China in 1911. Following defeat by the Communist Party in a civil war, the government moved to Taiwan in 1949.

14. See generally DORIS T. CHANG, *WOMEN'S MOVEMENTS IN TWENTIETH-CENTURY TAIWAN* (2009).

15. *China (Taiwan Only)*, U.S. DEP'T OF STATE (Mar. 4, 2001), <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8294.htm>.

and privacy of rape victims, but it unfortunately creates a large obstacle for those people seeking to monitor the effects of the reform.

By receiving permission from the Taiwanese Judicial Yan (the highest judicial institute in Taiwan) to review the rape cases in its database, this Article ends the dearth of scholarship by providing the first analysis of Taiwan's rape law reform based on cases and verdicts, with a particular focus on those decided under the new rape law.

Part II of this Article provides a brief introduction to the Taiwanese legal system, including an analysis of the historical colonial occupation of Taiwan by China and Japan.<sup>16</sup> Part III describes the feminist movement in Taiwan and its efforts to bring about gender equality and rape law reform.<sup>17</sup> Part IV examines some of the cases that have gone to trial in order to illustrate how the new rape law has been implemented in the courtroom. Through case law analysis, this Article endeavors to evaluate whether the reform reached its goal.<sup>18</sup> Part V utilizes a comparative legal method—American feminist theories—in order to propose a new model to reconstruct the substantive rape law in Taiwan. This model focuses on the protection of sexual autonomy, seeking to redefine rape and to reduce gender bias at rape trials. It also aims to narrow the gap between what the law in Taiwan proposes to do and what it actually does.<sup>19</sup> Part VI briefly concludes.

## II. THE EVOLUTION OF TAIWANESE LAW

The Taiwanese legal system went through radical changes and reforms in the twentieth century. The development of Taiwanese law reflects the historical complexity of being “one land with two national flags.”<sup>20</sup> A government imposed by Japan ruled Taiwan for the first half of the twentieth century, followed by a government that originated from China (ROC - Republic of China) in the second half of the century.<sup>21</sup> Originally Taiwan was a territory of the Ching Dynasty and was governed by traditional Chinese law; however, in 1895 the state was relinquished to Japan, who in 1945 transferred rule to the ROC. Under both Japanese and ROC rule, the law was largely modeled after the individualistic and liberal laws of the modern West.<sup>22</sup>

Therefore, the evolution and development of the modern Taiwanese legal system can be considered a series of acquisitions and adaptations of Western law. The term “Western law” as used here refers to both “continental European law and Anglo-American law.”<sup>23</sup> Continental European law was adopted by pre-war Japan and the Republic of China and therefore constitutes the fundamental legal structure in Taiwan. Anglo-American law, especially United

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16. See *infra* text accompanying notes 13-36.

17. See *infra* text accompanying notes 38-87.

18. See *infra* text accompanying notes 88-154.

19. See *infra* text accompanying notes 155-279.

20. Tay-Sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y J. 531, 531 (2002).

21. *Id.*

22. *Id.*

23. *Id.* at 531-32.

States commercial and intellectual property law, was gradually introduced to Taiwan as the United States' influence and power increased in the Pacific East.<sup>24</sup>

In Taiwan there is a clear three-stage progression of significant legal changes in the past 100 years. The first stage occurred during the colonial period, which took place under Japanese rule from 1895 to 1945. As Japan had already largely completed modernizing its own codes based on continental European law,<sup>25</sup> it used its colonial government influence and the argument of modernity to introduce a modern Western legal regime in Taiwan.<sup>26</sup>

The second stage of Taiwanese legal reform took place under Koumingtang (KMT) rule from 1945 to 1987. After the Second World War (WWII), Japan returned Taiwan to the Republic of China (ROC), which was led by the KMT. Before the annexing of Taiwan in 1945, the KMT regime had already established a legal system in China that closely resembled that of Japan. This ROC legal system enacted Western-style (especially German-influenced) codes in mainland China between the late 1920s and mid-1930s.<sup>27</sup> Nevertheless, these laws were not substantially enforced in mainland China after the 1930s due to continual chaos that began with WWII and was followed by the Chinese Civil War, which occurred between the ROC government and the Communist Army. In 1949, the entire KMT government, led by Chiang Kai-shek, retreated to Taiwan after a bitter defeat in China by the Communist coalition led by Mao Ze-Dong.<sup>28</sup> To solidify its power over the island, the KMT immediately enacted martial law and enforced it for almost forty years. Although the KMT was still influenced by Western legal traditions, many elements of Western liberalism in the ROC laws, especially those regarding national governance (such as a constitution, the judiciary, and criminal justice issues) were either substantially reduced or kept frozen.

The rapid growth of the Taiwanese economy and radical changes in the political environment placed significant pressure on the KMT government to terminate martial law, and in 1987 it was lifted, ushering in the third stage of Taiwanese legal reform. During this period, Taiwan moved toward becoming a more liberal and democratic country. Fueling this change was the adoption of laws based on an Anglo-American system. Numerous laws and regulations were enacted. For example, after 1991, popular representatives and administrative officials, including the President, were elected by popular vote.<sup>29</sup> For the first time in the KMT's rule, constitutional principles and criminal

24. See generally Michael Skrehot, *Taiwan's Changing Patent Law: The Cost of Doing Business with the World*, 30 INT'L LAW 621 (1996).

25. Wang, *supra* note 20, at 533.

26. During the Japanese colonial period, Taiwanese law inherited traditional Chinese laws, Western colonial laws, and traditional Japanese laws. The Japanese militarism policy was to "transplant" Japan's laws to its colonies in order to gain support outside Japan. See TAY-SHENG, WANG, *Re Ben Shi Dai Sha Taiwan De Fa Lu Gai Ge* [The Taiwanese Legal Reform under the Japanese Colonialism], in TAIWAN FA CHI SHE DE JIE LI [ESTABLISHING TAIWANESE LEGAL HISTORY] 163-66 (1997).

27. Wang, *supra* note 20, at 536.

28. Joseph L. Pratt, *The Two Gates of National Taiwan University School of Law*, 19 UCLA PAC. BASIN L.J. 131, 137 (2001).

29. Wang, *supra* note 20, at 539.

procedures were installed and Taiwanese citizens could technically hold their government and judiciary accountable.<sup>30</sup> These legal changes fostered a new political environment that allowed the KMT to transform itself from a foreign regime into a more legitimate government with broader acceptance by the native Taiwanese.<sup>31</sup> Despite broader recognition, the Democratic Progressive Party (DPP) still won in 2000. The peaceful transition of power from the KMT to the DPP marked a complete democratic political transformation.

Unlike the United States—which has a legal system based on common law traditions—Taiwan’s legal system developed through a lengthy process of adaptation. Both the Japanese colonial government and the KMT introduced their own interpretation of a Western legal model into the traditionally imperial Taiwanese society. Integration of this foreign legal regime enabled critiques of traditional laws. As a result, modern legal reform has become a legitimate means of creating contested norms that transform social and cultural values.

Among the various legal reforms attempted in Taiwan, the development of property law epitomizes the aforementioned transformation. Previously, Taiwanese citizens followed traditional customs established during the Ching Dynasty to settle property disputes.<sup>32</sup> The Japanese colonial government first incorporated these traditional customs into its civil law by creating similar concepts, and then gradually replaced these with Western-influenced property laws.<sup>33</sup> After the Taiwanese people accepted the concept of property rights, corporate and bankruptcy law was also introduced and adopted.<sup>34</sup>

However, the Taiwanese people did not as readily accept some other laws, especially those related to traditional social norms that were deeply imbedded in Taiwanese culture.<sup>35</sup> Further, because the new laws could not be enforced effectively, they were only followed if the Taiwanese people supported them. Because the laws were overly idealistic and failed to incorporate the existing cultural and social norms of traditional Taiwanese society, the reforms had a limited effect.<sup>36</sup>

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30. Pratt, *supra* note 28, at 140. In the period of martial law, many articles of the Taiwanese Criminal Code and Criminal Procedure Law were frozen. Criminal cases received military trials. Now that martial law has been lifted, only cases involving violations of the Criminal Code of the Armed Forces receive military trials.

31. Wang, *supra* note 20, at 539.

32. WANG, *supra* note 26, at 176.

33. *Id.*

34. *Id.*

35. The area of family law is an example of a failed transformation. Under the modern Taiwanese inheritance law, CODE CIVIL [C. CIV.] art. 1138, every child has the right to his or her parents’ inheritance or estate. Nevertheless, in Taiwanese society, women usually waive their rights of inheritance under the pressure from their families because a woman would no longer be a member of her original family after getting married. See Yuen-Hao Liao, *Duo Shao Nu Xing Bei Po Pao Qi Ji Chen [How Many Women Were Forced to Waive Their Inheritance Right]*, LIAN HE BAO [UNITED DAILY NEWS], Feb. 4, 2008, at A15.

36. Li-Ju Lee, *Law and Social Norms in a Changing Society: A Case Study of Taiwanese Family Law*, 8 S. CAL. REV. L. & WOMEN’S STUD. 413, 429 (1999); see CODE CIVIL [C. CIV.] art. 1138 (Taiwan) (“Heirs to property other than the spouse come in the following order: (1) Lineal descendants by blood; (2) Parents; (3) Brothers and sisters; (4) Grandparents.”). However, the traditional norm precludes a married daughter from claiming inheritance rights because a married daughter is considered part of her husband’s family and not her birth family. Lee, *supra*, at 418, 440. A married daughter carries

According to Professor Li-Ju Lee, the success of legal reforms in Taiwan depends on whether the legislature enacts laws with sensitivity to social norms and cultural practices.<sup>37</sup> The following analogy demonstrates how social norms and cultural practices can be understood and applied so as to achieve successful legal reform. When a doctor diagnoses a patient, the first step is to examine the patient to determine where the problem is. Legal reform should do the same thing. The legislature should collect all available information to understand the problem before proposing a legal diagnosis. Doing a complete survey and collecting the necessary social scientific evidence can help the legislature to appreciate social practices and how the old rules were interpreted. After finding the etiology, a doctor should then prescribe the right medicine for the illness. Knowing the problem but prescribing the wrong medicine will likely fail to cure the illness and could even be fatal.

The same is true for the legislature. Lawmakers should study the legal doctrines and apply these when creating a new law. Legal theories and ample knowledge about a problem's contours are the foundation for wise lawmaking. Finally, to cure a disease one needs an evolving treatment. A doctor should pay attention to any change in the patient's symptoms and adjust the prescription as necessary. Lawmakers should apply this same approach. Since amending a law should go through a formal process that takes a long time, and under the continental criminal law system an offense is usually codified in an abstract way that only really takes shape with application, it is the responsibility of the judicial branch to interpret statutes in light of social changes and maintain the core value of the law. If the legislature abruptly enacts laws without doing sufficient research and the judicial branch remains passive with respect to such legislation, the impact of the reform will surely be limited. Unfortunately, this exact failure appears to be what has been happening with rape law reform in Taiwan.

### III. THE TAIWANESE FEMINIST MOVEMENT AND REFORM OF THE RAPE LAWS IN THE 1990s

Rape law reform in Taiwan is directly linked to the Taiwanese feminist movement, which occurred in three waves from the 1970s through the 1990s. The Taiwanese feminist movement, like the legal system, was imported from Western countries, particularly the United States. Taiwanese feminists employed the rhetoric and arguments made by American feminists in their endeavor to effectuate change in Taiwan. Therefore, rape law reform in Taiwan is a mixed-product of United States feminist thought as well as the criminal law principles of the continental European tradition. This Part will discuss the development of the Taiwanese feminist movement and its role in reforming the rape laws.

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her husband's last name and is not responsible for her parents' support. Therefore, a married daughter does not have the right to claim any of her birth parents' inheritance. If the inheritance law is intended to protect the rights of a married woman to her parents' inheritance, lawmakers need to understand this traditional family practice and address any unreasonable arrangements that subordinate women based on their marital status.

37. *Id.* at 443.

Before the Japanese colonial period and long before any hints of feminism, Chinese patriarchal culture controlled sexuality and morality in Taiwanese society. Under this system of paternalism, women were dependent on their husbands and held a low status within the family. This slowly began to change during the transition to Japanese rule during the colonial period because the Japanese government modified some of the Chinese customs in Taiwan in order to assimilate the Taiwanese people to Japanese culture. Some of these customs involved gender relations. For example, the Japanese government prohibited the Chinese custom of foot binding. It also established many all-girls schools in order to change the traditional custom that prohibited girls from attending school.<sup>38</sup> World War II contributed to this shift because the labor shortage in the Taiwanese market meant women entered the workforce, which helped elevate their status.<sup>39</sup> After the war ended, some Taiwanese women began to organize in local communities, seeking rights and involvement in the political system.<sup>40</sup>

Unfortunately, efforts made by women in the post-war period did not garner a large following. After the KMT government came into power, it ignored the fact that the ROC Constitution guarantees equal rights and began to promote the image of the “dutiful wife and loving mother.”<sup>41</sup> Under the nationalism and patriotism of the martial-law era, women were forced to be submissive and play a supportive role by taking care of their families and serving the needs of the country.<sup>42</sup>

But this situation of subservience did not last due to Taiwan’s economic growth. Starting in the 1970s women became more economically independent. When Annette Hsiu-Lien Lu, the pioneer of Taiwanese feminism, returned to Taiwan from Harvard Law School, her slogan— “being a person before being a woman”—galvanized the first wave of the feminist movement.<sup>43</sup> The term “feminism” was first introduced in Taiwan at this time.<sup>44</sup> In 1982, feminists founded Awakening Foundation, a group that made significant contributions to the autonomous women’s movement.<sup>45</sup> This movement marked the second wave of feminism in Taiwan.

After martial law was lifted and politics were democratized in the late 1980s, many women’s associations were organized. In this post-martial law era, Awakening Foundation, cooperating with many other feminist groups and legal

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38. Ying-Kuen Zhang & Shen-Li Hwang, *Diversity and Unity Under the Big Umbrella: The Relations of Feminist Study, Gay Study, and Masculine Study*, Address at the Conference of Gender, Media, and Culture Studies at the Shih Hsin Graduate Institute for Gender Studies, Taiwan (June 11-12, 2004).

39. *Id.*

40. *Id.*

41. People of the ROC are equal, regardless of sex, religion, race, class, or political party. MINGUO XIANFA art. 7 (1947) (Taiwan).

42. See CHANG, *supra* note 14, 62-66 (describing the KMT government’s ideology and policies toward women).

43. NORMS AND THE STATE IN CHINA 210 (Chun-Chieh Huang & Erik Zürcher eds. 1993). Ms. Lu became the first female vice president of Taiwan after the 2000 election. *Vice President Annette Hsiu-lien Lu*, TAIWAN.COM.AU, <http://www.taiwan.com.au/Polieco/Government/Lu/report01.html> (last visited Jan. 16, 2011).

44. Zhang & Hwang, *supra* note 38.

45. CHANG, *supra* note 14, at 107.

reformers, tried to reform laws to eliminate discrimination against women.<sup>46</sup> Their first successful target was Taiwanese family law. Feminist groups lobbied Taiwanese Congress to amend discriminatory laws in order to bring about gender equality in the family.<sup>47</sup> The second achievement during this period came with the enactment of a law protecting female laborers' rights to equal treatment and reasonable benefits.<sup>48</sup> The third accomplishment of the Taiwanese feminist movement was modifying rape statutes in the Criminal Code and enacting the Sexual Assault Treatment and Prevention Act and Anti-Rape Law after a series of brutal rape crimes and violent acts against women.<sup>49</sup>

While feminists in Taiwan were in the process of arguing for these legal and political reforms, the first feminist lesbian group, Between Us (Women Zhi Jian), was established in 1990 in order to discuss issues in the lesbian community.<sup>50</sup> The establishment of this group formally marked the beginning of the third wave of the Taiwanese feminist movement.<sup>51</sup>

Originally Taiwanese feminist rhetoric focused on the heterosexual relationship, however, influenced by post-colonialist and anti-essentialist theory, the third wave feminist movement advocated for more diversity within the movement.<sup>52</sup> Acceptance of different types of feminists led many women within the overarching movement to form sub-groups. Homosexual women, female laborers, and migrant women began to split from the mainstream movement in order to improve their social status and legal rights based on their own cultural and social identities within Taiwanese society.<sup>53</sup>

46. *Id.* at 117.

47. The reform of family law aimed to protect women's equal rights in property, divorce, and child custody. See Fang-Mei Lin, *Zi You Zhu Yi Nu Xin Zhu Yi* [Liberal Feminism], in NU XING ZHU YI LI LUEN YU LIU PEI [THEORIES AND SCHOOLS OF FEMINISM] 28 (Yan-Ling, Gu ed., 2000).

48. Starting in 1990, feminist groups in Taiwan lobbied for the enactment of the Equal Right to Work Act to pursue equal protection in employment. Their eleven-year effort finally succeeded in 2001 when the Taiwanese Congress passed the Equal Right to Work Act.

49. On November 30, 1996, the body of a woman who had been brutally raped and murdered was found. This body was identified as Ms. P'eng Wan-ju, a famous feminist and the Executive Director of the Taiwan Democratic Development Party's Women's Department. See CHANG, *supra* note 14, at 151. In 1997, public order decreased even further. A wanted criminal committed several rapes after he ran away from the police. The series of rapes shocked the nation and raised awareness of the issue of women's safety. See Fu-Nian Tang, *Qiang Bao Qiang Dao Chen Jin Xing Shuo Shu Shi Jian* [Chen Jin-Xing Confessed Scores of Rapes and Robberies], LIAN HE BAO [UNITED DAILY NEWS], Nov. 21, 1997, at 3; see also Yu-Fang Liang, *Fu Nu Tuan Ti Sheng Yuan Bei Chen Qiang Bao Fu Nu* [Feminist Groups Expressed Support to the Women Raped by Chen Jin-Xing], LIAN HE BAO [UNITED DAILY NEWS], Nov. 24, 1997, at 3.

50. *Id.* at 135.

51. Zhang & Hwang, *supra* note 38.

52. *Id.*

53. After 1990, the number of feminist groups increased. The aims of these groups were to build up communities of women and to reform laws. These groups later became the center of the Taiwanese feminism movement, and the origins of "community women associations" and "women enhancement centers." During this time, groups such as the Female Labor United Assembly Line and the Pink Collar Organization were organized. See Hui-Tan Zhang, *TAI WAN DANG DAI FU NU YUN XING ZHU YI SHI JIAN CHU TAN* [Contemporary Women's Movement and Feminist Practices in Taiwan] 192 (2006). Since the first female homosexual group, "Between Us," organized in 1990, the homosexual movements in Taiwan changed their strategies and started to present their issues collectively and publicly. Many homosexual groups were organized in schools and communities.

The development of the Taiwanese feminist movement over the course of three decades reflects the rapid social changes occurring during this period and an increasing awareness of women's rights. It also reflects the methods by which women struggle for social equality and legal justice. Using the law, feminists made significant advances, the most remarkable being the successful amendment and ratification of gender-related laws.<sup>54</sup> These include: (1) amending family law to eliminate discriminatory marriage arrangements; (2) amending the Criminal Code so that rape statutes are broader and include additional forms of sexual violation; (3) enacting the Anti-Rape Act to help prevent sexual assaults; (4) enacting the Anti-Domestic Violence Act to protect disadvantaged members of a family; (5) enacting the Equal Protection Employment Act to require equal treatment in the workplace; (6) enacting the Equal Protection in Education Act to ensure gender equality on campuses; and (7) enacting the Sexual Harassment Prevention Act to protect women's sexual autonomy.<sup>55</sup> These legal reforms not only attracted public attention regarding the issue of subordination of women, but also formally improved women's social status and legal rights.

To understand the huge strides made by Taiwanese feminists, it is important to examine the provisions on sexual violations that existed before feminists effectuated large-scale change. In the Taiwanese Criminal Code, there are several offenses involving sexual violations. The offense of "forcible intercourse" (named rape before 1999) is inscribed in Article 221. Initially enacted in 1928, Article 221 defined rape as an act in which "a man engages in sexual intercourse with another woman by force, a threat of force, drugs, hypnotism, or any other means to prevent the woman from resisting his sexual demands."<sup>56</sup> Deconstructing the definition of rape reveals several gender inequalities in the law. First, the crime was not gender-neutral. Only women could be raped and only men could be rapists. Second, the law did not criminalize the act of rape unless the perpetrator used a very high level of force.

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Journals and magazines started to show concern about homosexual issues. See Xiao-Hong Zhang, Nu Tong Zhi Li Lun [Lesbian Theory] Nu Xing Zhu Yi Li Luen Yu Liou Pei [Theories and Schools Of Feminism] 264 (Yan-Ling Gu ed., 2000) (Taiwan). On the morning of July 6, 2005, migrant women from Kaohsiung and Pingtung gathered with their husbands and children and headed to Taipei to protest the Taiwanese government that ignored their rights by making citizenship standards more restrictive. See Xiao-Juan Xia, Xun Zhao Guang Ming [Seeking Promise], in BU YAO JIAO WO WAI JI XIN NIANG [Don't Call Me Foreign Bride] 12 (2005)(Taiwan).

54. The ratified gender-related laws include the Domestic Violence Prevention Act, the Gender Equality in Employment Act, the Gender Equality in Education Act, and the Sexual Harassment Prevention Act. See Xia-Dan Wang, *Xien-Bie Yu Fa-Lu [Gender and Law]*, in XIEN-BIE XIANG-DU YU TAIWAN SHE-HUEI [GENDER AND TAIWAN'S SOCIETY] 160 (2007) (Taiwan).

55. Chih-Chieh Lin, *Regulating Pregnancy in Taiwan: An Analysis from an Asian Legal Feminist Using Feminist Legal Theories*, 39 U. BALT. L.F. 204, 209 (2009). Taiwan's Congress passed family law reforms in the Civil Code amendment in 1985, Anti-Rape Act in 1997, Anti-Domestic Violence Act in 1998, rape statutes in the Criminal Code amendment in 1999, Equal Protection Employment Act in 2002, Equal Protection in Education Act in 2004, and the Sexual Harassment Prevention Act in 2005. See FOUND. FOR WOMEN'S RIGHTS PROMOTION & DEV., TAIWAN WOMAN'S ALMANAC 200-09 (2007), available at <http://wrp.womenweb.org.tw/uploads/TaiwanWomenalmanac/第92.pdf>.

56. Crim. Code art. 221 (Taiwan) ("Anyone who uses violence, coercion, threat, hypnotism, or other means to attempt to engage in sexual intercourse with a man or woman against his/her will shall be sentenced to a prison term between 3 and 10 years.").

Prosecutors were frequently unable to convict those accused of rape because the level of force used did not meet the level required for the victim to be unable to resist. Third, rape was a “handled only upon formal complaint” crime, which means that prosecutors could not prosecute the case unless the victim made a formal complaint.<sup>57</sup> As a result, even if the prosecutor had sufficient evidence to file a case against the defendant, the case would be dismissed if the victim did not want to make a formal complaint or if she withdrew her formal complaint.<sup>58</sup> The requirements of forcible compulsion and prompt complaint meant that the rape laws provided little protection to Taiwanese women. However, until the 1990s, very few critics attacked the traditional rape laws. During martial law, people in Taiwan were likely more concerned about the overall status of oppressed liberties and political reform than the improvement of women’s rights. Hence, the traditional rape laws remained in effect for more than fifty years.

Although rape has always posed a significant threat to women’s security, Taiwanese women did not publicly acknowledge its severity until 1996. After a series of brutal rape incidents in 1996 and 1997, Taiwanese women could no longer stand living in such an unsafe environment.<sup>59</sup> As a result, “a coalition of non-governmental women’s organizations staged a mass rally in all major cities throughout Taiwan to protest sexual assault and the government’s ineptness in ensuring women’s safety.”<sup>60</sup> The tragedy of those brutal rape and murder cases galvanized several policy and legislative reforms of rape laws. Feminists bolstered their advocacy with statistics showing the astronomical number of rapes perpetuated in Taiwan. According to the statistics, in 1988, 605 rape cases were reported to the police.<sup>61</sup> By 1995 the number had risen to 1,139 and it continued to climb with a reported 1,361 cases in 1996 and 1,701 cases just two years later.<sup>62</sup> A 1997 study found that women accounted for 86.1 percent of the victims of violent crimes.<sup>63</sup> Just four years later that figure had risen to 99.4 percent.<sup>64</sup>

Feminists and legal scholars attacked the traditional rape laws and demanded changes in the following ways. First, they argued that the purpose of the traditional rape laws was to protect sexual morality instead of one’s sexual autonomy.<sup>65</sup> This needed to change because the law became the source of the

57. The prosecutor cannot prosecute cases under Articles 221-30 unless the victim has made a formal complaint.

*Id.* at art. 236.

58. FAGUI HUIBIAN, CRIMINAL PROCEDURE CODE, arts. 252, 303 (Taiwan).

59. *See supra* note 49 and accompanying text.

60. *Id.*

61. FU NU SHIN ZHE JI JIN HUI [AWAKENING FOUNDATION], 1999 TAIWAN NU CHUN BO GU [REPORT OF TAIWANESE WOMEN’S RIGHTS] 4 (2000) (Taiwan), available at [http://www.scu.edu.tw/hr/document\\_imgs/documents/d6.pdf](http://www.scu.edu.tw/hr/document_imgs/documents/d6.pdf).

62. *Id.*

63. BUREAU OF STATISTICS, DGBAS, A STUDY OF GENDER STATISTICS AND WOMAN’S LIFE ANALYSIS, STATISTIC PAPER AND MONOGRAPHS SERIES 60 (2003) (Taiwan).

64. *Id.* Of course, cultural shifts that make it more acceptable for women to report rape crimes may also contribute to the increased numbers.

65. 88 TAIWANESE CONG. REP. no. 13, at 200 (1999). Under the former rape statutes, rape was considered to be an offense against sexual morality.

victim's "second rape" by labeling rape victims as unchaste women and providing the basis for societal disdain.<sup>66</sup> Second, the traditional rape laws were too narrow because they only recognized vaginal/penile penetration and did not address any other forms of sexual assault, including assaults against male victims.<sup>67</sup> Recognizing assaults against male victims required amending the statute to outlaw "forcible sexual intercourse" without reference to gender.<sup>68</sup> Third, reformers demanded that the "unable to resist" requirement be eliminated from the rape laws because women might not be able to fend off their attacker due to shock or fear.<sup>69</sup> Fourth, since most rape victims are not inclined to report what happened to the police,<sup>70</sup> reformers suggested eliminating the requirement that the victim make a formal legal complaint.<sup>71</sup> The Taiwanese Congress ultimately met several of these demands.

Under tremendous pressure from feminist groups and legal reformers, the Taiwanese Congress passed the Anti-Rape Act (the Act) in 1997 and made significant amendments to the Taiwanese Criminal Code in 1999. According to the Taiwanese legislative report, the purposes of the rape law reform included: (1) combating sexual crimes efficiently; (2) fully protecting sexual autonomy; (3) reducing harassment and myths about rape victims throughout the criminal process; (4) creating safe surroundings for women; and (5) enhancing sexual equality in Taiwanese society.<sup>72</sup>

The Act focuses on the protection of rape victims.<sup>73</sup> In Taiwan, rape victims often face "a second rape" when the media reports the crime because it causes the victim more trauma and humiliation. In order to prevent rape victims from facing a "second rape," the Act prohibits the media from reporting the victim's name or the case details in public.<sup>74</sup> The Act also requires every city and county to establish an anti-rape center<sup>75</sup> and provides police stations and hospitals with a standard process for handling rape cases.<sup>76</sup> The Act also asks the government, schools, and the criminal justice system to cooperate with each other to prevent rape crimes on campuses and within local communities.<sup>77</sup>

Besides enacting the Act, the Taiwanese Congress made important changes to the old definition of rape in the Taiwanese Criminal Code, modeling these changes on legal reforms that occurred in the United States and some European countries.<sup>78</sup> First, the Congress renamed the offense "forcible sexual intercourse" and redefined it as a gender-neutral crime.<sup>79</sup> Second, the legislature

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66. *Id.*

67. *Id.*

68. *Id.* at 201.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. FAGUI HUIBIAN, ANTI-RAPE ACT, art. 1 (Taiwan).

74. *Id.* at art. 13.

75. *Id.* at art. 4-6.

76. *Id.* at art. 9, 11-18.

77. *Id.* at art. 3, 4, 8.

78. See 88 TAIWANESE CONG. REP. no. 13, at 200-01 (1999).

79. Crim. Code art. 221 (Taiwan).

broadened the definition of sexual intercourse. Acts like anal intercourse, oral intercourse, and using an object to penetrate the victim are included in the new definition.<sup>80</sup> Third, force or threat was no longer a necessary element of rape. According to the new statutory language, a person commits “forcible sexual intercourse” if he or she “applies force, threat of force, hypnotism, or any other means to violate another person’s will to engage sexual intercourse.”<sup>81</sup> Therefore, even when the perpetrator does not apply force or threat of force, if the perpetrator engages in sexual penetration with another person without that person’s consent, the act constitutes forcible sexual intercourse. Fourth, the Congress added the crime of “aggravated forcible sexual intercourse” in Article 222 of the Taiwanese Criminal Code.<sup>82</sup> According to Article 222, the offense may be punishable by imprisonment for life if forcible sexual intercourse occurs in any of the following circumstances: gang rape, rape with a weapon, breaking and entering in order to commit rape, torturing the rape victim, and using drugs to commit rape. Further, intercourse with a person under the age of fourteen, with a person who is mentally retarded, or with someone who is physically helpless also constitutes rape.<sup>83</sup> In addition, Congress eliminated the requirement of a formal legal complaint of rape prosecution in Article 236. According to the old Article 236, the prosecutor cannot bring a rape case to trial if the rape victim did not make a formal legal complaint to the defendant or if the victim drops the complaint after making it. Under the new law, the lack of a formal legal complaint cannot stop the prosecution.<sup>84</sup>

Congress passed the Anti-Rape Act and amendments to the Taiwanese Criminal Code quickly, forgoing major discussion in both the internal standing committee meeting and the general Congress meeting, in the hopes that the Act and amendments would relieve society’s frustration with the rising number of rapes. In its haste, Congress overlooked some important shortcomings to the laws. While intending to protect the victim’s privacy, the Anti-Rape Act’s requirement that trials occur behind closed doors,<sup>85</sup> the prohibition on the publication of verdicts involving sexual violence,<sup>86</sup> and the rule that only judges and prosecutors have authority to access the files, the documents, and the verdicts of rape crimes<sup>87</sup> means that the general public lacks information about

80. *Id.*

81. *Id.*

82. Crim. Code art. 222 (Taiwan).

83. *Id.*

84. Currently, Article 221 is classified as a “public-prosecution” crime rather than a “handle-only-by-complaint” crime.

85. Trials for sexual assault are not open to the public unless the victim agrees (or if the victim has limited capacity or no capacity, the victim and his or her legal representative agree) and the judge or military judge considers the case suitable for public access. FAGUI HUIBIAN, ANTI-RAPE ACT, art. 18 (Taiwan).

86. “Advertisements, publications, broadcasts, television, electronic messages, computer, Internet or other kinds of media should report or record neither the victim’s name nor other information which can lead to the discovery of his or her identity. However, there will be no such limitation if an agreement is given by a competent victim or if the investigation on the sexual assault incident is in accordance with the law and revealing the victim’s identity is necessary.” FAGUI HUIBIAN, ANTI-RAPE ACT, art. 13 (Taiwan).

87. The Taiwanese Judicial Yuan finally granted public access to rape verdicts on July 1, 2010.

how the laws work in practice. Accordingly, no one has been able to conduct any research regarding the conviction and acquittal rates in rape cases after the passage of the Anti-Rape Act or assess how the rape laws have been implemented or interpreted during the past ten years.

#### IV. EVALUATING THE TAIWANESE RAPE LAW REFORM

The Taiwanese rape law reform created a new rape reporting system as well as a new rape law that claimed to provide sufficient protection and reduce prejudice towards rape victims. Despite the enactment of a promising new framework, many in Taiwan feel that in practice the law falls short of expectations. Just one year after the reform, critics began to declare that the new rape crisis centers had insufficient funding and unprofessional staff.<sup>88</sup> Some feminist scholars voiced doubts about whether the police, prosecutors, and judicial system were capable of coordinating with each other effectively.<sup>89</sup>

Survey results suggest that the public does not feel that rape law reform brought about significant changes. According to the Report of Taiwanese Women's Rights, in 2005 women assigned the lowest possible number when asked to rank their satisfaction about personal safety and sexual autonomy, ranking it lowest out of all the elements studied.<sup>90</sup> Another recent survey completed in 2009 demonstrates that women are unsatisfied with the protection of their sexual autonomy and personal safety.<sup>91</sup> Many interviewees pointed out that although Taiwan has a new rape law as well as other anti-sexual harassment regulations, sexual assault and harassment against women in public and in private is still a big concern.<sup>92</sup> These interviewees also felt that the government provides insufficient legal and social assistance to those who report sexual violence and need to enter the legal system.<sup>93</sup> This claim is supported by a report issued by the Taiwanese Ministry of Justice, which stated that every year from 2001 through 2005 there was an average of 3,137 sexual assault cases (including rape, sexual abuse, and sexual misconduct) reported to the prosecutor's office.<sup>94</sup> Although the average conviction rate was 88.9 percent for those cases that went to trial, the prosecutor dropped almost half of the reported cases. Only 48.8 percent of the reported cases were brought to trial.<sup>95</sup> This data suggests that in reality, from 2001 to 2005, only 43.4 percent of the reported cases resulted in convictions, meaning the 88.9 percent conviction rate does not accurately reflect the conviction rate of reported cases. Such statistics

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88. FU NU SHIN ZHE JI JIN HUI [AWAKENING FOUNDATION], *supra* note 61.

89. *Id.*

90. CHINESE ASSOCIATION FOR HUMAN RIGHTS, 2005 REPORT OF TAIWANESE WOMEN'S HUMAN RIGHTS (2005), <http://www.cahr.org.tw/eweb/uploadfile/20100906103750886.pdf>.

91. CHINESE ASSOCIATION FOR HUMAN RIGHTS, 2009 REPORT OF THE TAIWANESE WOMEN'S HUMAN RIGHTS 15 (2009), [http://www.tsc.nccu.edu.tw/doc/2009\\_8.pdf](http://www.tsc.nccu.edu.tw/doc/2009_8.pdf)

92. *Id.*

93. *Id.* at 15-16.

94. MINISTRY OF JUSTICE, TAIWAN, STATISTICAL ANALYSIS OF SEXUAL ASSAULT CRIME, <http://www.moj.gov.tw/public/Attachment/611210594768.pdf> (last visited Aug. 10, 2005).

95. *Id.*

demonstrate a lack of real government support for women who have been sexually assaulted.

The surveys and statistical data highlight that the rape law reforms in 1997 and 1999 did not sufficiently achieve all their goals. While the data should have stimulated public debate about the impact of the reform, the limited information that was available as a result of the Anti-Rape Act's prohibition on publishing rape cases meant that people had no way of learning how the new laws were being applied and interpreted. Since passage of the Act, there has been almost no legal research conducted to evaluate the impact of the reform. Reviewing cases and verdicts is the best way to understand whether the reform is working and how it actually operates. Combined with legal analysis, scholars can help provide responses for how best to continue improving the law.

#### A. An Illusory Right to Sexual Autonomy

Before assessing the courts' verdicts in rape cases, it is important to first review the new rape law. Although rape law reform introduced some new ideas into the Taiwanese legal system, the new rape laws continue to improperly focus on the use of physical coercion rather than the protection of a victim's sexual autonomy. The Taiwanese Congress stated that the new law focused on the protection of people's sexual autonomy, but the language of the statute never clearly addressed this issue. Instead, the language still focuses on the application of physical force.<sup>96</sup> Further, the unclear definition of the offense as either a violation of sexual autonomy or an improper use of physical force against another causes confusion within the judicial branch regarding how to interpret the elements. This confusion results in difficulties obtaining convictions. The following analysis and research reveals why the reform led to such a disappointing outcome.

Previously, rape was defined as a crime in the Taiwanese Criminal Law Chapter 16, which was titled "The Offenses Against Morality and Chastity." One of the important elements required to prove the offense of rape was the victim's defenselessness. In the rape law reform, Congress changed the title of Chapter 16 to "The Offenses Against Sexual Autonomy." Moreover, Congress renamed the offense of "rape" as "forcible sexual intercourse," intending to shift the focus from the victim's resistance to the violation of the victim's will.<sup>97</sup>

Under the new law, Chapter 16 lists several types of legal offenses involving nonconsensual intercourse. All of these sexual offenses are felonies. The first type, defined in Article 221, is "forcible sexual intercourse." According to the wording of the new statute, if sexual intercourse is obtained through the use of force, the defendant's conduct constitutes forcible sexual intercourse.<sup>98</sup> Hence, the offense of Article 221 now only happens when the actor violates victim's will by applying forcible compulsion or any other means "equal as forcible compulsion." Such an interpretation narrows the application of Article 221. If forcible sexual intercourse happens under aggravated circumstances, it

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96. Crim. Code art. 221 (Taiwan).

97. 88 TAIWANESE CONG. REP. no. 13, at 201 (1999).

98. Crim. Code art. 221 (Taiwan).

constitutes “aggravated forcible sexual intercourse” pursuant to Article 222.<sup>99</sup> Unwanted sexual intercourse involving abuse of authority constitutes separate offense. According to Article 228, one commits “abuse [of] power to obtain sex” if one abuses one’s authority in any of the following areas: the office, during medical treatment, while providing social welfare, in an educational environment, having child custody, in a supervisory role in a business, or any other similar situation involving an unequal power relationship in which one can use coercion against those under one’s authority to engage in sexual intercourse.<sup>100</sup>

Based on this legal structure, the most severe sexual offense is Article 222, aggravated forcible intercourse, which is punishable by imprisonment for a minimum of seven years to life.<sup>101</sup> The second most grave rape crime is Article 221, forcible sexual intercourse, with a term of imprisonment from three to ten years.<sup>102</sup> Article 228, abuse of authority, has the lightest sentence of imprisonment from six months to five years.<sup>103</sup> Sexual deception and having sex with an unconscious person are also offenses under Chapter 16. The legal framework for rape and the related crimes are detailed in Appendix I.

Based on the purpose of the Chapter 16 reform—protection of sexual autonomy—the new law should clearly tell the public under what circumstances the right to sexual autonomy may be infringed. If sexual autonomy is defined as the right “to freely decide when, with whom, and under what circumstance, to engage in sexual intercourse or other intimate behaviors with another person,” Congress could have built the legal framework of the new Chapter 16 in two different ways to reflect that principle. Either of these two models would better protect sexual autonomy than the current framework. The first approach is to adopt a “non-consent” model. The legal framework of this model would involve: (1) centering the elements of the crime on the violation of the victim’s autonomy, and (2) having a number of different sexual offenses covering the relevant autonomy-educing conditions. Examples could include creating an offense of using violence to engage in sexual intercourse, an offense of sexual intercourse with a person who is involuntarily intoxicated, and achieving sexual intercourse through use of deception.<sup>104</sup> The second way to protect sexual autonomy is to adopt an “affirmative consent” model. The legal framework of this model would involve: (1) requiring partner affirmation and voluntary agreement in all sexual intercourse, and (2) enumerating situations of forced submission that do not constitute consent, such as agreement expressed by another person, incapability of giving consent, the perpetrator’s abuse of power

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99. *Id.* at art. 222.

100. *Id.* at art. 228.

101. *Id.* at art. 222.

102. *Id.* at art. 221.

103. *Id.* at art. 222.

104. See MASS. CODE ANN. ch. 265, § 22(a) (2002) (“Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury and if either such sexual intercourse or unnatural sexual intercourse results in or is committed with acts resulting in serious bodily injury . . . shall be punished by imprisonment in the state prison for life or for any term of years.”).

or authority, or simply the victim's expressed lack of agreement to continue to engage in sexual activity.<sup>105</sup>

Unfortunately, Congress did not adopt either model. Instead, it modified a few elements in the original rape statute while keeping other elements and related offenses in Chapter 16 almost unchanged.<sup>106</sup> Consequently, the new law still centers on the use of violence or threats of violence by the perpetrator rather than focusing on the absence of victim's consent.<sup>107</sup> Sexual autonomy, the value which the legislation claims it protects, is lost in such a legal framework. In the law-making process, feminists did not foresee this serious problem. Although they had worked hard to attack the ineffectual requirement of the use of force and resistance in the old law, and they had proposed a new law to protect sexual autonomy, when the legislature decided to amend Article 221 and rename it "forcible sexual intercourse" (a name that actually reinforced and enhanced the prejudiced use of force), feminist groups did not protest.

After the reform, the Taiwan Supreme Court stated that because Article 221 lists several ways of violating a victim's sexual autonomy, the legislation intended to satisfy the elements of Article 221 by requiring "the same degree of force as physical compulsion and threat" by the defendant.<sup>108</sup> In other words, a victim saying "no" is still not enough to satisfy the elements of Article 221. To meet the elements of Article 221, a defendant must use drugs, threat, forcible compulsion, or *any other means that reach the degree equal to forcible compulsion* to violate another person's will. If the defendant applies sexual extortion by abusing power or authority, the conduct still constitutes an Article 228 violation instead of an Article 221 violation. And since Article 221 is interpreted narrowly, if the victim ultimately gives her consent, a court is likely to see sexual intercourse as consensual.<sup>109</sup> In sum, to meet the elements of Article 221 the requirement is still the application of forcible compulsion.

Another problem of the reform is its poorly designed legal framework. Article 221 is not accurate enough and it overlaps with other laws, thus causing difficulties when trying to apply the statute. For example, there is overlap in Articles 221 and 228. Article 221 provides: "Anyone who uses violence, coercion, threat, hypnotism, or other means to attempt to engage in sexual intercourse with a man or woman against his/her will shall be sentenced to a prison term between 3 and 10 years."<sup>110</sup> Article 228 provides:

Anyone who has sexual intercourse with the victim under an unequal relationship such as parents and children, teachers and students, or doctors and patients etc., and the one abuses the power or authority to demand sexual

105. See CAL. PEN. CODE § 261.6 (2008) ("[C]onsent shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.").

106. In 1999, Congress passed rape law reform, amending all the rape law statutes located in Criminal Code articles. 221-229. Nevertheless, most of the amendments only increased the severity of sentencing, for example, the amendments to Criminal Code articles 221, 223(deleted), 224, 225, 226, and 226-1(newly added).

107. For the content of the Taiwanese Criminal Code Article 221, see *supra* note 56.

108. See Precedent 98 Tai Shang Ze N.5439, Taiwan Zuigao Fayuan (Taiwan Sup. Ct. 2009).

109. See *id.*

110. Crim. Code art. 221 (Taiwan).

intercourse to the victim shall be sentenced to a prison term between 6 months and 5 years.<sup>111</sup>

Article 228 punishes any superior convicted of using his power to rape or direct lewd and obscene conduct toward a subordinate. When compared, these two statutes demonstrate that “all means against the victim’s will to have sexual intercourse” in Article 221 has already covered the element of “against the victim’s will by abusing power or authority” in Article 228. Both in language and in practice these two statutes overlap. For example, if a father coerces his daughter to submit to sexual intercourse with him by abusing his power as her father, such an act is against the daughter’s will and will satisfy Article 221. Yet it will also meet the requirements of Article 228 because the father is having sexual intercourse with the victim by abusing his power. Central to this is the fact that the lengths of imprisonment as punishment under Article 221 and Article 228 are very different. Because of the overlap, the courts have a difficult time determining which statute to apply, as well as having unfair discretion to apply a standard that comes with less prison time.

Based on the study of the case law discussed *infra*, the courts seem to apply Article 221 without discussing the fact that the case has actually met the elements of both Articles.<sup>112</sup> In a better legal framework, Congress would have Article 221 punish the offender who ignores a victim’s statement of “no” to sexual intercourse and would make Article 228 prohibit the act of abusing one’s power to demand sexual intercourse from someone in an inferior position. Unfortunately, this is not the case in Taiwan’s rape law reform.

#### B. Disappointing Judicial Decision-Making

As the case law demonstrates, the reform also fails to achieve its goal of protecting women’s sexual autonomy because the judicial branch applies the law in a gender-biased way. Below is a review of the rape cases that were heard between January 1, 2000 and February 28, 2010. These cases were prosecuted in either the Taipei District Court or the Kaohsiung District Court, which are the two largest district courts in Taiwan. The goal of this study is two-fold: (1) to find out why some cases resulted in a not guilty verdict, and (2) to understand what circumstances cause trial judges to find that the facts are not proven beyond a reasonable doubt and thereby fail to convict the defendant. However, further work must be done to more fully uncover the reasons why these cases resulted in not guilty verdicts.<sup>113</sup>

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111. Crim. Code art. 228 (Taiwan).

112. See Verdict 96 Su Ze N.4406, Kauhsung Difang Fayuan (Kauhsung Dist. Ct. 2009); Verdict 98 Su Ze N.216, Taipei Difang Fayuan (Taipei Dist. Ct. 2009).

113. Under the Taiwanese inquisitorial system, judges both find fact and decide law. Thus, when judges render not guilty verdicts, they still need to write the verdicts and provide reasoning. By studying these judicial opinions, scholars can better understand all of the factors that contributed to the finding of not guilty.

In the Taipei District Court, 1014 rape cases have been tried and 139 of these resulted in not guilty verdicts.<sup>114</sup> The non-conviction rate is 13.7 percent.<sup>115</sup> In the Kaohsiung District Court, there have been 2149 rape cases and 253 of these resulted in not guilty verdicts.<sup>116</sup> The non-conviction rate is 11.7 percent.<sup>117</sup> Compared with other types of crimes, the non-conviction rates of rape crimes in both courts are not especially high.<sup>118</sup> However, it should be noted that half of the reported cases were not prosecuted, meaning police and prosecutors apply their discretion to drop them, characterizing these cases as “non-solid” or “not convictable.”<sup>119</sup> As for those cases resulting in not guilty verdicts, according to this Article’s analysis, there are two major reasons that trial courts hand down not guilty verdicts: inconsistencies in victims’ accounts of rape crimes and stereotypes about rape crime scenarios. Together these two reasons may be labeled as the major rape myths in Taiwanese rape trials.<sup>120</sup>

In the first scenario, victims’ allegations are often discredited when their statements in official reports or records have discrepancies. In the course of reporting a rape, victims have to recount their story to several criminal justice officials, including police, prosecutors, and judges. Trial courts tend to question the credibility of the victim’s allegation by finding inconsistencies between information given to the police and the account given to the prosecutor. For example, in a Kaohsiung District Court verdict, the Court found the defendant not guilty solely because the victim’s two statements, one at the police station and one before the district attorney, were incompatible.<sup>121</sup>

The second circumstance where trial courts discredit victims’ allegations of rape is when there are atypical rape scenarios or behaviors that may diverge from what investigators expect. Like prosecutors, trial judges in the routine handling of rape cases usually develop a repertoire of knowledge about the

114. All the verdicts were collected from the Law and Regulation Retrieving System, which is available at <http://jirs.judicial.gov.tw/index.htm>. The data in the text were calculated by the author independently.

115. *Id.*

116. *Id.*

117. *Id.*

118. Between 2005 and 2009, the average non-conviction rates for all types of crimes were approximately 3.48% to 4.07%. See Ministry of Justice, FAN TZUEI JUANG KUANG JI CHI FEN SHI [Analysis of crime] 168 (2010).

119. The number of reported rape crime cases in 2006 was 3569. Only 1818 were prosecuted. In 2007, 3636 cases were reported, while only 1788 were prosecuted. In 2008, 3758 were reported, while 1943 were prosecuted. In 2009, only 1825 of 3677 reported cases were prosecuted. Between January and November of 2010, there were 1741 prosecuted cases of 3675 cases reported. The average prosecuted/reported rate between 2006 and November, 2010 is 49.7%. See MINISTRY OF JUSTICE, SITUATION OF RAPE CRIME PROSECUTION BY DISTRICT ATTORNEY (2010), <http://www.moj.gov.tw/site/moj/public/MMO/moj/stat/%20monthly/t5-10.pdf>.

120. The classic rape myths fall into four main categories: (1) only certain women (i.e., those with bad reputations) are raped; (2) only certain men (i.e., psychopaths) rape; (3) women invite or deserve rape because of their desire, revenge, blackmail, jealousy, guilt, or embarrassment. See DEBORAH RHODE, SPEAKING OF SEX 120-21 (1997); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1025 (1991); GENDER AND LAW, *supra* note 12, at 789-90.

121. Verdict 94 Su Ze N.958, Kauhsung Difang Fayuan (Kauhsung Dist. Ct. 2005).

“features” of rape crimes.<sup>122</sup> This knowledge includes how particular kinds of rape are committed, post-incident interaction between the parties in an acquaintance situation, and victims’ emotional and psychological reactions to rape and their effects on victims’ behavior.<sup>123</sup> These stereotypes of rape-relevant behaviors are another source of courts’ reasonable doubt. The following examples demonstrate this problem. In a case from the Kaohsiung District Court, the Court found the defendant not guilty because the victim and defendant were long-term acquaintances and had engaged in intimate body contact (the two parties has been friends and had previously massaged each other).<sup>124</sup> In another acquaintance rape case from the Taipei District Court, the Court found the defendant not guilty because the Court determined that the victim walked the defendant to a motel voluntarily before the rape incident.<sup>125</sup>

Furthermore, a victim’s failure to ask for help or failure to resist during the incident reduces his or her creditability. In a case from the Kaohsiung District Court, the Court questioned the victim about why she did not resist or ask for help when the defendant forced her to have sexual intercourse.<sup>126</sup> The victim explained that she did not cry out because the incident happened at midnight in her family’s home and she did not want her family to know that the defendant had been staying in the house so late. It was in this moment that the Court discredited her account and thereby found the defendant not guilty.<sup>127</sup>

Cases where the sexual assault causes no physical injury or visual bruises to the victim are also highly suspected by trial courts. The Kaohsiung District Court, for example, held a defendant not guilty because the medical report did not show that the victim suffered any injuries. Because the medical report did not match the victim’s story that she had resisted when the defendant tried to penetrate her, the Court failed to find the victim’s account credible.<sup>128</sup>

If a court finds the victim’s post-incident behavior atypical, this may also lead to a not guilty verdict. For example, in one Taipei District Court case, the Court believed that a victim should not be able to go to work the day after a rape incident. Since the victim in this case went to work as usual, the Court discredited her allegation and found the defendant not guilty.<sup>129</sup> Courts also consider the timeliness with which the crime is reported. Rape victims are expected to report the incident promptly. In a Kaohsiung District Court trial that resulted in a not guilty verdict, the Court questioned the victim about why she did not report the case immediately and why she did not go to a clinic or hospital immediately after the defendant left her.<sup>130</sup>

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122. Lisa Frohmann, *Discrediting Victims’ Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, in *RAPE AND SOCIETY*, *supra* note 9, at 204.

123. *Id.*

124. Verdict 93 Su Ze N.1039, Kauhsung Difang Fayuan (Kauhsung Dist. Ct. 2004).

125. Verdict 94 Su Ze N.1321, Taipei Difang Fayuan (Taipei Dist. Ct. 2005).

126. Verdict 95 Su Ze N.3019, Kauhsung Difang Fayuan (Kauhsung Dist. Ct. 2006).

127. *Id.*

128. Verdict 90 Su Ze N.588, Kauhsung Difang Fayuan (Kauhsung Dist. Ct. 2001).

129. Verdict 89 Su Ze N.273, Taipei Difang Fayuan (Taipei Dist. Ct. 2000).

130. Verdict 94 Su Ze N.240, Kauhsung Difang Fayuan (Kauhsung Dist. Ct. 2005).

Additionally, a victim's current circumstances, such as financial condition or connection with illegal activities such as prostitution, may enable a court to "find" an ulterior motive for the victim's allegation. Such an ulterior motive will lead to a court's discrediting of the victim's allegation and a finding that the evidence does not prove the defendant's guilt beyond a reasonable doubt. For example, in a case from the Taipei District Court, the complainant testified that she met the defendant using the Internet.<sup>131</sup> The defendant first invited her to lunch, after which he asked her to go to the hotel where he was staying in order to help her find work.<sup>132</sup> When she entered the defendant's room, he pulled her clothes off, pushed her onto the bed, and had sexual intercourse with her against her will.<sup>133</sup> However, the defendant said the complainant was a prostitute and the sex was consensual.<sup>134</sup> The Court ultimately believed the defendant's story and held that the complainant made a false allegation because: (1) the complainant came to the hotel to see a man alone; (2) the complainant did not leave the hotel immediately when the defendant opened the door wearing a robe; (3) although the complainant went to the hospital after the incident, the medical report did not show bodily injury; and (4) the call records show that the defendant called and conversed with the complainant twice after the incident.<sup>135</sup> This example demonstrates how a court uses ulterior motive to discredit a rape victim's allegations, and instead determines that a defendant's explanation is more accountable.

The judiciary maintains stereotypical beliefs about the characteristics of rape offenders. This stereotypical image assumes a random stranger lurking in the shadows is likely to be the aggressor and does not account for the fact that not all rapes are perpetrated by people who are unknown to the victim. Because courts hold presupposed notions about the characteristics of rape offenders and the relationships between offenders and victims, when defendants fail to act in stereotypical ways, courts are less likely to believe they could have committed rape. When defendants are friendly to the victim, leave money for the victim, or take the victim to a public space like a restaurant or a bar, courts tend to believe the defendant's argument that the intercourse was consensual.<sup>136</sup>

Besides discrediting victims' allegations and employing traditional perceptions of rape and rapists, courts sometimes offer peculiar justifications for not guilty verdicts. Rhetoric employed by the courts suggests that gender bias may play a role in courts' decisions. For example, in one verdict from the Taipei District Court, the Court found the defendant not guilty because the court considered the victim's personality to be "tough," a quality that made it difficult to sexually abuse her.<sup>137</sup> In the same case, the Court also believed the

131. Verdict 97 Su Ze N.569, Taipei Difang Fayuan (Taipei Dist. Ct. 2008).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. See Verdict 89 Su Ze N.1561, Taipei Difang Fayuan (Taipei Dist. Ct. 2000); see also Verdict 97 Su Ze N. 939, Kauhsiung Difang Fayuan (Kauhsiung Dist. Ct. 2005).

137. The court noted that the victim once reported a claim for damages against the police. In that case, the police offered a settlement, but the victim rejected it and insisted on making the complaint. Based on that incident, the court concluded that the victim was not a tender woman who could

defendant's argument that he was reluctant to have sex with the victim because the victim's two dogs were barking loudly and the victim's children kept knocking on the door.<sup>138</sup> According to the Court, "a man barely has sexual desire under such a circumstance."<sup>139</sup> Two more unique verdicts demonstrate courts' gender bias. In one case, the Kauhsiung District Court believed that the defendant did not have sexual intercourse with the victim because "men will not be interested in engaging in sexual intercourse with a woman during her period."<sup>140</sup> In another case, the Taipei District Court questioned the victim's nonresistance by asking the victim "since you testified that you were brushing your teeth when the defendant tried to sexually assault you, why didn't you use your toothbrush, which has a sharp handle, as a weapon against the defendant's compulsion?"<sup>141</sup>

Although judges may possess reasonable doubt and find defendants not guilty, to feminists such findings are contrary to the evidence. The doubts that preclude a guilty verdict reflect rape myths and the patriarchic culture in the courtroom. This culture divides rape victims into two groups. The first group is composed of victims who report rape crimes promptly, have serious injuries or bruises, are not acquainted with the defendant, have no ulterior motive to make any false accusations, and repeat their accounts consistently in front of different criminal justice officers. Victims in this group are referred to as belonging to the "rapable group."<sup>142</sup> In the second group are the victims whose stories and features are inconsistent with the traditional rape scenario. Victims in this group are considered "unrapable." In this second group, it is presumed that the victims have consented, especially in the situations where the courts believe that victims intentionally or negligently provoked defendants' desires when they stay, walk, or drink with men alone or at night or did not clearly reject the defendant's flirting.<sup>143</sup>

There are, however, some notable exceptions to the assumptions surrounding this second group of rape victims. First, if the prosecutor can prove that the defendant used drugs or alcohol to cause the victim to lose consciousness, courts tend to reach a guilty verdict, reasoning that the victim

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easily be abused by the defendant. Verdict 93 Su Ze N.709, Taipei Difang Fayuan (Taipei Dist. Ct. 2004).

138. *Id.*

139. *Id.*

140. Verdict 94 Su Ze N.3129, Kauhsiung Difang Fayuan (Kauhsiung Dist. Ct. 2005).

141. Verdict 93 Su Ze N.1712, Taipei Difang Fayuan (Taipei Dist. Ct. 2004).

142. See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 175 (1989). According to MacKinnon, society divides women into groups that can be raped and groups that cannot; only women whose behaviors and character mimic those of the stereotypical rape victim (for example, a pure, innocent, and powerless girl) are considered "rapable." If a nonconsensual sexual act occurs and the woman has behaved in a way that does not match the stereotype, it is unlikely that that act will be deemed rape. *Id.*

143. *Id.*; see CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 229-37 (2000) (stating that prostitutes, wives, or even acquaintances are usually categorized as "unrapable" women under the male gaze and the judicial system).

was unable to consent due to her involuntary intoxication.<sup>144</sup> Courts, such as the Taiwan Supreme Court, believe that such a circumstance can satisfy the element of forcible compulsion required by Criminal Code Article 221.<sup>145</sup> A second exception involves the use of a non-physical force called “religious compulsion.”<sup>146</sup> The Taiwan Supreme Court has long recognized the act of utilizing religious power to coerce a woman to submit to sexual intercourse as rape.<sup>147</sup> For example, if the defendant pretends that he is a messenger of God and therefore the victim must submit to sexual intercourse or suffer misfortune or tragedy, courts tend to hold that the fear of unknown power and supersuperstitious belief can constitute a strong enough force to change a person’s will to constitute coercion.<sup>148</sup> Therefore, prosecutors are willing to prosecute cases involving religious compulsion because of courts’ demonstrated willingness to convict.<sup>149</sup> The third type of exceptional case involves threats, misleading statements, or falsehoods. For example, in one case, the victim solicited sexual services on the Internet and the defendant accepted.<sup>150</sup> When they met, the defendant pretended he was a policeman and demanded that the victim engage in sexual intercourse with him.<sup>151</sup> The Court of Appeals held that the victim submitted to sexual intercourse based on the fear of being arrested and that her submission thus did not result from voluntary consent.<sup>152</sup> Because the defendant’s act violated the victim’s will, the Court held that it was forcible sexual intercourse under Article 221.<sup>153</sup>

Aside from these exceptions, there are few cases resulting in convictions in circumstances where two mentally capable adults engaged in intercourse after the defendant demanded the victim to submit to unwanted sex by non-forcible compulsion. In fact, according to the Taiwan Supreme Court, a victim’s testimony at a rape trial must be corroborated by other circumstantial evidences such as injuries, bruise, or medical report.<sup>154</sup> The endurance of the perception that rape is a crime of physical force and aggression undercuts genuine claims of rape and may lead to not guilty verdicts. Moreover, it is apparent that the requirement of utmost resistance pervades and shapes judges’ decision-making at rape trials, although the legislature eliminated this requirement over ten years ago.

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144. Verdict 93 Taishang Ze N.795, Taiwan Zuigao Fayuan (Taiwan Sup. Ct. 2004). In this case, the victim also offered the court her medical certificate to show that she suffered other physical injuries in the incident.

145. *Id.*

146. *See* Verdict 89 Shang Geng San Ze N.258, Taiwan Gaodeng Fayuan (Taiwan High Ct. 2000).

147. *See* Precedent 56 Taishang Ze N.2210, Taiwan Zuigao Fayuan (Taiwan Sup. Ct. 1967).

148. *Id.*

149. Verdict 89 Shang Geng San Ze N.258., Taiwan Zuigao Fayuan (Taiwan Sup. Ct. 2000).

150. Verdict 92 Shang Su Ze N.4586, Taiwan Gaodeng Fayuan (Taiwan High Ct. 2003).

151. *Id.*

152. *Id.*

153. *Id.*

154. Verdict 97 Tai-Shang Ze N.4589, Taiwan Gaodeng Fayuan (Taiwan High Ct. 2008).

## V. RECONSTRUCTING SUBSTANTIVE RAPE LAW

From the case law analysis above, it is apparent that a Taiwanese court will not find a man guilty of rape unless he forcibly overcomes a woman's physical resistance. The conservative and passive Taiwanese judicial culture prevents the judiciary from actively interpreting the law and taking gender equality into account. In order to eliminate stereotype and gender bias at trials three things must be done: (1) reconstruct the rape statutes in the Taiwanese Criminal Code; (2) limit judicial discretion; and (3) prohibit discrimination with respect to rape victims. In order to reconstruct the Criminal Code, one must identify what elements make rape a crime because different perspectives can lead to different reform models. The theoretical debates surrounding the crime of rape in comparative law and feminist legal theory provide a useful model for Taiwan's judiciary as it interprets and applies rape laws.

The following sections discuss and analyze what conduct should be considered rape. These sections apply feminist theory to answer the following questions: (1) What acts should be considered rape and what is the harm of such acts?; (2) What is the moral wrong of rape?; and (3) What kind of sexual encounters should be deemed as criminal and why?

## A. Rethinking the Wrongfulness of Rape

How one conceptualizes the wrong and harm of rape determines the direction of rape law reform. As Dorothy Roberts states, "if rape is violence as the traditional law defined it (weapons, bruises, blood), then what most men do when they disregard women's sexual autonomy is not rape."<sup>155</sup> Thus, for progressive rape law reform, we need first to reconsider how we conceptualize the harm and wrong of rape.

## i. The Essential Wrongfulness of Rape According to American Feminist Scholarship

What makes rape a crime? In Taiwan, the purpose of traditional, pre-reform rape law was to protect sexual morality and women's chastity.<sup>156</sup> Feminist-advocated rape law reform in 1997 was deeply influenced by Western feminist legal theories.<sup>157</sup> In rape law reform, Taiwanese feminists introduced the concept of the right to "sexual autonomy" and also referred to the United States rape law models.<sup>158</sup> Therefore, the American feminists' views toward the wrongfulness of rape can be an important reference for Taiwan.

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155. Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 362 (1993).

156. The title of the Old Chapter 16 of the Taiwanese Criminal Code was "Offense Against Morality and Chastity." The title of Chapter 16 was changed in the 1999 rape law reform. 88 TAIWANESE CONG. REP. no. 13, at 201 (1999).

157. See *supra* Part III.

158. See 88 TAIWANESE CONG. REP. no. 13, at 200 (1999); see also Xu Fu Sheng, *Mei Guo Qiang Jian Fa Lü Gai Ge Ji Wo Guo Xiu Fa Zhi Xing Si* [From the Perspective of the Rape Law Reform in the United States Reviewing the Rape Law Reform in Taiwan]; 16 ZHONG YANG JING CHA DA XUE FA XUE LUN JI [COLLECTION OF LEGAL PAPERS OF CENTRAL POLICE UNIVERSITY] 235 (1999) (Taiwan); Wang Ru Xuan, *Xing Qin Hai An Jian Fa Lü Gui Fan Zhi Xiu Ding Yu Guo Cheng* [The History of Rape Law Reform], 212

Susan Brownmiller, a pioneer of rape law reform in the United States, offered the first feminist view of the wrong of rape. In her book, *Against Our Will*, Brownmiller emphasized the violent nature of rape, claiming that all acts of sex forced on unwilling victims should be treated as equally grave offenses in the eyes of the law.<sup>159</sup> She proposed modifying rape law to make it a gender-neutral, non-activity-specific law governing all manner of sexual assaults.<sup>160</sup> Despite the fact that Brownmiller's approach was not accepted by all feminists, her theory formed the foundation of the 1970s rape law reforms in the United States.<sup>161</sup>

Critics of this reform continue to voice dissent today. Representing radical feminism, Catherine A. MacKinnon provides a contrary view to Brownmiller. According to MacKinnon, the wrong of rape is based on sex rather than violence.<sup>162</sup> She argues that the liberal tradition of seeing rape as an act of violence is problematic because it does not encompass the full range of crimes that should be considered rape.<sup>163</sup> Ann J. Cahill summarizes MacKinnon's analysis in *Toward a Feminist Theory of the State* as challenging "the legal perspective on rape that defines it as nonconsensual, forced, and coerced sex."<sup>164</sup> For MacKinnon, "a certain level of force or coercion can be expected in 'normal' heterosexual sex, or at least the presence of force does not necessarily indicate a lack of consent."<sup>165</sup> As a result, showing that force was used during sexual activity will likely not suffice to persuade the fact-finder that rape took place.<sup>166</sup> Because "normal" heterosexual sex includes some use of force, the fact-finder could conclude that the alleged victim consented to the employment of force during sex.<sup>167</sup> MacKinnon once famously declared that: "Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance."<sup>168</sup>

Susan Estrich, another legal scholar, also calls for rape law reform. A rape survivor, Estrich claims that in the United States legal system, "simple rape"

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LÜ SHI ZA ZHI (TAIPEI BAR JOURNAL) 19 (1997) (Taiwan); Wu Yuan Yao, *Qian Tan Nü Xing Zhu Yi Fa Xue Yu Wo Guo Fa Lü Zhi Gai Ge* [On *Feminist Jurisprudence and Taiwan's Law Reform* ], 313 LÜ SHI ZA ZHI (TAIPEI BAR JOURNAL) 2 (2005) (Taiwan).

159. BROWNMILLER, *supra* note 7, at 391.

160. *Id.*

161. For example, Catharine A. MacKinnon and radical feminists note that it is not legally sufficient to define rape as merely forced, but that the crime must be marked by a distinct and proven lack of consent as well. See generally MACKINNON, *supra* note 142, at 172. Ann J. Cahill contends that rape cannot be defined as simply as sex or violence; rather, rape is "an embodied experience of women." See ANN J. CAHILL, *RETHINKING RAPE* 109-42 (2001).

162. Catharine A. MacKinnon, *Feminism, Marxism, Method, and State: Toward Feminist Jurisprudence*, in *FEMINIST LEGAL THEORY* 187 (Katharine T. Bartlett & Rosanne Kennedy, eds., 1991).

163. *Id.*

164. CAHILL, *supra* note 161, at 37.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 37-38 (quoting MACKINNON, *supra* note 142, at 174). MacKinnon denies that her argument amounts to "all sex is rape" but for her, rape is virtually indistinguishable from normal heterosexual intercourse. *Id.* at 42-43.

(where the victim has a prior relationship with the defendant or the victim did not resist in the incident) has been excluded and prejudiced.<sup>169</sup> In her book *Real Rape*, she argues that the common law approach to rape, with its celebration of female chastity, is the wrong response to rape crimes.<sup>170</sup> For her, there are four basic prejudices in the common law tradition that should be eliminated: the resistance requirement, the marital exemption, the corroborating evidence rule, and the cautionary instruction.<sup>171</sup> She believes that consent should be defined as “no means no” in criminal law.<sup>172</sup> She also proposes changing the mens rea standard.<sup>173</sup> According to her, the law should hold men “to a higher standard of reasonableness” in order to demonstrate “that it considers a woman’s consent to sex significant enough to merit a man’s reasoned attention and respect.”<sup>174</sup> Reasonable men must know that “no means no” and that mistakes deemed unreasonable will not exculpate.<sup>175</sup>

Professors Caroline A. Forell and Donna M. Matthews support similar views to those of Estrich. They argue that in most jurisdictions, the current laws on harassment, rape, stalking, and domestic homicide assume that the conduct of a male perpetrator is reasonable but inquires as to the reasonableness of the victim’s behavior.<sup>176</sup> In other words, the key question is whether the victim behaved reasonably in the eyes of the male perpetrator. Instead of the assumptions embedded in the current law, Forell and Matthews argue that rape law should adopt the “reasonable woman standard” instead.<sup>177</sup> This reasonable woman standard has the following components: (1) “sexual penetration without a woman’s consent is rape”;<sup>178</sup> (2) “when a woman indicates her lack of consent by word, such as no, or by conduct, such as pushing away, crying, or trying to leave, a man’s failure to stop constitutes rape”;<sup>179</sup> and (3) “a woman’s clothing, line of work, marital status, sexual history, degree of intoxication, or actions such as accompanying a man in his car or to his room or to the park, and kissing or petting do not indicate consent to sex in and of themselves.”<sup>180</sup>

Another legal scholar who favors a “no means no” rule is Professor Donald Dripps. For Dripps, rape harms the value of sexual autonomy.<sup>181</sup> He defines sexual autonomy as “the freedom to refuse to have sex with any one for any

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169. See generally ESTRICH *supra* note 10.

170. *Id.* at 31.

171. See generally *id.* at 27-56.

172. *Id.* at 102. According to Estrich, “unreasonableness as to consent, understood to mean ignoring a woman’s words, should be sufficient for liability.” *Id.* at 103.

173. *Id.* at 98.

174. *Id.*

175. *Id.* at 103.

176. CAROLINE A. FORELL & DONNA M. MATTHEWS, *supra* note 143, at 17.

177. *Id.* See generally *id.* at 221-40 (describing the reasonable-woman standard and advocating its incorporation).

178. *Id.* at 223.

179. *Id.*

180. *Id.*

181. See generally Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992).

reason.”<sup>182</sup> He applies “commodity theory” to analyze the wrong of rape, claiming that individuals have a “property right” to their bodies, and their bodies belong exclusively to them.<sup>183</sup> He indicates that there could be either or both of two harms depending on the type of rape: (1) violence, or threatened violence; (2) “expropriation” of the victim’s body for sexual purposes.<sup>184</sup> According to Dripps’ theory, an attempted forcible rape involves the harm of violence, but not the harm of expropriation.<sup>185</sup> A completed forcible rape involves both harms.<sup>186</sup> The act of having “sex with a person who is unconscious or physically helpless” involves the harm of expropriation but not the harm of violence.<sup>187</sup>

To correspond to these two harms, Dripps creates two offenses in rape law. The first offense, sexually motivated assault is purposely or knowingly applying violence to cause another person to engage in sexual acts.<sup>188</sup> The second offense, sexual expropriation,<sup>189</sup> involves non-violent interferences with sexual autonomy such as sex with an unconscious or mentally incompetent person.<sup>190</sup> Dripps defines sexual expropriation as a misdemeanor or minor felony crime to punish those who purposely undertake “a sexual act with another person, knowing that the other person has expressed a refusal to engage in that act.”<sup>191</sup> He perceives sexually motivated assault as the more serious offense because “the interest in unwanted sex is less important than the interest in freedom from violence.”<sup>192</sup>

In his book *Unwanted Sex*, Professor Stephen J. Schulhofer evaluates the impact of rape law reform in the United States and argues that the failure of the reform lies in the missing right of “sexual autonomy.”<sup>193</sup> Schulhofer’s arguments can be summarized in four parts. First, he asserts that labels warrant attention.<sup>194</sup> “Rape” should encompass situations in which there is “intercourse by actual or threatened physical violence.”<sup>195</sup> In addition, there should be a new crime, labeled “sexual abuse” that includes “nonviolent interference with sexual

182. *Id.* at 1785.

183. *See id.*

184. *Id.* at 1797. The use of violence “violates the interest in freedom from injury and the right against intentional injury protected in nonsexual contexts by the punishment of assault.” *Id.* Expropriation entails “using another person’s body for sexual gratification violates the interest in exclusive control of one’s body for sexual purposes.” *Id.*

185. *Id.* at 1799.

186. *Id.* at 1797.

187. *Id.* at 1800.

188. *Id.* at 1797-99. According to Dripps, sexual motivations should enhance the penalty for assault. *Id.* at 1798.

189. *Id.* at 1799-1805.

190. *Id.* at 1800.

191. *Id.* at 1804.

192. *Id.*

193. STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 99 (1998).

194. *See id.* at 104-05 (describing the difficulty of labeling criminal offenses that violate one’s sexual autonomy).

195. *Id.* at 105.

autonomy."<sup>196</sup> Second, he posits that sexual autonomy encompasses three different dimensions.<sup>197</sup> Third, he stresses that coercion is not merely physical force; something may resemble an "offer," but in fact can be coercive and establish a crime.<sup>198</sup> He demonstrates this fact by comparing rape to corruption, wherein a coercive offer can establish extortion.<sup>199</sup> Applying this theory, Schulhofer claims that: "A sexual proposal is obviously coercive when it arouses fear of retaliatory acts that violate specific legal rights."<sup>200</sup> Fourth, Schulhofer asserts that laws need to recognize that "extreme physical violence is not the only important concern."<sup>201</sup> Laws should reflect the dangers of coercion and better protect sexual autonomy.

Reforms are necessary in the realm of supervisor-subordinate relationships, and Schulhofer explicates areas and relationships where criminal penalties are needed. For example, because reliance on ethical codes is insufficient to protect a patient's sexual autonomy, Schulhofer contends that criminal sanctions should apply when a therapist has a sexual encounter with a patient.<sup>202</sup> Similarly, if a doctor obtains consent to sexual relations from a patient by threatening to deny medical attention or medication, this coercive act should be treated as a crime.<sup>203</sup> Along these lines, Schulhofer also argues that "[o]nce a lawyer-client relationship is established, the client has a right to the lawyer's diligent professional services, with no sexual strings attached."<sup>204</sup> Finally, in a dating relationship, the person who wants to have intercourse must be to have a clear indication of the other person's affirmative consent.<sup>205</sup> As for what counts as affirmative consent, according to Schulhofer, "[a] woman who engages in sexual foreplay should retain the right to say 'no.' If she doesn't say 'no' and if her silence is combined with passionate kissing, hugging, and sexual touching, it is usually sensible to infer actual willingness."<sup>206</sup>

While most modern reformers suggest changing the legal definition of rape and eliminating the "force-resistance rule" (FRR),<sup>207</sup> Professor David Bryden asserts that reformers overestimate the significance of redefining rape.<sup>208</sup> Bryden provides a detailed critique of the arguments surrounding redefining rape.<sup>209</sup> He argues that much of the literature about rape law reform reflects

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196. *Id.* at 110-13.

197. *Id.* at 111. The first two dimensions are mental and entail the internal ability to make choices that are mature, sensible, and free from external pressures. *Id.* The third dimension is one's bodily integrity. *Id.*

198. *Id.* at 144.

199. *Id.*

200. *Id.*

201. *Id.* at 278.

202. *Id.* at 223-26.

203. *Id.* at 237.

204. *Id.* at 251. "A lawyer's quid-pro-quo sexual demand, like any other form of extortion, should be treated as a serious criminal offense." *Id.*

205. *Id.* at 273.

206. *Id.* at 272.

207. David P. Bryden, *Redefining Rape*, 3 *BUFF. CRIM. L.REV.* 317, 359 (2000).

208. *Id.* at 476.

209. *See generally id.*

expectations that are overblown.<sup>210</sup> In contrast to the aforementioned scholars who suggest the law should focus on subjective criteria, Professor Bryden argues that objective criteria are necessary.<sup>211</sup> Hence, the FRR is the best way to achieve objectivity and obtain an objective standard to prove the crime.<sup>212</sup> Bryden claims that supporting the FRR does not ignore women's fear of rapists but states that it is "ridiculous to suppose that every woman is terrified of every hollow-chested sophomore who reaches for her panties."<sup>213</sup>

According to Bryden, there are five basic legitimate functions of FRR requirements. First, "the FRR helps to assure equal treatment of similar defendants."<sup>214</sup> Second, it serves a grading function: "if some new types of nonforcible sexual offenses should be established, the maximum penalty for these offenses should be lower than for forcible rape."<sup>215</sup> Third, physical force distinguishes rape from seduction.<sup>216</sup> Fourth, the FRR can "corroborate other evidence that the victim did not consent," thus helping to prove the perpetrator's blameworthy mens rea.<sup>217</sup> Fifth, actions speak louder than words—one does not truly know another's intentions until one is in the moment.<sup>218</sup> Based on those functions, Bryden proposes a "reasonable FRR standard," meaning that either physical or verbal objection suffices to meet the resistance requirement.<sup>219</sup>

Although Bryden supports retaining the FRR in rape law, he also notes that sex achieved through extortion or other non-physical coercion is an area that most state laws do not sufficiently address.<sup>220</sup> He indicates that the main reason that the criminal punishment of sexual extortion is insufficient is because state legislatures have not adopted the Modern Penal Code's provision on Gross Sexual Imposition.<sup>221</sup> Moreover, these legislatures have also failed to incorporate into law "a provision prohibiting the use of threats as an inducement for sex, whenever the threat would be extortionate if coupled with a demand for property."<sup>222</sup> Bryden argues that sexual extortion should be criminalized, but emphasizes that it should be named and treated as a different offense than rape.<sup>223</sup>

By reviewing the discussion among legal scholars, it is apparent that different perspectives about the wrongs of rape result in different suggestions for legal reforms. Generally speaking, scholars like Brownmiller and Bryden who believe that the wrong of rape is an assault tend to adopt a gender-neutral

210. *Id.* at 477.

211. *Id.* at 372-73.

212. *Id.*

213. *Id.* at 368.

214. *Id.* at 373.

215. *Id.* at 375.

216. *Id.* at 375-76.

217. *Id.* at 376.

218. *Id.* at 384.

219. *See id.* at 476.

220. *See id.* at 386, 456.

221. *Id.* at 456.

222. *Id.*

223. *See id.* at 361.

approach and maintain the FRR as elements of the definition of rape. Scholars in this “rape as assault” group apply the traditional mens rea standard of knowledge or intent to the nonconsensual intercourse.<sup>224</sup> Scholars like Estrich and Schulhofer, who conclude that the basic wrong of rape is the violation of sexual autonomy, may be classified as members of the “rape as consent” school. They tend to support “consent-based” rape laws, although their legal proposals split into two streams. This Article names the first as the “favors a non-consent stream.” Estrich, in addition to Forell and Matthews, fall into this group. They advocate that rape law should be viewed from the woman’s perspective, respecting a woman’s right to reject unwanted sex.<sup>225</sup> Estrich even supports a negligence mens rea standard to avoid a defendant’s unreasonably mistaken belief of the victim’s consent.<sup>226</sup> This Article names the other stream as the “favors affirmative consent stream.” Scholars such as Schulhofer fall into this group. For example, Schulhofer asserts that the “no means no” approach is insufficient.<sup>227</sup> He argues that clear, voluntary, and informed consent should be required before engaging in any sexual relations.<sup>228</sup> To reflect such an affirmative consent rule, Schulhofer advocates for the mens rea standard of knowledge.<sup>229</sup> According to his view, any person who engages in intercourse knowing that he does not have unambiguous permission from his partner commits a serious sexual abuse and should be convicted of rape.<sup>230</sup>

#### ii. The Wrongfulness of Rape in Taiwanese Rape Law

The aforementioned theories shed light on the contradictions inherent in the framework of rape law in Taiwan. Taiwanese rape law appears to selectively incorporate elements of these theories, causing internal contradictions. For example, Taiwan’s Congress abandoned the resistance requirement in the old rape law and changed the title of the Criminal Code Chapter 16 to claim the protection of “sexual autonomy.”<sup>231</sup> This reform seems to target the protection of people’s free will to engage sexual activities. If the victim’s will is what lawmakers really want to protect, the elements constituting the crime of rape should be designed with either a “no means no” model or an “affirmative consent” model. Instead, the law’s focus on gender neutrality and the use of force demonstrates the law is really about preventing physical violence against an individual’s bodily integrity. Hence, the law seems to conflate the interests that rape laws should protect (people’s free will to engage in sexual activities) and the harms of rape (violation of bodily integrity). It is therefore not surprising that judges in rape cases do not apply the law consistently. Therefore, the redefinition of “sexual autonomy” should be the focus of efforts to construct new rape statutes. Only when the harm of “the

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224. *Id.* at 423.

225. FORELL & MATTHEWS, *supra* note 143, at 239-40; *see also* ESTRICH, *supra* note 10, at 96-104.

226. *See* ESTRICH, *supra* note 10, at 97-98.

227. SCHULHOFER, *supra* note 193, at 267.

228. *Id.* at 272.

229. *Id.* at 272-73.

230. *Id.* at 273.

231. 88 TAIWANESE CONG. REP. no. 13, at 201 (1999).

violation of sexual autonomy” can be clearly defined can the rape law be written correctly.

### B. Sexual Autonomy: A Group Perspective

The term “sexual autonomy” should be defined as a legal interest that is an expression of sexuality and self-determination. Autonomy commonly refers to the ability to control one’s life or “the ability to shape one’s life in accordance with one’s desires.”<sup>232</sup> In the law, “[a]utonomous agents are left to identify their own interests, make choices that fit into larger life plans, and make decisions about their own good.”<sup>233</sup> Autonomy is intertwined with the notion of consent because one controls one’s body through consent. Hence, “[t]he difference between sex and rape is consent.”<sup>234</sup> Consent protects personal autonomy because under the law we have duties not to interfere with, take, or touch another’s body or property. A’s consent makes it permissible for B to have sex with her. Moreover, consent is the mechanism by which we treat each other as equals—by asking for consent before engaging in sexual relations, we respect people’s autonomy and treat each other as we wish to be treated.<sup>235</sup> Contrary to this, failure to seek and secure consent before proceeding with sex is to perceive the other person as a tool or instrument for one’s own gratification.<sup>236</sup> Consent transforms the relationship between two individuals and infuses it with moral importance.<sup>237</sup> Therefore, engaging in sexual intercourse without getting the other person’s consent is morally culpable because rape violates one’s autonomy—it violates the victim’s sexuality, physical being, sense of safety, and more.<sup>238</sup>

Sexual autonomy is also a two-dimensional right that involves both the right to seek intimacy with willing partners (positive sexual autonomy) and the right to refuse the intimacy of those who one does not want to be intimate with (negative sexual autonomy).<sup>239</sup> Theoretically, a “state should not block the pursuit of positive sexual autonomy except where the exercising of power violates another’s negative sexual autonomy.”<sup>240</sup> By contrast, when one person abuses his or her positive sexual autonomy right and crosses another’s boundaries without that person’s consent, a state should intervene because a person’s negative sexual autonomy has been trampled. Criminal law should protect people’s negative sexual autonomy as it protects many other important autonomous interests.<sup>241</sup>

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232. ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 125 (2003).

233. JOAN MCGREGOR, IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN’S CONSENT SERIOUSLY 107 (2005).

234. NANCY VENABLE RAINE, AFTER SILENCE: RAPE & MY JOURNEY BACK 210-11 (1998).

235. *Id.*

236. *Id.* at 108.

237. *Id.* at 107.

238. CAHILL, *supra* note 161, at 133.

239. SCHULHOFER, *supra* note 193, at 276.

240. MCGREGOR, *supra* note 233, at 111-12.

241. *Id.* at 112.

Yet not every person is considered capable of exercising sexual autonomy. Sexual autonomy, similar to other liberties, "is reserved for competent adult agents."<sup>242</sup> Minors and people who are unconscious, intoxicated, or suffering from serious retardation and other mental illnesses might not be able to determine the nature and consequence of their actions. A person will be deemed to lack capacity to provide a valid consent if, by reason of age or immaturity, that person is unable to make a decision.<sup>243</sup> The law sometimes presumes that people who are mentally impaired consent to sexual intercourse unless it can be proven beyond a reasonable doubt to the contrary.<sup>244</sup> In these situations the law seeks to protect the individual because the individual lacks the ability to promote and protect his or her own interests.<sup>245</sup> Despite these individuals' reduced or limited ability to recognize the fact and consequences of engaging in sexual intercourse, the wrongfulness of rape is not reduced. In other words, rape is morally culpable irrespective of the incompetence of the perpetrator. When the victim is the one who exhibits diminished capacity, that person's inability to comprehend the situation means that his or her consent to engage in sexual intercourse cannot exculpate the accused. Knowingly taking advantage of such a person will constitute rape. The state has a responsibility to protect people when they are unable to give consent.

For those who can exercise their sexual autonomy, consent should be given freely and voluntarily. In sexual relationships, if consent is coerced, the consent is not given freely, and this renders the consent invalid. Hence, any intercourse that takes place should be deemed non-consensual. The biggest problem with a coercive sexual relationship is not the lack of consent, but to what extent such consent is freely given. In other words, just because consent exists does not mean it was not obtained through extremely coercive means. In this vein, the law must distinguish between acceptable influence and illegitimate coercion in order to identify unacceptable coercive sexual relationships.

When we talk about preventing coercive sexual demands and protecting sexual autonomy, we see sexual autonomy as an interest that transcends gender. Sexual autonomy is important for everyone, regardless of their gender, but rape is not a sex-neutral crime. This sex-based characteristic makes rape offenses different from other crimes. Rape is not only sex-specific on the level of individual experience; it is also sex-specific "on a larger, social level, in that it is a crime overwhelmingly committed by men against women."<sup>246</sup> To consider

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242. *Id.*

243. Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109, 116 (2004).

244. *Id.*

245. WERTHEIMER, *supra* note 232, at 215. There are many legal discussions about statutory rape and intoxication. Because this Article focuses on sexual relationships between competent adults, the issues of minors, intoxication, and mental retardation are not considered here. For a discussion of statutory rape, see Michelle Oberman, *Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 827, 865, 897 (2001). For a discussion of intoxication, see Valerie M. Ryan, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape*, 40 CAL. W. L. REV. 407 (2004). See also Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313 (2003).

246. CAHILL, *supra* note 161, at 121.

rape as a sex-neutral phenomenon precludes the possibility of recognizing the sexually differentiating social function of rape.<sup>247</sup> This means that rape is a means through which a large segment of society is oppressed.

Rape is an issue involving group domination. The conception of a “group,” as Iris Young explains, is an expression of social relations and it exists only in relation to other groups.<sup>248</sup> Members of a group have a specific affinity with one another because of their similar experiences or way of life.<sup>249</sup> Even if groups belong to the same community, groups acquire their own identities by encountering and interacting with other social collectives; by experiencing some differentiation in their way of life and forms of association, they uncover their niche in society.<sup>250</sup> Outsiders may identify a characteristic as defining a group even when those so identified do not have any specific consciousness of their group identity.<sup>251</sup> Sometimes a group comes to exist only because others exclude and label a category of persons and those labeled come to understand themselves as members of a group due to their shared oppression.<sup>252</sup> As Young argues, whether or not a group is oppressed depends on whether it is subject to one or more of five conditions: violence, exploitation, marginalization, cultural imperialism, and powerlessness.<sup>253</sup>

Young’s framework and the fact that women as a group are more frequently victims of rape may lead to the conclusion that women are an oppressed group in the realm of rape crimes. Young defines the violence that constitutes group oppression as members of a group living “with the knowledge that they must fear random, unprovoked attacks on their persons or property, which have no motive but to damage, humiliate, or destroy the person.”<sup>254</sup> Based on the number of sexual assaults perpetuated against women on a yearly basis, it is fair to conclude that rape is violence against women. Rape crisis centers estimate that more than one-third of all American women will experience an attempted or completed sexual assault in their lifetime.<sup>255</sup> Every two minutes, a woman in the United States is raped.<sup>256</sup> During a rape, victims suffer bodily harm and emotional distress.<sup>257</sup> Further, rape puts women at a

247. *Id.* at 122.

248. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 43 (1990).

249. *Id.*

250. *Id.*

251. *Id.* at 46.

252. *Id.*

253. *See generally id.* at 9.

254. *Id.* at 61.

255. According to the National Crime Victimization Survey, which includes crimes that were *not* reported to the police, 232,960 women in the U.S. were raped or sexually assaulted in 2006. *Violence Against Women in the United States: Statistics*, NAT’L ORG. FOR WOMEN, <http://www.now.org/issues/violence/stats.html> (last visited Jan. 16, 2011).

256. *How Often Does Sexual Assault Occur?*, RAPE, ABUSE & INCEST NAT’L NETWORK, <http://www.rainn.org/get-information/statistics/frequency-of-sexual-assault> (last visited Jan. 16, 2011).

257. WERTHEIMER, *supra* note 232, at 102-107.

high risk of having an unwanted pregnancy and contracting venereal diseases.<sup>258</sup>

Beyond violence, rape also exploits women. Young defines exploitation as a type of “oppression [that] occurs through a steady process of the transfer of the results of the labor of one social group to benefit another.”<sup>259</sup> Exploitation is apparent from the case law. According to the aforementioned case law study, in rape cases, “[a] man will rarely be found guilty of ‘simple rape’ or ‘acquaintance rape’ unless he forcibly overcomes the woman’s physical resistance.”<sup>260</sup> Thus, if a victim does not physically resist, it appears that “men are given broad sexual access to women with whom they are acquainted, regardless of the women’s wishes.”<sup>261</sup>

As for marginalization, Young argues that marginalization means that a society excludes some groups or blocks the opportunity to exercise capacities in socially defined and recognized ways.<sup>262</sup> By rejecting the reasonable woman standard, the law marginalizes victims and their experiences. Furthermore, rape trials illustrate the imperialism of male culture.<sup>263</sup> As Professor Taslitz asserts:

Rape victims are not literally silenced at rape trials. They do speak, but they are not heard. They often are dissenters, protesting, for example, against prevailing ideas that a woman who drinks and wears shorts skirts cannot be raped. But their protests are stifled and ignored. Their avenue for redress—the rape trial—is a sham.<sup>264</sup>

Society’s marginalization of women and the dominance of male culture in the courtroom indicate women’s oppression as a group, particularly in the rape context.

Women as a group also satisfy Young’s conception of powerlessness. According to Young, “[t]he powerless are those who lack authority or power, even in the mediated sense, those over whom power is exercised without their exercising it; the powerless are situated so that they must take orders and rarely have the right to give them.”<sup>265</sup> Violence toward women wreaks harm on female civic participation, access to professions, financial security, and sense of self.<sup>266</sup>

258. See generally Yakare-Oule Jansen, *The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 AKRON L. REV. 311 (2007).

259. YOUNG, *supra* note 248, at 49.

260. FORELL & MATTHEWS, *supra* note 143, at 224.

261. *Id.*

262. YOUNG, *supra* note 248, at 54.

263. ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 138 (1999). Young describes “the injustice of cultural imperialism” as “an oppressed group’s own experience and interpretation of social life find[ing] little expression that touches the dominant culture, while that same culture imposes on the oppressed group its experience and interpretation of social life.” YOUNG, *supra* note 248, at 60.

264. TASLITZ, *supra* note 263, at 137.

265. YOUNG, *supra* note 248, at 56.

266. See generally Kerrie E. Maloney, Note, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876 (1996). The fear of rape may have ramifications for how late a woman stays out at night or how she dresses. See Orenstein, *supra* note 2, at 675; see also Alexandra Wald, *What’s Rightfully Ours: Toward a Property*

Rape infringes women's sexual autonomy, restricts women's mobility, and makes women powerless.

Recognizing the group oppression when reforming rape law helps us to see the problem comprehensively. When an issue involves group oppression, the oppressed group deserves more protection, and the privileged group should take more responsibility to prevent such oppression. From the group oppression perspective, the existence of a more powerful group justifies placing a higher burden on oppressors. Therefore, those who initiate sexual activities or who make sexual demands—men or the party with greater power—should be asked to assume additional responsibility to prevent the abuse of power in a sexual relationship.

### C. The Relationship within an Unequal Power Dynamic: How Taiwanese Rape Law Can Learn from American Rape Law

Schulhofer's approach, which requires the more powerful party in a sexual relationship to pay more attention to the less powerful party, provides a meaningful standard for determining what should constitute coercive and thereby illegal sexual intercourse. According to Schulhofer, existing rape laws in the United States ignore unequal sexual bargaining power, "granting psychologists, doctors, lawyers, and teachers almost unlimited freedom to have 'consensual' sexual relationships with women whom they hold in their power."<sup>267</sup> He believes that "[e]ffective safeguards for sexual autonomy must identify the situations in which economic power or professional authority unjustifiably impairs the weaker party's freedom of sexual choice."<sup>268</sup> Therefore, he argues that a quid-pro-quo threat of sexual extortion is a coercive act.<sup>269</sup> Using criminal property extortion as the legal basis, he argues that "[a] school principal who obtains sexual favors by threatening to block a student's graduation should be guilty of a criminal offense" because this act is like extortion for monetary gain.<sup>270</sup> Second, even a sexual "offer" can be coercive if it arouses fear of retaliatory acts that violate specific legal rights.<sup>271</sup> For example, a supervisor may initiate a sexual proposal to his subordinate in exchange for an "offer" of promotion. Under this circumstance, according to Schulhofer, the subordinate's right to sexual autonomy is violated and the supervisor's initiation should be prohibited.<sup>272</sup>

In the United States, these types of quid-pro-quo sexual encounters have been regulated through the enactment of sexual harassment laws.<sup>273</sup> Employers can be held liable for sexual harassment occurring among employees and made to pay compensatory and punitive damages under Title VII of the Civil Rights

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*Theory of Rape*, 30 COLUM. J.L. & SOC. PROBS. 459, 492-94 (1997) (describing how women change their behavior due to fear of sexual violence).

267. SCHULHOFER, *supra* note 193, at 167.

268. *Id.*

269. *Id.* at 186.

270. *Id.* at 135.

271. *Id.* at 144.

272. *Id.*

273. ABIGAIL C. SAGUY, WHAT IS SEXUAL HARASSMENT? 22 (2003).

Act.<sup>274</sup> However, the purpose of a sexual harassment law is different from the purpose of criminal punishment. The function of sexual harassment law is to prevent sexual discrimination and a hostile environment for workers.<sup>275</sup> In contrast, the focus of criminal liability is to condemn moral wrong and prevent the expected harm of the criminalized act. A supervisor who fires a subordinate because she or he refuses to have an affair with him should be criminally punished. Similarly, a supervisor initiating “sexual offers” to his or her subordinate is also abusing authority. The wrongfulness of such behavior not only creates sex discrimination, but also expresses an authority to coerce another person into having sexual relations.<sup>276</sup> Therefore, acts that influence other people’s autonomy should be illegal and thereby constitute a criminal offense.

Rape law in Taiwan includes sexual extortion and coercive sexual offers under the Criminal Code Article 228. However, because of the weak legal framework and conservative judicial interpretation discussed *supra*, the distinction between Articles 221 and 228 is now blurred.<sup>277</sup> Article 228 regulates the circumstances where one’s consent is invalid because the consent was given due to coercive and abusive power.<sup>278</sup> It should define the elements and set the punishment for the quid-pro-quo sexual demands and other coercive offers. This Article argues that because the rape law’s goal is the protection of sexual autonomy, and sexual autonomy is demonstrated by a person’s free and voluntary consent, Article 221 should regulate the circumstances lacking affirmative consent. The law should be defined as “having sexual intercourse without the other party’s consent.” As such, the law would cover both the use of physical force and the use coercion. Furthermore, the legislature needs to define what consent *is*. Based on the reform’s claim to protect sexual autonomy, valid consent must be freely and voluntarily given by a fully competent person.

In addition, a rebuttable presumption of rape should be admissible.<sup>279</sup> Although this means a heavy burden on the accused, such a burden is justified for two reasons. First, women as a group are oppressed through rape. Making those accused of rape bear the burden of proving there was conscious, willing consent by the victim would mitigate some of the oppression.<sup>280</sup> Second, patriarchal standards pervade the courtroom and serve to discredit the victim, so the burden of disproving rape on the accused would provide a way for a victim to ensure that her claim is not dismissed without a full, thorough evaluation of the evidence.

Referring to the legislation of England and Wales, I propose a reformed legal framework centering on the protection of sexual autonomy to Taiwanese Rape Law in Appendix II. Although some may argue that this is too harsh or potentially discriminates against men, I believe this is the only way for female

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274. *Id.*

275. *Id.*

276. SCHULHOFER, *supra* note 193, at 183-89.

277. *See supra* Part IV.A.

278. Crim. Code art. 228 (Taiwan).

279. JENNIFER TEMKIN & BARBARA KRAHÉ, SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE 27 (2008).

280. *See supra* Part V.B.

victims to receive justice in Taiwanese courts. Until the legislature better defines key terms used in the laws—such as consent—women will find that their claims are dismissed without sufficient consideration.

## VI. CONCLUSION

It has been more than ten years since feminists and legal scholars drove the first wave of rape law reform in Taiwan. It is time to observe and evaluate the impact of that reform. The empirical data and case law analysis indicate that the reform has not yet reached its goals.<sup>281</sup> Two factors have contributed to this failure. First, Congress passed the new rape law to relieve public outrage over the prevalence of rape. Although the new rape law aimed to protect sexual autonomy, hasty legislation with a poorly designed legal framework resulted in the law being drafted in a way that does not protect women's sexual autonomy. Second, the culture of rape trials in the Taiwanese courtroom is conservative and patriarchal. Courts tend to discredit rape victims' allegations once the scenario of the rape varies from the stereotypical attack. Moreover, while the requirement of utmost resistance no longer exists in the law, it is still alive in judges' holdings. The case law shows that courts, due to gender bias and rape myths, frequently fail to find guilt beyond a reasonable doubt and therefore render verdicts of not guilty. The new rape law, interpreted and applied in this patriarchic courtroom culture, fails to serve its purpose.

After assessing the wrongfulness of rape, it becomes clear that rape is a crime against personal sexual autonomy as well as a crime against women as a group. Accordingly, new rape law reforms should focus on the protection of sexual autonomy and take into account the unequal power between the rapist and the victim. Decent protection of sexual autonomy does not require a broader definition of force; it requires recognition that sexual intimacy must always be preceded by the affirmative, freely given permission of both parties.<sup>282</sup> Any person who engages in sexual intercourse knowing that he or she does not have permission from his or her partner commits rape. Criminal law will never be omnipotent, but it can provide justice. Shifting from the traditional focus on the "physical compulsion model" toward the "affirmative consent model" and recognizing the unequal power in the sexual relationship in the substantive criminal code will help to eliminate judicial bias and ensure women's sexual autonomy.

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281. See *supra* Part IV.

282. SCHULHOFER, *supra* note 193, at 280.

### Appendix I: Present Rape Statutory Provisions in the Taiwanese Criminal Code

	Element of offences against sexual autonomy
Article 221 Forcible Sexual Intercourse	The offender compels, threatens, intimidates, hypnotizes, or forces the victim in any way against another person's will to have sexual intercourse.
Article 222 Forcible Sexual Intercourse with Aggravating Conditions	The offender violates Article 221 and with any of the following aggravating conditions: a. the offender commit with one or more accomplice. b. the victim is under the age of 14. c. the victim is insane or mental retarded or physical handicapped d. the offender uses drugs or medicine when committing the offence. e. the offender tortures the victim. f. the offender takes the opportunity of driving mass transit or taxi. g. the offender breaks and enters the dwelling house to commit rape crime h. the offender commits rape with a weapon.
Article 228 Having Sexual Intercourse by Abusing Power or Authority	1. The victim under a relationship is directed, supported, or cared by the offender. 2. The offender abuses his/her power or authority to the victim. 3. The offender has sexual intercourse with the victim.
Article 229 Having Sexual Intercourse by Deceiving as the victim's spouse.	1. The offender deceives the victim as his/her spouse 2. The offender has sexual intercourse with the victim.
Article 225 Incapable to Give Consent	1. The victim is incapable of consent due to insanity, mental retarded, physical handicapped, or any other similar conditions 2. The offender has sexual intercourse with the victim.

## Appendix II: A Model Statute to Reform the Present Statutory Provisions of Rape Laws

	Element of offences
Article 221 Rape	<p>The offender has sexual intercourse with the victim without the victim's affirmative consent</p> <p>A person consents if he or she agrees by choice and has the freedom and capacity to make that choice.</p> <p>Under the following circumstances, absence of consent will be presumed, and the defendant will be allowed to bring forward the evidence to rebut this presumption:</p> <ol style="list-style-type: none"> <li>a. Where the offender uses violence against the victim or causes the victim to fear that immediate violence would be used against her or him;</li> <li>b. where any person causes the victim to fear that violence was being used or that immediate violence would be used against a third party;</li> <li>c. where the victim was unlawfully detained;</li> <li>d. where the victim was asleep or unconscious;</li> <li>e. where the victim has a physical disability and as a result would not have been able to communicate where she or he consented;</li> <li>f. where a substance was administered to the victim's consent which was capable of stupefying or overpowering her or him.</li> </ol>
Article 222 Rape With Aggravating Conditions	<p>The offender violates Article 221 and with any of the following aggravating conditions:</p> <ol style="list-style-type: none"> <li>a. the offender commit with one or more accomplice;</li> <li>b. the victim is under the age of 14;</li> <li>c. the victim is insane or mental retarded or physical handicapped;</li> <li>d. the offender uses drugs or medicine when committing the offence;</li> <li>e. the offender tortures the victim;</li> <li>f. the offender takes the opportunity of driving mass transit or taxi;</li> <li>g. the offender breaks and enters the dwelling house to commit rape crime;</li> <li>h. the offender commits rape with a weapon;</li> </ol>
Article 228 Sexual Extortion	<ol style="list-style-type: none"> <li>1. The victim, under an unequal relationship, is directed, educated, employed, supported, or cared, by the offender;</li> <li>2 The offender demands the victim to submit sexual intercourse by extortion or coercive offer under the unequal power;</li> </ol>
Article 229 Having Sexual Intercourse by Deceiving as The Victim's Sexual Partner	<ol style="list-style-type: none"> <li>1. The offender deceives the victim as his/her partner</li> <li>2. The offender has sexual intercourse with the victim.</li> </ol>