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以女性主義法學重構刑事立法與審判—以性自主權保護為中心

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中文摘要

性侵害犯罪一直都是社會上最嚴重的問題之一，因為性侵害犯罪的存在，女性長期以來處於一個恐懼的狀態。這種恐懼所涵攝的範圍不只是來自於性侵害犯罪行為本身，更包含了社會對於性侵害被害人的偏見與不諒解，因此，近年來世界各國無不致力於防治性侵害犯罪，試圖改善被害人的處境，並且提高審判的定罪率。

本計畫成果共分為 6 章：第一章為緒論，介紹本文研究源起與研究目的；第二章係針對我國的法制進行介紹，此部分的目的在於使讀者了解我國法律制度與文化深受大陸與日本等大陸法系國家之影響，同時，近幾年來特定的法學領域更受到了相當程度的英美法系國家之影響。就時間上來看，本文引用王泰升老師之見解，將我國法制之發展分成三階段，分別為：受日本影響之殖民時代、受中國與國民黨影響的戒嚴時代以及戒嚴解除後的民主多元時代。在法律隨時代進步之際，許多繼受來的法律在施行上並未如預期般順利，以親屬、繼承法為例，法律的改革似乎並無法改變社會既成的風俗習慣，本部分也試圖分析過去法律改革成效不彰之原因。

第三章討論我國女性主義思潮之發展，而相關的理念是如何移植到法律改革之中。在女性主義思潮引進以前，我國法制充斥著傳統的中國式與日本式的父權思想。女性在家庭、社會的地位低落、教育水準普遍不高，一直到 1970 年代以後，我國才第一次認識到「女性主義」這個名詞，而我國本土的女性主義學者才真正開始嶄露頭角，並展開一系列的法律改革。其中最重要的改革議題，就包括了修正《民法》中有關夫妻財產制等不平等之規範、制定《家庭暴力防治法》以保護受家暴婦女、制定《兩性平等工作法》以保障兩性同工同酬等基本權利、制定《兩性平等教育法》以規範校園中的性別平等等議題。但是，儘管如此，社會中的性別歧視仍然存在，許多女性仍受限於傳統的價值觀而無法真正獲得法律所保障之權利。隨著戒嚴的解除，女性更成為了暴力犯罪下的主要受害者，直到 90 年代，政府在壓力之下才逐漸正視這個問題，陸續制定了《性侵害犯罪防治法》並且修正了《刑法》中有關性侵害犯罪之條文，本部分即是針對這些規範性侵害犯罪之法律修正進行初步介紹。

第四章是針對我國有關性侵害犯罪之修法深入評析。首先，在修法過後，社會普遍瀰漫著一股不信任修法成果的氣氛，性犯罪數字不但沒有減少，反而連年增加、新成立的性侵害處理單位，面臨著員額與經費皆不足的困境，學者質疑警察、檢方、法院無法完全整合。同時，各種調查顯示，我國女性仍然對於自我的人身安全與性自主權的實現感到失望。此外，《刑法》雖是在婦女團體的主導下進行修正，但卻仍係將重點擺在「強制力」上，而非被害人的「自主意識」，本章擬針對該次修法的細節進行深入分析，以指出其不足之處。最後，在法律之修正成效有限的情況下，實務也沒有扮演好一個彌補缺失的角色，本章針對 2000 年至 2009 年間，台北以及高雄地院有關性侵害犯罪之法院判決進行分析。目的

在於檢驗法院在個案中決定是否有「合理的懷疑」時，其論理的過程，有無受到性別偏見的汙染。很遺憾地，從約 300 個無罪判決的理由中，本文發現所謂的性侵害迷思仍然存在於我國法院判決中。許多法官在進行判決時，心中都會有一個「理想的」性侵害犯罪情境，例如：犯案過程應該如何、案發後，當事人之互動應該如何、被害人的情緒反應會是怎樣等等。當被害人的表現不如法官之「預期」時，法官即會依據經驗法則下無罪判決，殊不知法官的經驗法則本身即有可議之處。除了犯罪情境以外，許多與案情無關的要素，也同樣會因為性侵害迷思而帶進個案的判斷中，例如被害人的職業(是否為性工作者？)、金錢往來情況等等，這些要素都會影響法官在個案中的判斷。由上述的討論可知，在法院以及實務的雙重缺陷下，新一波的改革是迫切且必要的。

第五章討論的是有關性侵害實體法的重新建構。本章處理的議題包括：法益刑事責任之間的關聯性為何？性侵害犯罪所保護的法益為何？什麼樣的性行為才應該被認定為性侵害？本章透過整理美國學者之見解，建構出性侵害犯罪所保護的內涵。針對這個內涵，實體法又應該如何因應，本章將介紹美國學者所提出之數種規範模式，包括 Brownmiller、Bryden 等學者主張的「rape as assualt」模式，以及 Estrich、Schulhofer 等學者所主張之「rape as consent」模式。並且同時批判我國刑法之修正並沒有明確地採取特定的立場，換言之，我國刑法雖然名義上保護的是性自主權，但是法條本身卻無法釐清這項意旨，而這也就導致了實務在適用與詮釋上的無所適從。最後，再以性自主權為中心，透過女性主義法學以及比較法學的觀點，討論其實質內涵，並試圖提出一個未來修法的新方案，目的在於重新定義性侵害犯罪並減少性別偏見，同時，縮小實務運作與學術理念之間的差距。

第六章為本文之結論。本文認為，過去的性侵害法律改革並沒有達成女性主義學者所預設之目標，其原因有二：第一，立法過程粗糙，立法者受迫於社會壓力，快速通過相關法案之修正，但是卻未經過學理上充分之討論，導致法條邏輯不一致，規範範圍模糊不清；第二，法庭審判文化保守且充滿父權色彩，透過判決的分析，本文發現在許多個案中，法院會依據一些典型的性侵害迷思或是性別偏見，而建構出「合理的懷疑」，繼而下無罪判決。是以，本文試圖從女性主義法學之角度，提供一個新的修正方案，將規範重點從行為人的強暴脅迫，移轉至被害人的性自主意識，換言之，即是以被害人明示的同意作為判斷之重心。本文相信，一旦如此，將促使法院更仔細地聆聽被害人的證言，並且減少性侵害迷思與性別偏見的使用機會。

關鍵字：性侵害犯罪、性侵害法律改革、女性主義法學、性自主權、合理的懷疑

Abstract

Sexual offenses are always one of the most difficult social problems and keep the women in an endless fear, which involves not only the criminals but also the prejudiced view toward the victims. Therefore, many countries in the world have dedicated to cope with sexual offenses, victim aiding and conviction efficiency.

This paper is divided into 6 Chapters. Chapter one is an introduction to the purpose of this paper. Chapter two focuses on the law system in Taiwan. Chronically, the development of Taiwanese law system has three stages: the Japanese colonial period, KMT and martial law period, and the post-martial law period. Despite the law has kept progressing, the substantial effect has been limited. Take the family and inheritance law for example, it seems that the change in the words of the law doesn't entail the same thing in the society and the custom. In this chapter we are going to analyze the pathology of this failure.

Chapter three introduces the feminism movements in Taiwan. Traditionally, due to the Chinese and Japanese paternity, the women have always been degraded in the society and their own family. It is not until the 1970's when the feminism began to evolve in Taiwan, and women started to join in the reformation of the law to demolish all the inequalities and even discrimination of the women. There are some distinguished improvements, but it was not enough, most of the women are still placed far away from what they deserve, including the freedom from fear of being sexual offended. In the 1990's, the protestation culminated in the establishment of the Anti-Sexual Assault Act and the reformation of the relative articles in the Penal Code, which will be introduced in this chapter.

Chapter four takes a closer look into the reformation. First of all, the reformation failed to get the social recognition. The sexual crime rate didn't decrease but increased, scholars suspecting the cooperation of the police department and the prosecutors, and even the relative agencies didn't get enough fund to cover the expenses. Secondly, the text of the code still failed to aim at the sexual autonomy of women and the court failed to get rid of the sexual prejudice, especially about the reasonable doubt, and cover this gap, all of which is going to be shown in the investigation of the judgments made by Taipei and Kaohsiung district courts.

Chapter five focuses on the reformation of substantial criminal law. The reform in the 90's seemed to aim at the protection of sexual autonomy, but the texts itself apparently miss the target. Consequently, the interpretation and the application of the law seemed to be troublesome for the court. In this chapter, I will start from the concept of sexual autonomy and use feminist and comparative legal theories to suggest future reforms.

Chapter six is the conclusion. There are two reasons why the expectation of the reformation didn't come true. The first one is that, under the climate of the society, the process of the legislation was full of carelessness and lack of comprehensive theoretical observation. Secondly, the conservative and patriarchal atmosphere in the jurisprudence tends to follow the rape myths and set the criminals free. In conclusion, I suggest a new model that turns the focus from "force" to "non-consent," hoping that the change will result in a more gender-equal judicial environment.

Keywords: rape crime, rape law reform, feminism jurisprudence, sex autonomy, reasonable doubt

一、前言與研究目的

性侵害犯罪一直都是社會上最嚴重的問題之一，因為性侵害犯罪的存在，女性長期以來處於一個恐懼的狀態。這種恐懼所涵攝的範圍不只是來自於性侵害犯罪行為本身，更包含了社會對於性侵害被害人的偏見與不諒解，因此，近年來世界各國無不致力於防治性侵害犯罪，試圖改善被害人的處境，並且提高審判的定罪率。

美國過去針對性侵害犯罪的改革，與女性主義運動有絕對的關聯性，從 1970 年代開始，女性主義學者在美國各州，掀起了一波波與性侵害犯罪有關之法律改革，改革內容雖然在細節上有所不同，但是建立一個性別平等的法律環境的理念卻是相同的。不過，改革至今雖已歷經 30 餘年，而相關的法律確實有展現了許多女性主義的理念，但是相關的實證研究卻顯示，過去的改革似乎對於被害女性的地位與處境沒有太大的助益，也因此，美國學界針對這個議題的討論從沒有間斷過，學者將所觀察到的問題再精緻化，試圖針對過去的改革提出「再改革」的方案。

我國近年來積極推動性別主流化，並爭取加入聯合國「消除對婦女一切形式歧視公約」（Convention on the Elimination of all Forms of Discrimination Against Women, CEDAW）顯示政府已開始將女性權利的促進與保護視為國家重點工作。為因應我國將來發展之需求，並建立一個真正性別平等，兩性相互尊重的社會，性別研究的需求實已達刻不容緩的地步。在所有與女性相關之社會、經濟與文化等基本權中，婦女人身安全之保障應是所有權利得以發展之基礎，因此，凡是基於性別所產生之暴力行為（violence based on sex），國家皆應充分消除之。在這些暴力行為之中，又以性暴力、性騷擾以及家庭暴力等問題最為嚴重。針對此三項議題，在我國女性主義學者以及婦女團體的努力下，過去十餘年間分別制定了性侵害犯罪防治法、性騷擾防治法以及家庭暴力防治法，同時完成了刑法分則妨害性自主罪章之修正。這一系列與性侵害犯罪相關的法律改革，由於是女性主義學者所推動的，因此，相關的法條也都反映了女性主義之理念。不過，修法至今已 10 餘年，卻鮮少看到檢討或是批判當年修法成效之討論，因此，社會無從得知相關法律實際運作後之成果。此外，1996 年所制定之《性侵害犯罪防治法》，考量被害人之隱私，更進一步封鎖了所有相關的實務判決，至此，性侵害犯罪之議題成為了學術界所不得其門而入之禁區。

為了處理這個議題，本成果在結構上可大致分為三大部分，分別為回顧、檢討以及展望。回顧的部分是指第二章與第三章，第二章首先從法制史的角度來介紹我國法制受到了哪些思想與文化之影響。第三章接著我國女性主義思潮之發展，而相關的理念是如何移植到法律改革之中。第四章開始檢討的部分，針對我國有關性侵害犯罪之修法深入評析，透過本計畫之便，獲得了司法院之許可，進入其內部之資料庫，在隱匿當事人之資料後，擷取過去 10 年來受到塵封之性侵害犯罪判決進行研究，期待能夠實際了解實務是如何解讀過去性侵害法律之修正？另，實務的詮釋有沒有符合當年修法者的期待？最後的第五章以及第六章則是展望，

討論的是有關性侵害實體法的重新建構，試圖以性自主權為中心，透過女性主義法學以及比較法學的觀點，討論其實質內涵，並試圖提出一個未來修法的新方案，目的在於重新定義性侵害犯罪並減少性別偏見，同時，縮小實務運作與學術理念之間的差距。

二、研究方法

(一) 文獻的回顧與整理

本文首先將以文獻整理的方式來回顧過去社會上對於女性所施加的道德束縛，以及該等束縛是如何地影響立法模式，參考文獻主要是以美國的書籍期刊為主，蓋女性主義法學自 1970 年代以後在美國蓬勃發展，至今仍百家爭鳴，蔚為顯學，相關的婦運團體更是帶動起一波波針對刑事法律的改革，因此可供本文參考之文獻頗為豐富，其中更不乏美國法學界公認之經典著作，足可完整介紹女性法律地位的轉變。除了外國文獻以外，我國之相關文獻亦當然為本文參考對象。

(二) 實證研究

本文擬並採量化以及質化分析，首先就量化分析而言，本文針對民國 88 妨害性自主罪章增訂過後之法院判決進行檢索、整理，並找出有罪判決與無罪判決的比率、法院最常使用之無罪理由等等，所分析的對象包括台北、台中以及高雄三個地方法院；就質化分析而言，則是就性侵害案件之判決文本進行分析，檢討性侵害案件被害人處境有無改善以及修法意旨有無落實到審判實務等問題。

(三) 女性主義法學方法

所謂的女性主義法學方法指的是：以女性的身體、經驗與觀點來批判既有的法律與法文化，並以建構性別平等的法律體系作為努力的目標。本文的目的即在以女性觀點去瞭解法律在性別壓迫上所扮演的角色，並探究法律是否可能及如何去創造性別平等的改變。為了達到這樣的目標，為了達到這樣的目標，本文擬針對女性主義進行時間向度的歷史研究，並同時進行範圍廣度的方法研究，針對第一波、第二波以及第三波女性主義法學的發展，及其在法學發展上所造成的影響進行分析與評述，同時關注台灣本土女性主義發展的脈絡，如何結合台灣政經社會演變，在刑事法的立法和審判方式上，對性自主權的內涵以及保障方式進行改革。

三、結果與討論

(本部分之內容已獲美國杜克大學所發行之 Duke Journal of Gender Law & Policy 接受，預計將於 99 年下半年刊登出版。)

How and Why the Rape Law Reform in Taiwan Fails its Goal?
- A Feminist Perspective

Chih-Chieh Lin*

I. Introduction

It was a hot, humid afternoon. I was 14 years old, and I was almost home from school one day. As usual, I took the elevator to my apartment on the 11th floor. On the way up, the elevator stopped on the third floor and a workman walked in. I let him know 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. After a few seconds, I moved to the side of the elevator and quickly pushed every button. When the door finally opened again, 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.

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. Thus, I was forbidden to come home late or travel alone. After graduating from law school in Taiwan, I became an attorney. Despite years of being a knowledgeable and experienced legal professional, whenever I am alone in an enclosed space such as an elevator or a taxi I still cannot help but feel powerless and worry that somebody may hurt me, with no hope of immediate help.

I am not the only one who worries about falling victim to the crime of rape. Regardless of your race, age, or profession, if you are a woman you face the threat of rape every day.

“You should be careful.”

“She was raped because she was too reckless.”

We receive these precautionary messages from our families, our schools, and the general public. We then identify ourselves as a ‘rape-vulnerable’ group, and this identification is an essential factor that distinguishes women from men. The fear and self-identification become basic considerations in a woman’s daily life, controling her schedule and influencing her choices. The fear of being rape is a cross-border

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phenomena. Therefore, attempts to better support the rape victims and to increase the conviction rate have been made throughout the world.

Rape Law reform in the United States has strong ties to the feminist movement and theories. Beginning with Susan Griffin's classic 1971 article, "Rape: The All-American Crime,"[1] and books by Susan Brownmiller (AGAINST OUR WILL)[2] and Diana Rusell (THE POLITICS OF RAPE)[3], rape became the point of departure for an ongoing investigation of the subordination of women and of their experience of sexual victimization.[4] Feminist advocates led the feminist movement and finally prompted large scale reformation of the rape law in the 1970, a decade within Griffin's landmark publication. Even though different states have since adopted different legal models, their common purpose remains to establish a more gender-equal rape law that can be applied in the legal system.

In comparison to the reform in the United States, Taiwan's rape law reform was similar in that it was also deeply influenced by the feminist movement despite a later acknowledgement of the problem from the overall Taiwan country. Under the continental legal system, Taiwanese rape law had not been amended for 50 years since the KMT government applied it in 1949. However, along with the rapid social and economic change that occurred at the end of the 1990s, the Taiwan feminist movement emerged from within the many protests of general social discontent. In response to the women's voice, the Taiwanese Congress made significant amendments to rape law in 1999, and Taiwanese rape law was finally reformed.

30 years following the rape reform in the United States, many scholars, through either theoretical or empirical studies, have criticized the effects of the reform, arguing that the goal of rape reform legislation has not been fully realized. Scholars in the US still seek to improve the effectiveness of the legal system and its ability to achieve just results. In contrast, ten years after implementation of Taiwan's rape law reform, there is no legal literature looking into its effects and virtually no information is available about how the Taiwanese judiciary has interpreted and applied the law. The Anti-Sexual Assault Act, adopted by Taiwan's Congress in 1996, prohibits the disclosure of the details of rape cases to the public via internet or other means. The original purpose of this policy was to protect the reputation and privacy of rape victims. However, it unfortunately creates a large obstacle for scholars and the public to monitor the effects of the reform.

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[1] *See generally* Susan Griffin, *Rape: The All-American Crime,* RAMPARTS, Sept. 26, 1971, at 26.
[2] *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975).
[3] *See generally* DIANA E.H. RUSSELL, THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE (1975).
[4] PATRICIA SEARLES & RONALD J. BERGER, *Preface*, RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT, at xi (Patricia Searles & Ronald J. Berger eds., 1995).

This article breaks the ice and is the first analysis of Taiwan's rape law reform ascertained on cases and verdicts. The author of this article received permission from the Taiwanese Judicial Yuan (the highest judicial institute) for the review of rape cases, espeically those decided under the new rape law, in its database.

Part II of this article provides a brief introduction of the Taiwanese legal system, describing the impact of the long historical colonial occupation by China and Japan, and Taiwan's patriarchic culture.[5] Part III describes the feminist movements in Taiwan and their efforts to bring about gender equality and rape law reform.[6] Part IV illustrates the passage of the new rape reform law,[7] and Part V looks into the effects of the new law, describing the cases decided under the new law and evaluating them[8] Lastly, Part VI applys feminist perspectives as well as a comparative legal method into the study, and concludes with a proposed alternative model of the rape legislation centered on the protection of sexual autonomy, seeking to redefine rape and reduce gender bias at rape trials, with aims to narrow the gap between the law-in-books and law-in-action of Taiwan.[9]

II. Legal Evolution in Taiwan

The Taiwanese legal system went through radical changes and reforms in the twentieth century. The development of Taiwanese laws reflects the complexity of "one land with two national flags:"[10] 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.[11] Prior to 1895, Taiwan was a territory of the Ching Dynasty and was governed by traditional Chinese laws. However, after the Ching Dynasty relinquished Taiwan to Japan in 1895, the state laws introduced by the rulers of Japan and later, the ROC, were largely modeled after the individualistic and liberal laws of the modern West.[12] Therefore, the evolution and development of the modern Taiwanese legal system can be considered a series of acquisitions and adaptations to the Western laws. The term 'western laws' refers to both continental European laws and Anglo-American laws.[13] Of the two, continental European laws, which had been adopted by pre-war Japan and the Republic of China, constitute the fundamental legal structure in Taiwan. Anglo-American laws, especially the U.S. commercial laws and intellectual property

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[5] *See infra* text accompanying notes 10-29.
[6] *See infra* text accompanying notes 30-76.
[7] *See infra* text accompanying notes 77-132.
[8] *See infra* text accompanying notes 133-258.
[9] *See infra* text accompanying notes 259-61.
[10] 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 (2002).
[11] *Id.*
[12] *Id.*
[13] *Id.* at 531-532.

laws, were gradually introduced to Taiwan with the increase of the U.S. influence and power in the Pacific East.

As a result, there is a clear three-stage progression of significant legal changes in the past 100 years of Taiwan. The first stage is the colonial stage. Japan had already largely completed its own modern codes, modeled after the continental European laws, during the Meiji era.[14] Alongside the swords of its colonial government and under the cloak of the metropolitan Japanese laws, Japan introduced modern western laws to Taiwan when it acquired the island from China in 1895.[15]

The second stage of Taiwanese legal reform took place under Koumingtang (KMT) rule from 1945 to 2000. After the Second World War, Japan returned Taiwan to the Republic of China (ROC), which was led by KMT. Before the annexing of Taiwan in 1945, the KMT regime had already established a legal system in China that closely followed the example of Meiji, Japan in China. This ROC legal system enacted Western-style (especially German-style) codes in the mainland since the late 1920s to the mid 1930s.[16] Nevertheless, these laws were not substantially enforced in mainland China after the 1930s due to continual chaos starting from World War II followed by the Chinese civil war between the ROC government and the Communist Army. In 1949, the entire KMT government, let by Chiang Kai-shek, retreated to Taiwan after a bitter defeat in China by the communist coalition led by Mao Ze-Dong.[17] To solidify its power on the island, the KMT immediately enacted martial law and enforced it for almost forty years from 1949 to 1987. Therefore, although the KMT government brought with it the western-style legal system established in China to Taiwan, 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. There was more freedom for legal scholars to study civil and commercial laws during the martial law period, as civil and commercial laws regulate disputes between private individuals and not between the KMT government and the Taiwanese citizens.[18]

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[14] *Id.* at 533.

[15] *Id.* at 534. Japanese government gradually applied western legal system in Taiwan. In the Japanese colonial time, it can be divided three era of the colonial policy. The first era is special colonial law as a principle in which the Japanese government issues special order to repress the armed resistance power against the Japanese military takeover. The second era is extension of the homeland in which the Japanese government increased to transplant the modern Japanese law into Taiwan. The final era is imperialization of subject peoples in which Japanese government want to assimilate Taiwanese as Japanese citizens. After entering the third era, Taiwan entered the wartime period and the liberalism in Western-style law had no chance to be transformed. *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).

[16] Wang, *supra* note 10, at 536.

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

[18] *Id.*

The rapid growth of the Taiwanese economy and radical changes in the political environment created major pressures on the KMT government to terminate martial law. In 1987, the KMT government lifted the martial law and opened up the third stage of Taiwanese legal reforms. With the end of martial law, Taiwan moved toward becoming a more liberal and democratic country. Numerous laws and regulations were enacted. Popular representatives and administrative officials, including the President, were elected by popular vote after 1991.[19] It was during this stage of reform that many Anglo-American laws were added onto the original Continental European legal model that had formed the basis of the island's legal system to that point. Moreover, through the constitutional amendments and reforms in criminal laws and procedure, the Taiwanese judicial system established its independence from the executive and legislative branches of the government. With this independence, they were now held accountable by Taiwanese citizens.[20] These legal changes fostered a new political environment that allowed the KMT to transform itself from a foreign regime to a more legitimate and accepted government to for native Taiwanese.[21] The KMT's loss to the Democratic Progressive Party (DPP) in the 2000 presidential election and the peaceful transition of powers marked a complete democratic political transformation.

However, unlike the United States -- where the legal system was built upon the tradition of common laws -- Taiwan developed its legal system through a lengthy process of adaptation and implantation. The Japanese colonial government westernized the Taiwanese legal system, and the KMT government furthered the westernization. Each of them introduced their own interpretation of the western legal model into the traditionally imperial Taiwanese society. As a result, the modern Taiwanese legal system no longer reinforces its traditional social culture; instead, it has become a legitimate means of creating contested norms that transforms social and cultural values.

Among the various legal reforms attempted in Taiwan, the development of property laws was a successful example. Taiwan had its own customs in property disputes back in the Ching Dynasty.[22] The Japanese colonial government first incorporated the traditional customs by creating similar terms, then gradually applying the western property laws to replace the traditional legal customs.[23] New corporate and bankruptcy laws were also adopted successfully after the colonial period.[24] However, some laws, especially those that relate strongly to deep traditional

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[19] Wang, *supra* note 10, at 539.
[20] Pratt, *supra* note 17, at 140.
[21] Wang, *supra* note 10, at 539.
[22] WANG, *supra* note 15, at 176.
[23] *Id.*
[24] *Id.*

social norms, did not transform so smoothly. Often the reforms had only a limited effect on people's lives, largely because new laws could not be enforced effectively. These laws were overly idealistic and failed to incorporate the existing cultural and social norms of traditional Taiwanese society.[25] Family law was an example. Under the modern Taiwanese inheritance law, every child has the right to his or her parents' inheritance or estate.[26] However, the traditional norm precludes a married daughter from claiming inheritance rights[27] because traditionally, a married daughter is considered part of her husband's family and not her birth family.[28] A married daughter carries her husband's last name, is not responsible for her parents' support, and therefore does not have the right to claim any of her birth parents' inheritance. Therefore, if the laws are to protect the rights of married woman to her parents' inheritance, the law makers need to understand the traditional family practice and address any unreasonable arrangements that subordinate married women in family law before the inheritance law could be applied meaningfully.

Because so many of Taiwan's laws are transplanted from foreign models, it is a challenge to create contested norms by law against many of the unjust but prevailing social traditions. According to Professor Li-Ru Lee's observation, the success of these legal reforms in Taiwan is based on the factor that the legislature enacts laws with sensitivity to the social norm and cultural practice.[29] Being a sociological legal scholar, I agree with her observation and also want to add a few points of my own.

When a doctor diagnoses her patient, the first step is to check the patient to find where the problem is. So should legal reform. The legislature is supposed to collect all information to understand the problem before proposing a legal diagnosis. Doing a complete survey and collecting the necessary social scientific evidence helps the legislature to appreciate social operations and how the old rules were interpreted in action. After finding the etiology, a doctor then should prescribe the right medicine for an illness. Knowing the problem but prescribing the wrong medicine may leave the patient with the illness unimproved, and may even be fatal. Same with the legislature. It should study the legal doctrines and apply those doctrines to construct a new law. Legal theories are the foundation for wise lawmaking. Finally, to cure a disease needs a chronic treatment. A doctor should pay attention to any change in the patient's symptoms and adjust the prescription from time to time. Just as the application of a new law should do, too. Since laws cannot always be amended, it is the responsibility of the judicial branch to interpret statutes in light of social changes to keep the core

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[25] 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).
[26] *See* CODE CIVIL [C. CIV.] art. 1138 (Taiwan).
[27] Lee, *supra* note 25, at 440.
[28] *Id.* at 418.
[29] *Id.* at 443.

value of the law. If the legislature abruptly enacts laws without doing sufficient research and the judicial branch remains passive 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. Feminist Movements and the Rape Law Reform in 1990s

The rape law reform in Taiwan is deeply related with feminist movements. The Taiwanese feminist movement, like the rest of its legal system, was imported from the western countries. However, standing out in contrast to the rest of the legal system which basically follows a western continental model, the feminist movement that influenced law reform in Taiwan strongly followed the U.S. feminist movement and its theories, which will be more deeply discussed in Part V. Therefore, rape law reform in Taiwan is a mixed-product of U.S. feminist thoughts as well as continental criminal law principles; the latter will be discussed first.

Before the Japanese colonial period and long before any hints of feminism, Chinese patriarchal culture controlled sexuality and morality in Taiwanese society. Under the paternalist system, women were dependant on their husbands and had low status in the family. In the colonial time, to assimilate Taiwanese people, the Japanese government abolished several Chinese traditions in Taiwan. Some of these customs involved gender relations. For example, the Japanese government prohibited the Chinese custom of foot binding, and it established many single-sex schools to educate girls.[30] In the Second World War, women's status was further enhanced in Taiwan because of labor shortage in the market.[31] After the war ended, some Taiwanese woman began to organize in local communities seeking political engagement and rights for women.[32]

Unfortunately, the post-war feminist movement did not develop well. After the KMT government took power in Taiwan, the feminist movement and associations were discouraged and oppressed. Although the ROC Constitution guarantees equal rights, the KMT government advocated the image of the "dutiful wife and loving mother" to Taiwanese women.[33] Under the nationalism and patriotism of the martial-law era, women were forced to play a supportive role to take care of their families and serve the needs of their country in submissiveness.

The situation changed as a result of Taiwan's economic growth. After 1970, women became more independent economically. When Ms. Shou-Lien Lu, the

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[30] Ying-Kuen, Zhang & Shen-Li, Hwang, *The Diversity and Unity under the Big Umbrella: The Relations of Feminist Study, Gay Study, and Masculine Study*, *in* SEX, MEDIA AND CULTURE CONFERENCE (2004) (TAIWAN).

[31] *Id.*

[32] *Id.*

[33] MINGUO XIANFA [Constitution] art. 7 (Taiwan).

pioneer of Taiwanese feminism, returned to Taiwan from Harvard law school, her slogan -- "being a 'person' before being a 'woman' – turned the first page of the feminist movement in Taiwan.[34] The term "feminism" was first introduced in Taiwan at this time.[35] After martial law was lifted and politics were democratized in the late 1980s, many women's associations were organized. Cooperating with legal reformers, feminist groups propelled the second chapter of the Taiwanese feminist movement, and in the next decade they eliminated many unjust legal regulations. Their first successful target was Taiwanese family law. Feminist groups pushed Congress to amend family law to rearrange the relationships and property in marriage.[36] The second achievement at this stage was protecting working women's right of equal treatment and reasonable benefits.[37] The reform of rape law and sexual harassment law became the third accomplishment for the Taiwanese feminist movement in this stage. Using the fear caused by prior brutal cases, the feminist groups successfully brought pressure on the legislature, and Congress passed the Anti Rape Act and also modified the traditional rape law.

While the second-stage feminists were in the process of reworking these legal and political reforms, the first lesbian group was established in 1990. The establishment of a gay/lesbian group formally marked the beginning of the third stage of Taiwanese feminist movement.[38] The original Taiwanese feminist theories focused on the heterosexual relationship. However, influenced by post-colonialism and anti-essentialism, the third stage feminist movement advocated more diversity.[39] Many diverse feminist groups were organized and raised their voices. Homosexual women, female labors and migrant women began to split from the mainstream to seek their own identities in the Taiwanese society, and to improve their social status and legal rights.[40]

The development of the Taiwanese feminist movements during the past two decades reflected the rapid social change and awakened women rights in Taiwan. It

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[34] Ms. Lu became the first female vice president in Taiwan after the president election in 2000.

[35] Zhang & Hwang, *supra* note 30.

[36] Fang-Mei, Lin, *Zi Iou Zhu Yi Nu Xin Zhu Yi* [*Liberal Feminism*], *in* NU XING ZHU YI LI LUEN YU LIOU PEI [THEORIES AND SCHOOLS OF FEMINISM] 28 (Yan-Lin, Gu ed., 2000).

[37] From 1990, feminist groups in Taiwan had kept pushing the enactment of Equal Right to Work Act. Their 11-yeaer's efforts obtained the result in 2001 when the Taiwanese Congress finally passed the Equal Right to Work Act.

[38] Zhang & Hwang, *supra* note 30.

[39] *Id.*

[40] Regarding the development of female labor movement, please see Hui-Tan, Zhang, TAI WAN DANG DAI FU NU YUN DONG YU NU XING ZHU YI SHI JIAN CHU TAN [*Contemporary Women's Movement and Feminist Practices in Taiwan*], 192 (2006). Regarding homosexual women's movement, please see Xiao-Hong, Zhang, Nu Tong Zhi Li Lun *[Lesbian Theory*] in Nu Xing Zhu Yi Li Luen Yu Liou Pei [*Theories and Schools Of Feminism*] 264 (Yan-Lin, Gu ed., 2000).And regarding migrant women, please 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 (Xiao-Juan, Xia ed., 2005).

also reflected how women struggle for social and legal justice. Feminist movements made significant advances, and the most remarkable one is the successful ratification of several gender-related laws.[41] Those legal reforms include (1) amending family law to eliminate gender-discriminated marriage arrangements, (2) amending rape laws to include more types of sexual violations, (3) enacting the Anti-Rape Act to prevent sexual assaults, (4) enacting the Anti-Domestic Violence Act to protect disadvantaged members of the family, (5) enacting the Equal Protection Employment Act to provide equal treatment in the workplace, (6) enacting the Equal Protection in Education Act to ensure gender equality on campus, and (7) enacting Sexual Harassment Prevention Act to protect women's sexual autonomy.[42] Such legal reforms not only awakened public attention towards the subordination of women, but also formally improved women's social status and legal rights.

Although women's movements made some remarkable headway achievements in law reform, Taiwanese women still do not enjoy full rights equality. Literally and superficially, Taiwan is a modern, democratic country with many laws to ensure women's rights; yet, its patriarchal culture defines what those laws actually mean in life. Taiwanese women can clearly feel the gap between the law and reality. According to the 2005 Annual Report of Taiwanese Women's Human Rights, many women believed that the unequal gender values, such as the belief in male superiority, still hinder women's right to social participation.[43] Traditional gender stereotypes and the lack of a comprehensive child-care policy continue to hinder women's right to work.[44] Many women have to quit their jobs after getting married. According to the Report of the Women's Living Condition Survey in 2006, 46.7% of Taiwanese women are unemployed and rely on the income of their spouses.[45] For those women who want to pursue economic independence, they are still expected to meet their 'family obligation' after work – to be a devoted wife, a good mother, and an able housekeeper in her husband's family. The patriarchic culture in the society creates the gap between the legal norm and social norm. Furthermore, not even mentioned so far are some of the legal norms that are made under the patriarchic culture.

Although Taiwan still has a long way to run for reaching a gender-equal society, feminist movements do accelerate rape law reform. Following the civil law model, in Taiwan, any crime or criminal punishment should be defined clearly in a written code.

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[41] *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 (Shu-ling, Huang & Mei-Huei, Yu eds., 2007).

[42] 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).

[43] CHINESE ASSOCIATION FOR HUMAN RIGHTS, 2005 REPORT OF THE TAIWANESE WOMEN'S HUMAN RIGHT http://www.cahr.org.tw/pindex0501.htm (last visited Aug. 10, 2005).

[44] *Id.*

[45] MINISTRY OF THE INTERIOR AFFAIRS, REPORT OF THE WOMEN'S LIVING CONDITION SURVEY, REPUBLIC OF CHINA 27 (2006).

In the Taiwanese Penal Code, there are several offenses involving sexual violations. The offense of "forcible intercourse" (named rape before 1999) is inscribed in Article 221. The initial Article 221, enacted in 1928 and amended in 1999, defined rape as an act when 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.[46] We can deconstruct this definition by the following characteristics. First, it was not a gender-neutral crime. Women were the only eligible rape victims. Second, it did not criminalize the act of rape unless the level of "force" engaged was very high. Convictions frequently failed because the use of force did not meet the level at which the victim was unable to resist. Third, it was a "handled only upon formal complaint" crime, which means that the prosecution cannot prosecute the case unless the victim has made a formal complaint.[47] In those crimes, even though the prosecutor holds sufficient evidence to accuse the defendant, the case will be dismissed if the victim does not want to make a formal complaint or if she withdraws her formal complaint.[48] As a result of these requirements, the previous rape laws provided little protection to Taiwanese women. However, up until the 1990s, very few critics attacked the traditional rape law. During the long period of martial law time, people in Taiwan cared more about the overall status of oppressed liberties and political reform much more than the improvement of women's rights. Hence, the traditional rape laws remained in effect for more than 50 years without any amendment.

The Taiwanese legal system entered a new era after the elimination of martial law in 1987. With the rapid economic and political changes as well as forces of globalization, the original laws became insufficient to meet the changing social needs. Crime rates skyrocketed, and women became the major target of crimes (especially violent crimes) during this time. A 1997 study found that female victims accounted for 86.1% of the victims of violent crimes.[49] And in 2001, the figure rose to 99.4%.[50] The number of rape cases increased rapidly. In 1988, 605 rape cases were reported to the police;[51] by 1995, the number had risen to 1139. The numbers kept increasing, to a reported 1361 cases in 1996 and 1701 in 1998.[52]

Although rape has long been a big threat to women's security, Taiwanese women did not seem to acknowledge its severity until 1996. After a series of brutal rape incidents that occurred in 1996 and 1997, Taiwanese women could no longer stand

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[46] Prior TAIWANESE PENAL CODE art. 221: Rape.
[47] Prior Taiwanese PENAL CODE art. 236: Handled only upon Formal Complaint Crimes.
[48] FAIGUI HUIBIAN, CRIMINAL PROCEDURE CODE, art. 252, 303 (Taiwan).
[49] BUREAU OF STATISTICS, DGBAS, A STUDY OF GENDER STATISTICS AND WOMAN'S LIFE ANALYSIS, STATISTIC PAPER AND MONOGRAPHS SERIES, at 60 (2003) (taiwan).
[50] *Id.*
[51] FU NU SHIN ZHE JI JIN HUI [AWAKENING FOUNDATION], 1999 TAIWAN NU CHUN BO GU [REPORT OF TAIWANESE WOMEN RIGHT] 4 (2000).
[52] *Id.*

living in such an unsafe environment.[53] They went onto the streets to protest and demanded political and legal reforms.[54] Led by several feminist groups, the protesters advocated changes to the old rape law.

Feminists and legal scholars attacked the traditional rape law from the following aspects. First, the purpose of the traditional rape law was to protect sexual morality instead of one's sexual autonomy.[55] By asking women to be chaste, the law became the source of victim's "second rape."[56] Second, the traditional rape law was too narrow because it only recognized vaginal - penile penetration and did not address any other types of sexual assaults, including assaults against male victims.[57] Moreover the word "rape" often refers to the scenario of a male attacker and a female victim, therefore, it should be amended to "forcible sexual intercourse."[58] Third, reformers demanded the elimination of the "unable to resist" requirement from the old rape law.[59] Fourth, most rape victims incline not to report to the police,[60] the reformers suggested to eliminate the requirement that the victim must make a formal legal complaint in order to prevent future crimes.[61]

Under tremendous pressure from the feminist groups and other legal reform advocates, Taiwanese Congress passed the Anti Sexual Assault Act in 1997, and then made significant changes in the Taiwanese Penal Code in 1999. According the Taiwanese legislative report, the purposes of the rape law reform included: 1) attacking sexual offenses efficiently, 2) fully protecting people's 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.[62]

The Anti Sexual Assault Act focuses on the protection of rape victims.[63] In Taiwan, rape victims often face "a second rape" when the media reports the crime and causes the victim more trauma and humiliation. In order to prevent rape victims from facing the "second rape," the Act prohibits the media from reporting the victim's

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[53] On Nov. 30, 1996, a body was found raped and murdered brutally. This body then was identified as Ms. Wan-Ru, Peng, a famous feminist and the Director of Women Affairs of Democratic Development Party in Taiwan. In 1997, the public order got worse. A wanted criminal committed several rape offenses after he ran away from the police arrest. The series of rape crimes shocked the Taiwanese society and raised the issue of woman's safety.

[54] FU NU SHIN ZHE JI JIN HUI [AWAKENING FOUNDATION], 1999 TAIWAN NU CHUN BO GU [REPORT OF TAIWANESE WOMEN RIGHT] 4 (2000).

[55] TAIWANESE CONG. REP. vol. 88, periodical 13, at 200.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 201.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] FAIGUI HUIBIAN, ANTI SEXUAL ASSAULT ACT, art. 1 (Taiwan).

name or the case details in public.[64] The Act also requires every city and county to establish an anti-rape center,[65] and the Act provides police stations and hospitals with a standard process for rape cases.[66] The Act also asks governments, schools, and legal systems to cooperate with each other to prevent rape crimes on campus and in local communities.[67]

Besides the enactment of Anti Sexual Assault Act, learning from the law reforms in the U.S. and some European countries, the Taiwanese congress made several major changes to the definition of old rape offense in the Taiwanese Penal Code.[68] First, Congress renamed "rape" as the offense of "forcible sexual intercourse" and redefined it as a gender-neutral crime.[69] Men can be rape victims under the new law. Second, the legislature broadened the definition of sexual intercourse. Acts like anal intercourse, oral intercourse, and using an object to penetrate the victim were all included in the new meaning of sexual intercourse.[70] Third, the element of force or threat was reduced to a supportive role after the amendment. According to the statutory language, a person will commit "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.[71] Therefore, even though the perpetrator does not apply force or threat of force, if he engages sexual penetration with another person without the other person's consent through any other means, his act constitutes forcible sexual intercourse. Fourth, the legislature added the crime of "aggravated forcible sexual intercourse" in Article 222.[72] According to Article 222, the offense may be punished by imprisonment for life if forcible sexual intercourse occurs with any of the following circumstances: gang rape, rape with a weapon, break in to rape, rape and torture of the victim, rape by the use of drugs, and intercourse while the victim is (1) under fourteen years old, (2) mentally retarded, or (3) physically helpless.[73] Finally, the legislation eliminated the requirement that the victim file a formal legal complaint.[74] In Taiwan, some offenses are handled only if a formal legal complaint has been filed, and in the past, rape crime being one of them. In the past, many rapists were actually not convicted because the victim decided to withdraw the legal complaint during the investigation or at trial. Even though the prosecutor could

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[64] *Id.* Art. 13.
[65] *Id.* Art. 4-6.
[66] *Id.* Art. 9, 11-18.
[67] *Id.* Art. 3,4,8.
[68] *See* TAIWANESE CONG. REP., *supra* note 58, at 200-01.
[69] TAIWANESE PENAL CODE art. 221.
[70] *Id.*
[71] *Id.*
[72] TAIWANESE PENAL CODE art. 222.
[73] *Id.*
[74] The current Taiwanese Penal Code Article 221 is defined as a public prosecution crime instead of a handle only by complaint crime.

provide the evidence beyond reasonable doubt, the case was dismissed. The legislature amended the statute and eliminated requirement of a formal complaint in rape cases. Under the new rape law, any rape victim also has no right to withdraw the complaint she or he ever made.

Congress passed these two bills with the hope to relieve the social anger toward the series of brutal rape and murder incidents. Therefore, these two laws did not require a lot of discussion either in the standing committee meeting or in the general Congress meeting, and were hastily ratified. Even though some feminist groups suggested different proposals to the Congress, the final version of the new laws, especially the amendment of the Penal Code, was still hasty work. Worse, the Anti Rape Act for protecting victim's privacy, prohibit any verdict involving sexual violence to be published or revealed on paper or online.[75] The Act also requires that rape trials should be non-public. Only judges and prosecutors have authority to log into the internal database system to review rape verdicts. Accordingly, legal scholars in accordance with the general public have been unable do any research regarding the conviction or the acquittal of rape cases after the passage of Anti-Rape Act. Neither does the public nore the scholars have an opportunity to know how rape law is implemented or interpreted in action during these past ten years.

IV. A Review of the Taiwanese Rape Law Reform

A. General Reflections

The Taiwanese rape law reform creates a new rape report system and also a new rape law that claims to provide sufficient protection and reduce the prejudice towards rape victims. Unfortunately, the majority of Taiwanese women have generally not been satisfied with the results of the reform.

Actually, critics begin to claim that the new rape crisis centers have insufficient funding and unprofessional staff after a year into the reform.[76] Some feminist scholars also doubt whether the police, prosecutor, and judicial system are capable of coordinating with each other effectively under the system.[77] The public reaction toward rape law reform was also passive. According to the Women Right Annual Report, women's satisfaction about personal safety and sexual autonomy in 2005 did not even pass the bottom requirement of the evaluation, becoming the worst part of women's satisfaction index.[78] These results were similar to those reported in the 2003's annual survey prior to the reforms. Personal safety and the assurance of sexual

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[75] FAIGUI HUIBIAN, ANTI SEXUAL ASSAULT ACT, art. 13 (Taiwan).
[76] AWAKENING FOUNDATION, 1999 TAIWAN NU QUEN BAU GAU [1999 TAIWANESE WOMEN RIGHT REPORT], at 9 (2000).
[77] *Id.* at 17.
[78] CHINESE ASSOCIATION FOR HUMAN RIGHTS, 2005 REPORT OF THE TAIWANESE WOMEN'S HUMAN RIGHT http://www.cahr.org.tw/pindex0501.htm (last visited Aug. 10, 2005).

autonomy were the least satisfactory to Taiwanese women.[79] Surveys show that Taiwanese women feel the threat of violence from both public and private spheres.[80] Many women do not believe that there is a sufficient channel to report the crimes once they face sexual harassments or sexual violence no matter on campus, workplace, or even at home.[81] Women also feel that the government provides insufficient legal and social assistance to them once they encounter sexual violence and need to enter the judicial procedure.[82] Another statistic report issued by the Taiwanese Ministry of Justice echoed women's dissatisfaction regarding the protection of their safety. According to the report, from 2001 to 2005, every year, there were 3137 sexual assault cases/defendants (including rape, sexual abuse, and sexual misconducts etc.) reported to the prosecutor in average.[83] Although the average rate on rape crime conviction was 88.9% during these years; however, almost half of the reported cases got non-prosecuted decision before trial. Only 48.8% reported cases were accused and brought to trial by prosecutors[84]. Therefore, seriously speaking, from 2001 to 2005, only 41.2% of the reported cases were finally convicted.

The surveys and statistical data highlight that rape law reforms in 1997 and 1999 do not sufficiently achieve all their purposes. Reflection on this data should have further stimulated public debate about the impact of the reform. However, because the Anti Sexual Assault Act prohibits publicizing rape cases on-line or in hard copy, people had no way to learn how rape law was applied and interpreted in reality. More clearly, since 1997, after the Congress passed the Anti Sexual Assault Act, there has been essentially no legal research conducted to evaluate the impact of the Taiwanese rape law reform by reviewing the verdicts of rape crimes, because the Act made it successfully impossible to do so. However, case screening is the gateway to the criminal court system. Case review and the accompanying legal analysis are the most important methods to determine the aptitude of reform and its realistic application. Therefore, through securing a research project and grants from the Taiwan's National Science Council, the author of this article obtained a rare permission to access the data base of rape cases dating from 2000 to 2009. By providing discussion and details of many first-hand cases revealed in this article, the public and scholarly field will better understand how the reform has been executed since its enactment and whether the law reform reaches acceptable performance.

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[79] CHINESE ASSOCIATION FOR HUMAN RIGHTS, 2003 REPORT OF THE TAIWANESE WOMEN'S HUMAN RIGHT 23 (Dec. 2003).
[80] *Id.* at 26.
[81] CHINESE ASSOCIATION FOR HUMAN RIGHTS, 2005 REPORT OF THE TAIWANESE WOMEN'S HUMAN RIGHT http://www.cahr.org.tw/pindex0501.htm (last visited Aug. 10, 2005).
[82] *Id.*
[83] MINISTRY OF JUSTICE , TAIWAN, STATISTIC ANALYSIS OF SEXUAL ASSAULT CRIME, http://www.moj.gov.tw /public/Attachment/611210594768.pdf (last visited Aug. 10, 2005).
[84] *Id.*

B. Missing Entitlement and Poorly Designed Legislation

Although the reform introduces some new ideas such as sexual autonomy and gender-neutral legislation into the Taiwanese legal system, this article finds that the new rape law still maintains its focus mainly on the use of physical coercion instead of on the protection of a victim's will. The following analysis and research also reveal the first reason as to why the reform leads to such a disappointing outcome: legislation never clearly addressed the core detriment of rape. A reform with a missing entitlement creates bad legal framework, one which provides no proper condition under which the offence of rape is perpetrated and leaves confusion within the judicial branch in interpreting terms and difficulties at reaching conviction.

While rape has long been considered an offense in Taiwan's history, for a long time, the core harms of rape have been mistitled. In the era when KMT parties ruled Taiwan, rape was one of the crimes of Chapter 16 of the Penal Code against "social order and sexual morality." The offense was composed by perpetrator's application of physical force to have sexual intercourse with the victim and the victim's "defencelessness" to such a sexual coercion. The rape law reform in 1997 and 1999 eliminated the requirement of defenselessness, and changed the title of the Penal Code Chapter 16 from "offenses against social order and sexual moral" to "offenses against sexual autonomy." The legislation announced that the offenses of this chapter were to prevent the violence against people's sexual autonomy; accordingly, it renamed the offense of "rape" as "forcible sexual intercourse" and shifted the focus from victim's resistance to the violation against victim's will.[85] According to these statements, the new rape law in Taiwan gives the impression that the core offense of rape is the infringement of people's will to engage sexual activities. More precisely speaking, it seems to claim that rape is a crime harms people's legal interest of "sexual autonomy".

Regardless of whether one agrees with this statement or not, if the legislation prefers this "sexual autonomy right" model, Chapter 16 of the Taiwanese Penal Code should be constructed with the core value of sexual autonomy, and under what circumstances such autonomy might be infringed. If the definition of sexual autonomy is "to decide freely, when, with whom, and under what circumstance, to engage sexual intercourse or other intimate behaviors with another person," the ideal legal framework of Chapter 16 can be built with two different ways. Either one can be a good example to demonstrate the protection of sexual autonomy. The first way is adopting a "non-consent" model. The legal framework of this model would be: (1) centering the elements of crime on the violation of the victim's autonomy, and (2)

[85] Taiwanese Cong. Rep., *supra* note 58.

having a number of different sexual offenses around the relevant autonomy-educing conditions (for example, an offense of sexual intercourse through violence, an offense of sexual intercourse of the involuntarily intoxicated, and the sexual intercourse by deception). [86]The second way would to adopt an "affirmative consent" model. The legal framework of this model could be: (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 victim consent, perpetrator's abuse of power or authority, or simpily the expression of a lack of agreement of the victime to engage or continue to engage in the sexual activity.[87]

Unfortunately, the Congress of Taiwan did not adopt either model. Instead, it only modified few elements in the original rape statute while keeping other elements and related offenses in Chapter 16 almost unchanged. Consequently in sum, the new law still mainly centers on the use of violence or threats of violence by the perpetrator rather than focuses on the absence of consent. Disorganized statutes and poorly designed framework make the whole Chapter full of inconsistency and even contradictions. Worse, "sexual autonomy," the value which the legislation claims to protect, was totally lost in the inconsistency. Regrettably, feminists did not sense this major oversight. They had worked hard to attack the ineffectual requirement of the use of force and the victim's resistance in the old law, proposing a new law to protect sexual autonomy; neverthelss, 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 make any arguments or protests in the process.

Without any definition about sexual autonomy, consent, or non-consent, the legislature in Taiwan still listed several types of legal offenses involving nonconsensual intercourse under the current Taiwanese Penal Code Chapter 16. All of those 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 against the other person's will, the defendant's conduct constitutes forcible sexual intercourse, no matter how the defendant achieves the sexual intercourse.[88] If forcible

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[86] Like Massachusetts Rape which states that 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. MASS. ANN. CODE tit. 265, § 22 (a).

[87] Like California Penal Code which states that consent 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. Penal Code, CAL. STAT. § 261.6.

[88] TAIWANESE PENAL CODE, *supra* note 69.

sexual intercourse happens with aggravated circumstances, it constitutes "aggravated forcible sexual intercourse" pursuant to Article 222.[89] Unwanted sexual intercourse involving sexual extortion by abusing authority constitutes another offense. According to Article 228, one commits "abuse [of] power to obtain sex" if he abuses his authority in areas of office, medical treatment, social welfare, education, child custody, business supervision, or another similar unequal power relationship to coerce the one under his authority to submit to sexual intercourse.[90] According to the legal structure above, the most severe sexual offense is Article 222, aggravated forcible intercourse, which is punishable by imprisonment for seven years to life.[91] The second most severe rape crime is Article 221, forcible sexual intercourse, where the term of imprisonment is three to ten years.[92] Article 228's sentence for abuse of authority, from six months to five years, is the lightest.[93] Sexual deception and having sex with unconscious person are also the offenses in this Chapter. The legal framework about rape and the related crimes can be showed as the following chart:

	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 ith 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	1. The victim under a relationship is directed, supported, or cared by the offender.

[89] TAIWANESE PENAL CODE, *supra* note 72.
[90] TAIWANESE PENAL CODE art. 228.
[91] TAIWANESE PENAL CODE art. 222
[92] TAIWANESE PENAL CODE, *supra* note 69.
[93] TAIWANESE PENAL CODE, *supra* note 90.

Intercourse by Abusing Power or Authority	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.

Although the provisional list seem to draw clear lines on each offfense, the major problem of such a framework is the difficulty to distinguish Article 221 – the general rape statute and Article 228 – sexual extortion since the current statute claim to protect personal will. From the view of protecting sexual autonomy, Article 228 is actually good legislation. It recognizes that rape can occur under an unequal power structure. However, the poorly designed legal framework makes a much too complicated relationship between Article 221 and Article 228. Before the legal reform, courts have been known to apply Article 228, but gave the definition of 'abusing authority' a very narrow interpretation. In addition, the Taiwanese Highest Court decided several cases interpreting Article 228. According to the court we derive that first, the unwanted sex in Article 228 cases should be the result of an unequal relationship;[94] second, the victim should be situated under the perpetrator's authority and have no choice but to submit to the perpetrator's demand;[95] third, "supervision" means that the person possesses the power to command action upon the victim, or that the person has the power to discipline the victim;[96] fourth, "authority" means the power to influence the victim's position, criteria, business, job, or any other similar situations.[97] Therefore, according to the court, a person with supervising authority meant having the power to evaluate or to dominate the victim in work or education.[98]

[94] *See* Taiwan Highest Court, 25 Shang Ze N.7119, precedent.
[95] *See* Taiwan Highest Court, 33 Shang Ze N.262, precedent.
[96] *See* Taiwan Highest Court, 96 Tai Shang Ze N.297, precedent.
[97] *See* Taiwan Highest Court, 96 Tai Shang Ze N.7487, precedent.
[98] *Id.*

Under such interpretation, cases involving the abuse of authority were not easily convicted. Article 228 remains in existence after the legal reform, while the new statute alongside, Article 221, defines forcible sexual intercourse as applying any means of violating the victim's will. Therefore, theoretically speaking, all cases falling under Article 228 (against victim's will by abusing authority) could be incorporated into the new Article 221(against victim's will by violence, threat, medicine, and any other means), making article 228 substantially no longer necessary. However, the legislature did not repeal Article 228 in the reform, which now exists parellel to Article 221. Article 228 now becomes a lesser crime included within Article 221. According to the Taiwanese Penal Code, if a single conduct of a defendant constitutes more than one offenses at the same time, the court can only punish the offender with the more severe crime (for example, when a defendant burns a house and the burning kills a person inside the house, the law will only convict the defendant with a murder or homicide).[99] When one abuses his official authority to achieve his sexual demands against the other person's will, in logic, the conduct now violates both Article 221 and Article 228 and since the punishment for Article 221 is more severe, the defendant would be convicted with Article 221 instead of Article 228. Following this argument, Article 228 truly becomes mere formality in the current Penal Code.

Astonishingly, the criminal courts in Taiwan do not apply the new rape statutes in this way. After the reform, the Highest Court of Taiwan pointed out that since the legislation lists several means to violate a victim's will in Article 221, legislation meant to constitute Article 221 with application of "the same level degree of force as physical compulsion and threat" by the defendent, rather than using a general element of "against another person's will." Following this contention, to suffice the use of new Article 221, a defendant should apply medicine, threat, forcible compulsion or any other means which reach the degree equal to forcible compulsion to violate another person's will. If the defendant applies sexual extortion by abusing the power or authority, the conduct still constitutes Article 228 instead of Article 221. And since Article 221 is interpreted narrowly, if the victim "still has other choices but decides to submit her consent," the court will see sexual intercourse as consensual.

The application of the new Chapter 16 deprives the reform's purpose to protect sexual autonomy. In rape trial, a court focuses more on whether the defendant's behavior reaches the degree of forcible compulsion rather than whether the victim's sexual intercourse was based on consent. In other words, whenever the defendant had applied non-physical force or applied merely a minor threat, prosecutors will tend to drop the case and courts will tend to make a not-guilty verdict. Before the reform,

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[99] TAIWANESE PENAL CODE art. 55.

although Article 228 was narrowly interpreted before the reform, it was at least a weapon to prevent non-physical coercion in sexual relationships. The new law seemingly merge Article 228 into Article 221; Therefore, in application, supposing a teacher abuses his authority to sexually coerce his student, the teacher should be charged under Article 221 instead of Article 228 after reform. The problem is that under the unclear legal definition of new Article 221, which is interpreted by the courts to require the application of force, the reformed law actually loses its weapon against non-physical yet non-consensual sexual intercourse, especially when it involves the abuse of authority such as the example stated above. A poorly designed legal framework and unclear legal definition definitely erode the foundation of the reform.

C. Disappointing Judicial Decision-Making

The reform fails its goal not only because the poorly designed legal framework is absent of core entitlement, but also because the judicial branch implemented the law with serious gender bias. The major purpose of the legislature's 1999 reforms was to change the traditional definition of rape crimes, to include more types of sexual violations, to eliminate the "unable to resist" requirement, and to focus on protecting women's will. However, upon review of the judicial determinations, this article finds that rape myths and gender bias dominate the preponderance of rape verdicts. It is clear that women's sexual autonomies are not fully protected by the new law.

While most people in Taiwan accept the inevitable bias evidenced by police and defense attorneys in rape crimes, Taiwanese people also still believe that prosecutors and judges are the objective source of authority in the legal system, deeming as symbols for the public interest. In the courtroom, people still hope the prosecutor can fight for their rights and the judge can balance any inequality between two parties; however, according to my case reviews, instead of pursuing justice, prosecutors seldom challenge the courts in rape cases -- instead they tend to dismiss cases if they believe such cases will not get the court's approval. Half of the reported rape cases are not brought into trial. Further, even when a rape case is prosecuted, judges seem to adopt and enforce gender and rape myths about rape victims.

This article mainly reviews rape cases from Jan 1st, 2000 to Jan 1st2009 in both Taipei District Court and Kaohsiung District Court, which are the two largest district courts in Taiwan, to see why the verdict for some prosecuted rape cases turned out "not guilty." The purpose of this case reviewing is to understand under what circumstances trial judges would reach "reasonable doubt" toward the facts to leave them unable to convict defendants. In Taipei District Court, there have been 120 rape cases obtaining not-guilty verdicts from a total of 884 rape cases. The non-conviction

rate is 13.5 %. In Kaohsiung District Court, there have been 221 rape cases obtaining not-guilty verdicts from a total of 1844 rape cases. The average non-conviction rate is 11.9%. Compared with other types of crimes, the non-conviction rates of rape crimes in both courts are not especially high. As it may, it should be noted that first of all, half of the reported cases were not prosecuted by district attorneys. (In the other words, prosecutors applied their discretion to drop half of the reported rape cases which are characterized as 'nonsolid' or 'not convictable.') Second, the low non-conviction rate does not guarantee a fair and justice trial. We should go further to review the reasons why those defendant were acquitted.

Through case screening, this article finds that cases obtained not-guilty verdicts present severe gender discrimination and rape myths. According to this article's research, discrediting victims' allegations of rape crimes and typifying rape scenario are two major reasons trial courts find "reasonable doubt" and make acquittal verdicts.

The first occasion where victims' allegations are discredited is 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 held the defendant not guilty solely on the reason that the victim's two allegations, one at police station and one before the district attorney, were inconsistent.[100]

The second circumstance where trial courts discredit victims' allegations of rape incident relates to the non-typical rape relevant behaviors or scenarios. Like prosecutors, trial judges in the routine handling of rape cases usually develop a repertoire of knowledge about the "features" of rape crimes.[101] 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.[102] These typifications of rape relevant behaviors are another resource for courts' "reasonable doubts." For example, in an acquittal verdict from the Kaohsiung District Court, the court held the defendant not guilty by the reason that victim and defendant were acquainted to each other for a long time, and usually had intimate body contact (the two parties massaged each other before the rape incident).[103] In another acquaintance

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[100] Kauhsiung District, 94 Su Ze N.958, Verdict.

[101] Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, *in* RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT 204 (Patricia Searles & Ronald J. Berger eds., 1995).

[102] *Id.*

[103] Kauhsiung District Court, 93 Su Ze N.1039, Verdict.

rape case from the Taipei District Court, the court held the defendant acquittal, too, when the court found that victim walked the defendant to the motel willingly before the rape incident.[104] Furthermore, victims' silence about asking for help or showing nonresistance in the incidence reduces their creditability, too. In a case from the Kaohsiung District Court, the court questioned the victim why she did not resist or even ask for help when the defendant forced her to submit sexual intercourse.[105] The victim explained that she did not cry out because the incident happened at midnight within her home co-occupied with her family, and she did not want her family to know that the defendant had been staying in her house so late at that moment, the court discredited her account and held the defendant not guilty.[106] Additionally, cases involving nonphysical force which causes no physical injury or visual bruises to victims are also highly suspected by trial courts. The Kaohsiung District Court once held a defendant not guilty because the medical report did not show that the victim suffered any injuries, and so it did not match what victim alleged when she said that she had kept resisting when the defendant tried to penetrate her.[107] Victims' untypical post-incident behaviors lead to an acquittal verdict, too. For example, in one Taipei District Court's verdict, the court discredited the victim's account because "how can victim go to work and handle her clients 'so normally' the next day after a rape incident."[108] Another important feature relates to the reporting timeliness. Rape victims are expected to report the incident promptly. In one Kaohsiung District Court's verdict, the court questioned the victim why she reported the case at a late timing and why she did not go to any clinic or hospital immediately after the defendant left her.[109]

Additionally, a victim's current circumstance, such as her financial condition, or her connection with illegal activities, such as prostitution, may enable the court to "find" ulterior motive for her allegation. Such ulterior motive will lead to a court's "reasonable doubt" and discredit victim's allegation as well. For example, in a case from the Taipei District Court, the complaint testified that she knew the defendant on internet.[110] The defendant first invited her to have lunch together, and then asked her to go to the hotel he was staying at to find job offers for her.[111] When she entered the room, the defendant pulled off her clothes, pushed her to bed and had sexual intercourse with her against her will.[112] However, according to the defendant's

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[104] Taipei District Court, 94 Su Ze N.1321, Verdict.
[105] Kauhsiung District Court, 95 Su Ze N.3019, Verdict.
[106] *Id.*
[107] Kauhsiung District Court, 90 Su Ze N.588, Verdict.
[108] Taipei District Court, 89 Su Ze N.273, Verdict.
[109] Kauhsiung District Court, 94 Su Ze N.240, Verdict
[110] Taipei District Court, 97 Su Ze N.569, Verdict.
[111] *Id.*
[112] *Id.*

version, the complaint was a prostitute and had sex with him consensually.[113] The court finally favored the defendant's version and held the complaint made a false complaint with the following reasons: (1) the complaint came to the hotel to see a man alone, (2) the complaint did not leave the hotel immediately when she saw the defendant wearing a robe to open the door, (3) although the complaint went to the hospital after the incident, the medical report did not show the complaint suffering bodily injury, and (4) the call records show that the defendant called the complaint twice after the incident, and the complaint had conversation with the defendant each time (the length of the conversation: the first time - 156 seconds, and the second time - 65 seconds).[114]

Non-typical rape victims' allegations are discredited; on the contrary, non-typical defendant's arguments are evaluated as more accountable evidence at trial. Courts have their typical features toward rape offenders, too. Those features include violence, rudeness, and ferociousness. The imagination of a man who commits rape crime is a monster which jumps from the bushes and tries to tear and eat his target. Therefore, once a defendant behaves in a different scenario, such as being friendly to the victim, leaving money to the victim, or taking the victim to a public space like a restaurant or a bar after the sexual intercourse, courts tend to believe the defendant's argument that the intercourse was consensual.[115] Besides discrediting victims' allegations and typifying rape scenarios aforementioned, in some cases, this article finds that trial courts use very peculiar reasons to reach the acquittal verdicts. For example, in verdict from the Taipei District Court, the court held the defendant not guilty, because the court considered the victim's personality as "tough" which is not easy to sexually abuse.[116] In the same case, the court also believed the 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 the door when he was with the victim in the room at the alleged time.[117] According to the court, "a man barely has sexual desire under such a circumstance"[118] Another two special verdicts demonstrate courts' gender bias. In one case, the court believes that the defendant did not have sexual intercourse with the victim because "men will not have interests to engage sexual

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[113] *Id.*
[114] *Id.*
[115] *See* Taipei District Court, 89 Su Ze N.1561, Verdict. *See also* Kauhsiung District Court, 97 Su Ze N. 939, Verdict.
[116] The court contended that the victim once report a damage case to the police. In that case, the police tried to make a settlement, but the victim rejected and insisted to make the complaint. The court thus concluded that the victim is not a tender woman who will be abused by the defendant easily. *See* Taipei District Court, 93 Su Ze N.709, Verdict.
[117] *Id.*
[118] *Id.*

intercourse with a woman during her period."[119] In the other case, the court questioned the victim's nonresistance by asking "since the victim testified that she was brushing her teeth when the defendant tried to sexually assault her, why didn't she use her toothbrush which has a "sharp handle" as a weapon against the defendant's compulsion?"[120]

When we screen those not-guilty verdicts carefully, the true face of the perceived "high convicted rate" is unveiled. While many of the mentioned not-guilty verdicts might have had reasonable doubtful factors in the eyes of the judges, under the eyes of women and feminists, however, those doubts are most "unreasonable." Those doubts, in fact, reflect rape myths and patriarchic culture in the courtroom. Such a culture divides rape victims into two groups. Victims who report rape crimes promptly, have serious injuries or bruises, are not acquainted with defendants, have no ulterior motive to make any false accusations, and repeat their accounts consistently in front of different criminal justice officers, may belong to the "rapable group." On the contrary, once victims' stories and features are inconsistent with the traditional rape scenario, they will be shifted to the "unrapable group." In this group, victims' consents to sexual intercourses are presumed, 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 men's flirting. Besides the rapable/ unrapable distinction, such a culture maintains the "aggressive male stereotype" at rape trials. The aggressive male stereotype encourages men to be socially, culturally and sexually forward and dominative. When such a stereotype applies in the courts, it reinforces the requirement of severe physical force in rape crimes. Therefore, under the prior rape law, the force that overcame the victim's resistance needed to be very strong. After the reform, force was no longer a required element, yet rape cases involving nonphysical force were seldom found to be brought in the courts of the Taiwanese judicial system. When rape victims are non-typical, their allegations of sexual assault were discredited by the courts and created a "reasonable doubt" of fact. Vice versa, when rape offenders are non-typical, their allegations of consensual sexual intercourse were acredited by the courts and also created a "reasonable doubt" of the fact.

It should be noted, however, that under some exceptions such as the following circumstances, courts will see the cases as more convictable. First, if the prosecutor can prove that defendant made the victim unconscious using drugs or alcohol, courts

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[119] Kauhsiung District Court, 94 Su Ze N.3129, Verdict. The court state, "the day the victim complained to be raped was the second day of the victim's period…usually, men will not have interest to have sexual intercourse with women in her period."

[120] Taipei District Court, 93 Su Ze N.1712, Verdict. The court asked, "since the victim claimed that she was brushing her teeth when the defendant tried to rape her, why didn't she use the toothbrush against the defendant's violation?"

tend to reach a guilty verdict, because the victim was unable to consent due to her being intoxicated by the defendant's acts.[121] Courts believe that such a circumstance can satisfy the element of forcible compulsion in the Penal Code Article 221. A second type of non-physical force case involves religious compulsion.[122] The act of applying religious power to coerce a woman to submit to sexual intercourse, such as a defendant's deceit of godly power so a victim will have intercourse with him, has been recognized as rape by the Taiwanese Highest Court for a long time.[123] Courts believe that the fear of unknown power is a force which is strong enough to change a person's will and coerce a person to submit sexual intercourse. Therefore, prosecutors are not reluctant to bring those cases to trial, and the courts are more willing to convict those defendants, because they knew the courts will hand down convictions with the Penal Code Article 221.[124] The third type of case involves threats from misrepresentation or misleading falsehood. For example, in one case, the victim solicited sexual services online and the defendant accepted.[125] When they met, the defendant pretended he was a policeman and demanded that the victim engage in sexual intercourse with him.[126] The Court of Appeals held that the victim submitted to sexual intercourse based on the fear of being arrested, and that her submission did not result from voluntary consent.[127] Therefore, the defendant's act violated the victim's will and satisfied the crime of the elements of Article 221, forcible sexual intercourse.[128]

Outside of the above types, this research finds very few convicted rape cases involving two mentally capable adults where the defendant coerced the victim to submit to unwanted sex by non-physical force. In light of the report, either the victims are not reporting their cases to the police, or the prosecution is dismissing them. In sum, gender discrimination and rape myth dominate the outcome of rape trials. According to the Highest Court's holding in a rape case, victim's testimony at rape trial should be collaborated by other circumstantial evidences such as injuries, bruise, or medical report.[129] Moreover, it is apparent that the ghost requirement of utmost resistance still haunts the courtroom at rape trial even though such an element was eliminated by the legislator ten years ago.

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[121] Taiwan Highest Court, 93 Taishang Ze N.795, verdict. Moreover, in this case, the victim also offered the court her medical certificate to show that she suffered other physical injuries in the incident.
[122] *See* Taiwan Court of Appeal, 89 Shang Geng third Ze N.258, verdict.
[123] *See* Taiwan Highest Court, 56 Taishang Ze N.2210, precedent.
[124] Taiwan Highest Court, 89 Shang Geng third Ze N.258.
[125] Taiwan Court of Appeal, 92 Shang Su Ze N.4586, verdict.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] Taiwan Highest Court, 97 Tai-Shang Ze N.4589,Verdict.

V. Reconstructing Substantive Rape Law

A. Rethinking the Wrongfulness of Rape

The Taiwanese judicial culture is conservative and passive. Therefore, it is difficult for the judiciary to interpret the law with gender equality thoughts actively. The most effective way to eliminate rape myth and gender bias at trials is to reconstruct the statutes of rape offences in the Taiwanese Penal Code, to limit the judicial discretion and to avoid the discrimination to rape victims. Before reconstructing the substantive criminal code, one must answer a question as to what makes rape a crime, because different perspectives regarding the wrongfulness of rape may lead to a different reform model. Although lawmakers in Taiwan enacted new rape laws with the term "sexual autonomy," there is no definition and full discussion toward what sexual autonomy means. Taiwanese legal literatures have few studies about rape issues due to the difficulty in accessing rape cases. Thus, comparative laws and feminist legal theories which have a lot of debates about rape crime and rape law would provide as useful reference for Taiwan to analyze the wrongfulness of rape.

Historically, the U.S. legal reformers view the wrong of rape from a simple right-based perspective. Schulhofer, for example, suggests that unwanted sex is a violation of sexual autonomy, and sexual autonomy is an important right deserving more protection.[130] This is a typical rights-based argument. I agree that sexual autonomy is an important individual right in the society. I further agree with Schulhofer's definition of sexual autonomy. He indicates that sexual autonomy should include three dimensions: (1) the internal capacity to make reasonably mature and rational choice, (2) freedom from impermissible external pressure, and (3) physical and bodily integrity of the individual.[131] However, I believe that the relationship of the wrongs, harms, and violations of sexual autonomy constitute a complex dynamic and needs a more elaborate discussion.

First, sexual autonomy violation can involve non-forcible coercion. An aggravated rape inevitably results in physical injury to the victim so that no one can doubt the harm and wrong of such an act. But, nonconsensual yet non-forcible intercourse involves no force and physical injury, and the harm and wrongness of such an act is more ambiguous. Second, while sexual autonomy is an important right to human beings, there are various ways to prevent the harms. If we decide to protect sexual autonomy with criminal law, what is our justification?

In the following sections, this article will discuss and analyze what conduct should be considered as rape. This article applies feminist theories to the judicial research in answering the following questions. 1. What is the relationship between harm, wrong

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[130] STEPHEN J. SCHULHOFER, UNWANTED SEX 99 (1998).
[131] *Id.* at 111.

and criminal liability? 2. What act should be considered as rape and what is the harm of such act? 3. What is the moral wrong of rape? 4. What kind of sexual encounters should be deemed as criminal behavior and why?

a. The Relations of Harm, Wrong and the Criminal Liability

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 (weapon, bruises, blood), then what most men do when they disregard women's sexual autonomy is not rape."[132] Thus, for progressive rape law reform, we need first to reconsider how we conceptualize the harm and wrong of rape. In order to do so, we will need to understand the current theories of wrong and harm in criminal law.

A criminal act is thought to be a wrong act worthy of blame and punishment. However, what sorts of conduct can a society rightly make as criminal? According to Professor Feinberg, it is legitimate for society to criminalize behavior if and only if it causes harm.[133] As for the questions of what is such harm, Feinberg argues that such harm should be (1) a wrongful act that (2) injures or invades the interest of another person.[134] Feinberg's argument seems to provide a justification of the criminalization of certain behavior. However, to define harm in terms of set-backs to interests pushes the question back to the definition of the interests.[135]

We can divide human interests into two major categories: the well-being interest and the rights-based interest.[136] These two interests serve different functions in criminal law. We say A sets back B's well-being interest when A's act causes B's life to go less well, as when A breaks B's arm, steals B's money, or kidnaps B's child.[137] However, when we say A sets back B's right-based interest, we mean that A's action violates B's legal rights and A has legal responsibility. Sometimes legal rights interests are violated even if a person's well-being interest is not harmed. Professor Alan Wertheimer indicates that A might violate B's property right if he trespasses on B's house when A is sleeping and not aware of the invasion.[138] There are also occasions when one's well-being interest is harmed, but he does not have legal right to sue. For example, A had a car accident and should receive an emergency surgery. Doctor B cut A's muscle in the surgery to set A's broken bone. Although A's well-being interest (body) was harmed in the surgery, A's legal right was not harmed because what B did was an authorized medical treatment. Therefore, Feinberg's interest-harm analysis

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[132] Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 362 (1993).
[133] ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 92 (2003).
[134] *Id.*
[135] FEINBERG, HARM TO OTHER 34-35 (1984).
[136] WERTHEIMER, *supra* note 133, at 92.
[137] *Id.*
[138] *Id.* at 94.

might not sufficient to explain what ultimate interests the law should protect. As Wertheimer argues, the interest-harm analysis fails to specify whether the interest is defined in purely experiential terms, or also in objective or moral terms.[139]

Professor Wertheimer offers another view to consider the wrong, harm and criminal liability. According to Wertheimer, we might say that the wrongness of an act is a function of three factors: (1) expected or ex ante harm to a victim, (2) the actor's culpability for that act, and (3) the actual harmful consequences of the actor's act.[140] Wertheimer believes that the distinction between "A's act is wrong" and "A's act harms B" is important.[141] According to him, the distinction opens up some theoretical space because it makes it more plausible to accept a predominantly experiential account of harm without fearing that such an account will have unacceptable moral implications.[142] In the other words, under this analysis, the moral or ethnical wrong of an act can be separated from the individual harm of the act. A's act might not involve a serious harm to B (because B might not be seriously harmed experientially), even though A's action can still be seriously moral or ethnical wrong.

Professor Wertheimer's approach is helpful in harmonizing individual difference with the necessity of a universal legal standard. It is true that every person is a distinct individual. The actual harm and reaction caused by an act is particular to one's personal experience. For example, B is a millionaire and experiences a relatively minimal loss or inconvenience if A steal $100 from his pocket. On the contrary, $100 might be C's entire week's wage and C would likely experience substantial hardship if A takes this $100 away. Therefore, if we want to determine the criminality of an act by focusing on the individual harm, the problem of how to evaluate such harm will always exists because there is no universal harm of the same act. As a result, we might not be able to make any law or regulation.

The "distinction" approach that distinguishes harm and wrong avoids the paradox by focusing on the "expected harm" instead of the "individual harm." Moreover, it distinguishes between the wrongness *of* the act and the harm *by* the act. Applying this theory, the justification for criminalization should be based on the wrong of the act instead of the individually resultant harm of the act. Additionally, the wrong of the act should be evaluated according to a standard of moral or ethnical malice and the expected harm to the victim and the society. Malice is based on the defendant's state of mind and the cruelty of the act. The expectant harm of an act means the average harm caused by the act.[143]

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[139] *Id.*
[140] *Id.* at 96.
[141] *Id.*
[142] *Id.*
[143] *Id.*

According to this approach, robbery is more wrong than burglary, because generally the average expected harm of robbery (which involves direct physically interference with the victim) is greater than the average harm of burglary, even though many robberies involve less significant loss than burglaries.[144] Moreover, considering the malice, since one's culpability for his act is a function of his intentions or capacities, while murder is accepted to be more wrong than robbery, negligent homicide may be less wrong than armed robbery, even though the expected harm of manslaughter is greater than the expected harm of armed robbery.[145] In the other words, the wrong/harm distinction approach allows for criminalizing certain wrongful acts without requiring evidence of actual serious harm being suffered by the specific victim.[146]

After distinguishing between the wrong and harm of an act, consideration must be given to the following question: why is civil liability insufficient such that certain acts must be considered criminal? The function of criminal punishment is different from civil liability. Civil liability focuses on compensating the damage.[147] However, the aim of criminal law is to protect the public against harm.[148] With torts, the emphasis is more on a fair adjustment of the conflicting interests of the litigating parties to achieve a desirable social result, with morality taking on less importance.[149] With crimes, there is emphasis on a bad mind and immorality.[150] As Henry Hart once concluded, what distinguishes a criminal from a civil sanction and all that distinguishes it, is that it is ventured, it is the judgment of community condemnation which accompanies and justifies its imposition.[151] Accordingly, some behavior when it cannot reach the minimum requirement of morality in the community, it not only establishes the civil liability but also deserves the criminal punishment.

b. The Essential Wrongfulness of Rape

Then, what makes rape a crime? In Taiwan, the traditional rape law prior to the reform was to protect sexual morality and women's chastity. "Sexual Autonomy" is a product imported from the U.S. legal perspective. Therefore, the US feminists' views toward the wrongfulness of rape can be an important reference to Taiwan.

Susan Brownmiller, a pioneer of the U.S. rape law reform, claims the first feminist view of the wrong of rape. In her book, "Against Our Will," Brownmiller identifies an inherent and ingrained inequality of men and women under the law. She regards rape

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144 *Id.*
145 *Id.*
146 *Id.* at 96-97.
147 WAYNE R. LAFAVE, CRIMINAL LAW 12 (2d ed. 1986).
148 *Id.* at 13.
149 *Id.*
150 *Id.*
151 RICHARD J. BONNIE ET AL., CRIMINAL LAW 6 (1997) (citing Henry Hart, *Criminal law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958)).

as violence, claiming that that all acts of sex forced on unwilling victims deserve to be treated in concept as equally grave offenses in the eyes of the law.[152] She proposes to modify rape as a gender-free, non-activity-specific law governing all manners of sexual assaults.[153] Brownmiller's theory formed the basic theme of the 1970's rape law reforms. However, this approach quickly faced challenges from other legal feminists.

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. She argues that the liberal tradition of seeing rape as an act of violence is problematic and not feminist enough.[154] One of MacKinnon's famous arguments is "perhaps the wrong of rape has proven so difficult to articulate because the unquestionable starting point has been that rape is definable as distinct from intercourse, when for women it is difficult to distinguish them under conditions of male dominance."[155] She argues the necessity of reforming the U.S. criminal law because criminal laws defined the crime of rape long before women were permitted to vote or to serve on juries.[156] Since MacKinnon sees rape as a form of male dominance, the method she provided is a sex equality analysis. Instead of drafting a substantive rape statute, MacKinnon's argument is that rape is sex-based violation. She agrees with the enactment of Equal Protection Bill such as VAWA (the Violence Against Women Act). It seems that she supports putting the power to bring claims for sexual violence into the hands of victims rather than state authorities because she conceives the injury of sexual violation not as a moral wrong, but as a violation of human rights on the basis of sex.[157]

Susan Estrich, another brilliant legal scholar, also called for rape law reform. Being a rape survivor, Estrich claims that in the U.S. legal system, simple rape (victim has prior relationship with defendant, or victim did not resist in the incident) has been excluded and prejudiced.[158] She argued in her book, "Real Rape", that common law approach celebrates female chastity and is the wrong answer for rape crime.[159] For her, there are four basic prejudices in common law tradition should be eliminated: the resistance requirement, the marital exemption, the corroboration evidence rule, and

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[152] BROWNMILLER, AGAINST OUR WILL 378,391 (1975).
[153] *Id.*
[154] MacKinnon, *Feminism, Marxism, Method, and State*, *in* FEMINIST LEGAL THEORY 187 (1991).
[155] *Id.* MacKinnon once rebutted those who interpret her theory as a claim that all sex is rape, however, it is clear that by reading her work, she tend to argue that rape is virtually indistinguishable from normal heterosexual intercourse. *See* ANN J. CAHILL, RETHINKING RAPE 42 (2001).
[156] MACKINNON, SEXUAL EQUALITY: RAPE LAW 766 (2001).
[157] *Id.* at 888.
[158] *See generally* SUSAN ESTRICH, REAL RAPE (1987).
[159] *Id.* at 31.

the cautionary instruction.[160] She believes that consent should be defined as "no means no" in criminal law.[161] She also proposes changing of *mens rea* standard.[162] According to her, the law should hold a man to a high reasonableness standard.[163] A reasonable man should be held to know that no means no, and unreasonable mistakes, no matter how honestly claimed, should not exculpate.[164]

Professors Caroline A. Forell and Donna M. Matthews support similar views to those of Estrich. These two scholars argue that the current structure of the law of harassment, rape, stalking, and domestic homicide in most jurisdictions allocates evidentiary burdens in a way that assumes a male perpetrator's conduct has been reasonable and asks if the victim behaved reasonably from "his" perspective.[165] Although violation against a woman's will is the wrong of rape, the woman's perspective is ignored in law.[166] Therefore, they advocate more correctly, that rape law should adopt the "reasonable woman standard." This reasonable woman standard has the following components: (1) sexual penetration without a woman's consent is rape, (2) a woman's indication of her lack of consent by words, such as saying "no," or by conduct, such as pushing away, crying, or trying to leave, and a man's failure to stop constitutes rape, or (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.[167]

Another legal scholar who also favors "no means no" rule is Professor Donald Dripps, who provides an entirely different view about rape. For Dripps, rape harms the value of sexual autonomy.[168] He defines sexual autonomy as "the freedom to refuse to have sex with any one for any reason."[169] 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.[170] He argues, "the injustice of the ex ante distribution of economic assets does not justify theft; still less does the injustice of the distribution of erotic assets justify rape."[171] He indicates that there could be either or both two harms depending on the types of rape.[172] The first harm is

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[160] *See id. generally* Ch.3: Wrong Answers: The Common Law Approach.
[161] *Id.* at 102.
[162] *Id.* at 98.
[163] *See* general discussion *id.* at 97-104.
[164] *Id.* at 103.
[165] CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN 17 (2000).
[166] *Id.* at 223.
[167] *Id.*
[168] *See* Donald A. Dripps, *Beyond Rape: An Essay on the Difference between the Presence of Force and the Abbsence of Consent*, 92 COLUM L. REV. 1780, 1785 (1992).
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 1797.

violence, or threatened violence; the second is "expropriation" of the victim's control of her body for sexual purposes.[173] According to Dripps' theory, an attempted forcible rape involves the harm of violence, but no harm of expropriation.[174] A completed forcible rape involves both harms.[175] The act "engaging sex with non conscious victim" involves the harm of expropriation, but no harm of violence.[176] To correspond with these two harms, Dripps creates two offenses in rape law. The first offense, which should enhance the penalty for assault is purposely or knowingly applying violence to cause another person to engage in sexual acts.[177] Under current law, if no sex ensues, this is attempted rape. In contrast, under Dripp's proposal, it would be a sexual motivated assault.[178] Sexual penetration is not an element of such offense, but if penetration occurred, it would constitute the separate crime named sexual expropriation. The second offense, called sexual expropriation, covers nonviolent interferences with sexual autonomy such as sex with an unconscious or mentally incompetent victim, or sex obtained by fraud or nonviolent extortion.[179] For Dripps, "the law should demand no more from anyone than the expressed refusal to engage in sex and should punish the disregard of that expressed refusal even if the expressed refusal is proved by twenty bishops to have been insincere."[180] Dripps defines sexual expropriation as a misdemeanor or minor felony crime to punish those who purposely or knowingly engage in a sexual act with another person, knowing that the other person has expressed a refusal to engage in that act.[181]

A historical view, offered by Professor Anne M. Coughlin, forms another approach to rape law analysis. Coughlin agrees that rape is harm to women's "sexual self-determination," but she argues that for historical reasons such protection has not been achieved by legal system and enforcement.[182] She analyzes rape by studying the cultural and historical analysis of heterosexuality in conjunction with the prohibitions of fornication and adultery.[183] In Coughlin's view, rape law, like fornication and adultery, is a way for states to regulate heterosexual intercourse outside the marriage.[184] Coughlin points out that the criminalization of non-marital intercourse influences the content of rape doctrine and causes the deep suspicion of legal systems

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[173] *Id.*
[174] *Id. See also* David P. Bryden, *Forum on the Law of Rape: Redefining Rape*, 3 BUFF. CRIM. L. R. 317, 393 (2000).
[175] *See* Dripps, *supra* note 168, at 1797-1800.
[176] *Id.* at 1800.
[177] *Id.* at 1796-1797.
[178] *Id.* at 1799.
[179] *Id.* at 1799-1803.
[180] *Id.* at 1804.
[181] *Id.*
[182] *See generally* Anne. M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 45 (1998).
[183] *Id.* at 7.
[184] *Id.* at 26, 27.

toward raped women.[185] She cites Schoar Perkins and Boyce's comments, that any woman who claims that she had been raped necessarily also confesses that her body has been the site of an unlawful sexual connection.[186] Therefore, when a woman comes forward to report that she has been raped, she is not in the same position as the person who comes forward to report that she has been robbed, because someone who gives away sex, unlike someone who gives away money, is herself committing a crime.[187] Under a system that punishes all non-marital heterosexual intercourse, a woman's non-consent distinguished the man's crime (rape) from the couple's crime (fornication or adultery).[188] Thus, a rape complaint had been required for utmost resistance to prove that she did not commit fornication or adultery.[189] On the contrary, a man who was accused as a rapist, could confess that a crime had occurred but insist that the transgression was fornication or adultery for which the woman shared joint criminal responsibility, rather than rape, to reduce his responsibility.[190] For Coughlin, although the current legal system no longer punishes anyone directly for fornication or adultery, the substantive elements of rape still are calibrated so as to require women to prove that they should not be held responsible for one of those offenses.[191] Therefore, she proposes to eliminate the traditional stigma to female sexual activity, such as the requirement of force and resistance, from the official definition of rape law.[192]

Professor Stephen J. Schulhofer provides well argued and insightful views of rape, rape law and rape law reform in his book "Unwanted Sex." He evaluates the impact of rape law reform and points out that the failure of the reform lies in the missing entitlement of "sexual autonomy." Schulhofer's arguments can be summarized as four parts as follows.

First, he uses unwanted sex to replace the term "rape" and defines the harm of unwanted sex as a violation of sexual autonomy.[193] Second, he defines that sexual autonomy as three distinct dimensions. The first two dimensions are mental - an internal capacity to make reasonably mature and rational choices and an external freedom from impermissible pressure and constrains; the third dimension is the physical boundary and the bodily integrity of the individual.[194] Third, he stresses that coercion does not merely means physical force but entails different types; some

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185 *See id.* part II.
186 *Id.* at 31.
187 *Id.* at 29.
188 *Id.* at 27.
189 *Id.* at 39.
190 *Id.* at 31.
191 *Id.* at 45.
192 *Id.* at 46.
193 SCHULHOFER, *supra* note 130, at 110-13 (1998).
194 *Id.*

demands which resemble an "offer," but in fact could be coercive and establish a crime.[195] For example, in corruption, coercive offer can establish extortion.[196] Applying the same theory, Schulhofer claims that a sexual proposal should be treated as coercion and a violation of sexual autonomy when it arouses fear of retaliatory acts that violate specific legal rights.[197] Fourth, to provide sufficient protection of sexual autonomy, Schulhofer lists different circumstances where illegitimate coercion might exist, and proposes different legal solutions for each circumstance. In supervisor-subordinate relationships, Schulhofer suggests the law should ban a supervisor's initiation of "unwelcome" sexual advances.[198] In teacher-student relationships, he suggests that university should ban on all intimate liaisons between teachers and their current students.[199] In therapist-patient relationship, Schulhofer argues that an affair between psychiatrists and his or her patient's valid consent barely exists because "if the therapist is attracted to the patient and the emotionally involved, he cannot possibly give disinterested advice [to have that patient's valid, informed consent]. If he is not emotionally involved, a sexual liaison would be devastating for the patient, and any advice he gives would be seriously incomplete unless he discloses that fact. The only possibility for adequately informed consent would be for the patient to consult another therapist and discuss the problem in depth."[200]

Schulhofer argues that relying on ethical codes is insufficient to protect patients' sexual autonomy and proposes to apply criminal sanctions when a therapist has a sexual encounter with the patient in any mental health therapy.[201] According to Schulhofer, if a doctor obtains consent to sex from his or her patient by threatening to withhold care or medication, it should be treated as a crime akin to extortion.[202] Similarly, if a doctor obtains a patient's consent by misrepresenting that sex is part of treatment, this act should be subjected to criminal prosecution.[203] Similarly, Schulhofer argues that once a lawyer-client relationship is established, a client has a right to the lawyer's diligent professional service, with no sexual strings attached.[204] A lawyer's quid-pro-quo sexual demand, like any other form of extortion, should be treated as a serious criminal offense.[205] Finally, in a dating relationship, Schulhofer attacks the traditional force/ resistance requirement and men's culture ignorance, arguing that the person who wants to have intercourse must be sure he has a clear

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[195] *Id.* at 139-44.
[196] *Id.* at 142.
[197] *Id.* at 144.
[198] *Id.* at 186.
[199] *Id.* at 200, 201.
[200] *Id.* at 223.
[201] *Id.* at 223-26.
[202] *Id.* at 237.
[203] *Id.* at 237, 238.
[204] *Id.* at 251.
[205] *Id.*

indication of the other person's affirmative consent.[206] 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 does not say no and her silence is combined with passionate kissing, hugging, and sexual touching, it is usually sensible to infer actual willingness.[207]

While most modern reformers suggest changing the legal definition of rape and eliminating the force and resistance requirements (FRR), some scholars argue that the effects of redefining rape probably would not be as great as many reformers have said or implied.[208] Professor David P. Bryden provides a detailed critique of the approaches of other rape reformers. He first argues that much of the literature about rape law reform reflects exaggerated expectations.[209] Second, he believes that by defining rape as forcible sexual intercourse, FRR is necessarily the best possible external and objective standard to prove the crime.[210] Bryden claims that supporting FRR does not mean to ignore women's fear of rapist; however, it is ridiculous to suppose that every woman is terrified of every hollow-chested sophomore who reaches for her panties."[211]

According to Bryden, there are five basic legitimate functions of FRR's requirement. First, the equal treatment function – FRR helps to assure equal treatment of similar defendants.[212] Second, the grading function – if some new types of non-forcible sexual offenses should be established (like sexual abuse or sexual extortion), then the maximum penalty for these offenses should be lower than for the type of force / resistance rape.[213] Third, the bright line function – physical force marks the well-know bright line between seduction and rape.[214] Fourth, the corroborative function – FRR can corroborate other evidence that the victim did not consent, and that the perpetrator had a culpable mens rea.[215] Fifth, the Rubicon function – actions speak louder than words. One does not truly know the other's intentions until the time comes to cross the Rubicon because action is the crucible of intention.[216] Based on those functions, Bryden proposes a "reasonable FRR standard" that means either physical or verbal objection suffices to meet the resistance requirement.[217]

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[206] *See generally id.* Ch.12.
[207] *Id.* at 272.
[208] *See generally* Bryden, *supra* note 174, at 476.
[209] *Id.* at 477.
[210] *Id.* at 372-73.
[211] *Id.* at 368.
[212] *Id.* at 373.
[213] *Id.* at 375.
[214] *Id.* at 376.
[215] *Id.*
[216] *Id.* at 384.
[217] *See Id.* at 476.

Although Bryden supports retaining FRR in rape law, he also notes that extortionate sex is a field where most state law do not sufficiently prevent non-physical coercion.[218] He indicates that the chief responsibility for the insufficient criminal punishment of sexual extortion lies with the legislatures that have failed to adopt either (1) the Modern Penal Code's provision on Gross Sexual Imposition, or (2) 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.[219] Bryden argues that sexual extortion should be criminalized, but it should be named and treated as a different offense than rape.[220]

Despite supporting the criminalization of sexual extortion, Bryden, prefers to limit the definition of sexual abuse. He argues that sexual extortion should not forbid any of the common, socially-accepted types of sexual pressure, such as repeated requests, or threats to stop dating.[221] He even argues that criminal law should not prohibit sex between supervisors and employees, except in the relatively rare cases in which the supervisor offers an improper inducement or threatens reprisal if the employee declines.[222]

Reviewing the discussion among legal scholars makes it clear that different perspectives about the wrongs of rape result in different legal proposals. Generally speaking, scholars who believe that the wrong of rape is an assault tend to adopt a gender neutral approach and maintain FRR standard in rape crime. Brownmiller and Bryden belong to this school. As for the scholars who conclude that the basic wrong of rape is the violation of sex or woman's sexual autonomy, they tend to support "consent-based" rape laws. Estrich and Shulhofer are the prominent examples.

Scholars in "rape as assault" school might note that sexual extortion should be criminalized, but they prefer to create another new offense (such as sexual extortion) to distinguish the traditional forcible rape crime. Scholars of this school also tend to favor a mens rea standard of knowledge or intent to decide the defendant's mental state. Scholars of the "rape as consent" school tend to believe that rape is a violation of sexual autonomy, but their legal proposals split into two streams. The first stream favors a "nonconsent rule." Susan Estrich, Caroline A. Forell, and Donna M. Matthews advocate that rape law should be viewed as women's standard, respecting a woman's right to reject unwanted sex. Estrich advocates a negligence mens rea standard to avoid a defendant's unreasonably mistaken belief of victim's consent. The other stream of this school favors an "affirmative consent" rule. Schulhofer, for

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[218] *Id.* at 456.
[219] *Id.*
[220] *See Id.* at 361.
[221] *Id.* at 456.
[222] *Id.*

example, asserts that the no means no is approach is not enough; rather, a clear, voluntary and informed consent is required in any sexual relationship. To reflect such affirmative consent rule, Schulhofer advocates the mens rea standard of knowingly. According to this view, any person who engages in intercourse, knowing that he does not have unambiguous permission form his partner, commits a serious sexual abuse and should be held guilty.

Referring to the feminist legal theories about the wrongfulness of rape in the US, the legal framework of rape law in Taiwan is total a self-contradiction. The Taiwan's congress abandoned the resistance requirement in the old rape law and changed the title of the Penal Code Chapter16 to claim the protection of "sexual autonomy." The reform seems to reject the FRR model, targeting at the protection of people's free will to engage sexual activities. If victim's will is what lawmakers really want to protect, the elements of rape crime should be designed with either "no means no" model or "affirmative consent" model. However, the new rape law is not designed by this way. On the contrary, new rape laws adopt a gender neutral form and emphasize the use of force, which seems to define rape as a physical violence against people's bodily integrity. It is no wonder that judges at rape trials in Taiwan confuse the harm of rape and the interest that rape law should protect. Therefore, this article argues that the redefinition of "sexual autonomy" is the key element of the reconstruction of new rape statutes. Only when the harm of "the violation of sexual autonomy" can be clearly defined, can the rape law be written correctly.

B. Sexual Autonomy: from both Individual and Group Perspectives

This article defines that sexual autonomy is a legal interest which is an expression of sexuality, self-determination, and embodied experience. Autonomy commonly refers to control of one's life, the ability to shape one's life in accordance with one's desire.[223] An autonomous person can be analogized to sovereign nations.[224] To apply this autonomous, determinative power, we need some tool to control our borders and exchange our thoughts. This is achieved through the notion of consent. In law, autonomous agents are left to identify their own interests, make choices that fit into larger life plans, and make decisions about their own good.[225] The difference between sex and rape is consent.[226] Consent protects personal autonomy because under the law we have duties not to interfere with, take, or touch another's body or property.[227] 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.[228] By asking for consent before

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[223] WERTHEIMER, *supra* note 133, at 125.
[224] JOAN MCGREGOR, IS IT RAPE? 106-107 (2005).
[225] *Id.* at 107.
[226] NANCY VENABLE RAINE, AFTER SILENCE: RAPE AND MY JOURNEY BACK 210-211 (1998).
[227] *Id.*
[228] *Id.*

crossing another's border or taking what is rightfully theirs, whether it is their property or their body, we respect other people's borders and rights and treat each others as equals to ourselves.[229] In sexual relationships, asking the person for permission before having sex with that person means that we treat the person an equal. On the contrary, 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.[230] The fact that consent transforms the relationship gives it moral importance.[231] As Ann J. Cahill points out, as a traumatic, violent, embodied experience, rape thus does not merely attack the victim's sexuality, or her sense of safety, or her physical being; it does all of this, and more.[232] Engaging in a sexual intercourse without getting the other person's consent is, therefore, morally culpable.

Sexual autonomy is also a two-sided right involving both the right to seek intimacy with partners who may be willing, and the right to refuse the intimacy of those one does not want.[233] Theoretically, a state should not block the pursuit of positive sexual autonomy except where the exercise of power violates another's negative sexual autonomy.[234] By contrast, when one person abuses the 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.[235] Therefore, the criminal law should prohibit and punish such morally culpable behavior.

Of course, not every person is capable of excising sexual autonomy. Like many liberties, those that make up sexual autonomy are reserved for competent agents.[236] Minors and people who are unconscious, intoxicated, or suffering from serious retardation and other mental illnesses, especially where mental capacity is affected seriously might not be able to determine the nature and consequence of their actions. In law those people may be deemed to be temporarily or permanently without sexual autonomy. In these situations the law seeks to protect the individual because the individual lacks the ability to promote his or her own interests.[237] Despite these

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[229] *Id.*
[230] *Id.* at 108.
[231] *Id.* at 107.
[232] CAHILL, *supra* note 155, at 133.
[233] SCHULHOFER, *supra* note 130, at 276.
[234] MCGREGOR, *supra* note 224, at 111-112.
[235] *Id.* at 112.
[236] *Id.*

[237] WERTHEIMER, *supra* note 133, at 215. There are many legal discussions about statutory rape or intoxication, because this dissertation focuses on the sexual relationship between competence adults, the issues of minors, intoxication or any other mental retardation are not considered here. For a

individuals' reduced or limited ability to recognize the fact and consequence of engaging in sexual intercourse, the wrongness of rape is not reduced. In such situations, the diminished capacity of the person to comprehend what he or she is granting permission to, means that their consent to engage in sexual intercourse cannot be taken at face value, and knowingly taking advantage of such a person will constitute rape. The state has a responsibility to protect people when they are unable to give a valid consent.

Consent should be given freely and voluntarily. In sexual relationships, if consent is coerced, the consent is not valid and any intercourse that takes place would be deemed nonconsensual because it violates the person's sexual autonomy. The largest problem with a coercive sexual relationship is not the lack of consent, but to what extent such consent is freely given and how to distinguish acceptable influence from illegitimate coercion.

When we talk about the prevention of coercive sexual demands and the protection of sexual autonomy, we see sexual autonomy as a sex-neutral interest. However, rape is not a sex-neutral crime. Rape is not only sexed on the level of individual experience, it is also sexed on a larger, social level, in that it is a crime overwhelmingly committed by men against women.[238] Because women are subject to a pervasive threat of rape, a threat to which the vast majority of men remain virtually immune, women will experience individual acts of rape in a qualitatively different way than men will.[239] This sex-based characteristic makes rape offense different from other crimes. To consider rape as a sex-neutral phenomenon will preclude the possibility of recognizing the sexually differentiating social function of rape.[240] Focusing on individual experience truly can help to recognize the difference of personal harm. However, in some issues, ignoring the group-based oppression is dangerous and inadequate, because it trivializes the issue into an individual view and ignores the common oppression to a group.

Rape is an issue involving group oppression. "Group" as Iris Young outlines, is an expression of social relation and it exists only in relation to other groups.[241] Members of a group have a specific affinity with one another because of their similar

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discussion of statutory rape, *see* Symposium, *DePaul Law Review Spring 2001*, 50 DEPAUL L. REV. 722, 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).

[238] CAHILL, *supra* note 155, at 121.
[239] *Id.* at 122.
[240] *Id.*
[241] IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 43 (1990).

experiences or way of life.[242] Group identification arises in the encounter and interaction between social collectivities that experience some difference in their way of life and forms of association, even if they also regard themselves as belonging to the same society.[243] One's group identification can be transnational and multiple. An American female in some instances may identify herself belonging to the group categorized as "Asian American", but in other instances she may identify herself as a member of the "middle-class" group.

A group may be identified by outsiders without those so identified having any specific consciousness of themselves as a group.[244] Sometimes a group comes to exist only because one group excludes and labels a category of persons, and those labeled come to understand themselves as group members only slowly on the basis of their shared oppression.[245] Young further points out that whether or not a group is oppressed depends on whether it is subject to one or more of the five conditions: exploitation, marginalization, powerlessness, cultural imperialism, and violence.[246]

In the issue of rape, according to its sex-based characteristic, conclude that rape victims, mostly women, is an oppressed group in rape crimes. First, nonconsensual intercourse involves bodily penetration and emotional distress. It is a violation that hurts a woman's physical and mental well-being. Second, sexual exploitation of women in the sex trade industry, as many feminists observed, exploits women's sexual autonomy and damages woman's sex health. Third, woman's sexual desire and right to self-determination are not respected enough in society. The "mistake of fact" defense in rape reflects such a phenomenon. "I thought she consented" is the most popular argument in rape cases. Men ignoring and marginalizing women's desires and autonomy can be very severe and unreasonable to most women. Fourth, rape involves cultural imperialism wherein men's group experience and culture dominate the definition of rape. For a long time, regardless of jurisdiction, a victim's earnest resistance was the essential element to establish the conviction. The traditional gender myth in Taiwan of "men should be aggressive in sex and woman's consent is presumed," perpetuates an inferior imagery of women and an expectation that women will conform with and behave in accordance with men's imagination and expectation. Rape is a result of male cultural dominance and is predicated on men's mistaken or perceived sex culture dominance. Finally, as a result of the male dominant societal norms, women are born, raised and educated as a rapable group. Such a "rapable" identity limits women's freedom and mobility, and causes women's fear and insecurity.

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[242] *Id.*
[243] *Id.*
[244] *Id.* at 46.
[245] *Id.*
[246] *Id. generally* Ch.2.

Rape makes women powerless. Powerlessness is a form of group oppression. To recognize the group oppression when reconstructing 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. Therefore, to require those who initiate sexual activities or who make sexual demands with higher duty is justified.

Professor Schulhofer's approach, which requests the powerful party in sexual relationship to pay more attention to the powerless party, especially provides a meaningful standard for determining what should be counted as illegal coercive sexual intercourse. First, he finds that a quid-pro-quo threat of sexual extortion is a coercive act.[247] Thus, a school principal who obtains sexual favors by threatening to block a student's graduation should be guilty of a criminal offense employing the same reasoning as criminal property extortion.[248] Second, he mentions that even a sexual "offer" can be coercive if it arouses fear of retaliatory acts that violate specific legal rights.[249] For example, a supervisor may initiate a sexual proposal to his subordinate in exchange for an "offer" of promotion. Under this circumstance, according to Shulhofer, the subordinate's right of fair competition is violated and the supervisor's initiation should be prohibited.

In the U.S., these types of quid-pro-quo sexual encounter have been regulated through the enactment of sexual harassment laws.[250] Employers can be held liable for sexual harassment occurring among employees and made to pay compensatory and punitive damage under Title VII of the Civil Rights Act.[251] However, the purpose of the sexual harassment law is different with criminal punishment. The function of sexual harassment laws is to prevent sexual discrimination and a hostile environment to workers.[252] The focus of the criminal liability, in contrast, is to condemn the moral wrong and prevent the expected harm of such an 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 his authority. The wrongness of those behaviors not only creates sex discrimination, but also expresses an authority to coerce another person into having sexual relations. Therefore, this article argues that such acts illegally influence other people's autonomy and should constitute criminal offenses.

Rape law in Taiwan actually covers sexual extortion and coercive sexual offer by the Penal Code Article 228. However, because of the weak legal framework and

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[247] SCHULHOFER, *supra* note 130, at 135.
[248] *Id.*
[249] *Id.* at 144.
[250] ABIGAIL C. SAGUY, WHAT IS SEXUAL HARASSMENT? 6 (2003).
[251] *Id.*
[252] *Id.* at 22.

conservative judicial interpretation aforementioned, the distinction between Article 221 and Article 228 is now blurred. This article, therefore, argues that Article 228, the offense of sexual abuse, should be distinct from Article 221. Article 228 regulates the circumstances where the validness of consent is reduced. It should define the elements and set the punishment for the quid-pro-quo sexual demands and other coercive offers. Article 221 regulates the circumstances where an affirmative consent lacks. Moreover, since the legislature claims that rape law is to protect sexual autonomy, and sexual autonomy is demonstrated by a person's feely and voluntarily given consent, Article 221 should be defined as "having sexual intercourse without the other party's consent." Physical force or compulsion should play only a supportive role instead of a necessity. Furthermore, it is a serious flaw that the legislature does not define what consent is. According to the reformers' claim to protect sexual autonomy, this article argues that a valid consent is one given freely and voluntarily by a fully competent person. Moreover, since law should empower the powerless group and require the powerful group to take more responsibility, a rebuttable presumption of rape laws should be admissible.[253] Like what Keith Burgess-Jackson argues, since the overwhelming majority of rapes are by men of women, men should bear the cost; men -- not just rapists, but men as a class -- are the source of women's fear.[254] By making the presumption of the law, it would be less possible for courts to use patriarchic standards to discredit the victim's allegation. Instead, the burden of proof would shift to the defendant under the listed conditions. Referring to the legislation of England and Wales, this article proposes a reformed legal framework centering on the protection of sexual autonomy as follows.

	Element of offences
Article 221 Rape	The offender has sexual intercourse with the victim without the victim's affirmative consent A person consents if he or she agrees by choice and has the freedom and capacity to make that choice. 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: 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; b. where any person causes the victim to fear that violence was being

[253] JENNIFER TEMKIN & BARBARA KRAHÉ, SEXUAL ASSAULT AND JUSTICE GAP: A QUESTION OF ATTITUDE27(2008).
[254] KEITH BURGESS-JACKSON, RAPE: A PHILOSOPHICAL INVESTIGATION 192 (1996).

	used or that immediate violence would be used against a third party; c. where the victim was unlawfully detained; d. where the victim was asleep or unconscious; e. where the victim has a physical disability and as a result would not have been able to communicate where she or he consented; f. where a substance was administered to the victim's consent which was capable of stupefying or overpowering her or him.
Article 222 Rape 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 Sexual Extortion	1. The victim, under an unequal relationship, is directed, educated, employed, supported, or cared, by the offender; 2 The offender demands the victim to submit sexual intercourse by extortion or coercive offer under the unequal power;
Article 229 Having Sexual Intercourse by Deceiving as The Victim's Sexual Partner	1. The offender deceives the victim as his/her partner 2. The offender has sexual intercourse with the victim.

VI. Conclusion

It has been another 10 years since the feminists and legal scholars drove the first-wave of the Rape law reform in Taiwan. It is time to observe and evaluate the impact of the reform. By the empirical data and case screening, this article finds that the reform does not reach its goal. This article believes that two factors contribute to

this failure. First, the Congress passed the new rape law to relieve the anger and the pressure from the pubic. Although the new rape law aims to focus on the protection of sexual autonomy, a hasty legislation with a poorly-design legal framework cause a missing legal entitlement. Second, the culture of rape trial in the Taiwanese courtroom is conservative and patriarchic. Courts tend to discredit rape victims' allegation once the scenario of rape crime is untypical. Moreover, since the new rape law still keeps the element of physical compulsion in the statute, the defencelessness/utmost resistance requirement revives. From many acquittal verdicts, this article observes that many courts find "reasonable doubts" based on the gender bias and rape myth. The new rape law, interpreted and applied under such patriarchic courtroom culture, unfortunately fails to serve its purpose.

By comparative law and feminist legal theories, this article wishes to redefine rape in Taiwan and calls for a new rape law reform. Beginning with the rethinking of the wrongfulness of rape, this article believes rape is a crime against personal sexual autonomy as well as a crime against women as a group. Accordingly, this new rape law reform should center its focus on the protection of sexual autonomy and be aware of the unequal power between the two parties. The decent protection of sexual autonomy requires not a broader definition of force, but a recognition that sexual intimacy must always be preceded by the affirmative, freely given permission of both parties.[255] Any person who engages in sexual intercourse, knowing that one does not have permission from his/her partner, commits rape. Just as Professor Schulhofer points out, threats of bodily harm and other acts of physical force, beyond those intrinsic to intercourse, aggravate the offense, but they should not be required to justify criminal punishment if the defendant knew he was proceeding without having clear, affirmative consent.[256] This article believes that once Taiwan adopts such an affirmative consent model, the traditional rape culture in the courtroom can be changed; because under this new model, judges are required to listen to victims' stories seriously and have less chance to discredit victims' allegations with gender bias and rape myths. Criminal law will never be omnipotent, but can define justice, and normally does remedy injustice. Since criminal law not only gives commands and issues sanctions for violation of rules, but also educates people by providing information about an issue and conferring legitimacy on new social norms,[257] Taiwan needs more theories and more empirical research to modify its rape law. Shifting from the traditional focus on the "physical compulsion model" toward the "affirmative consent model" in the substantive criminal code will help to eliminate judicial bias.

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[255] SCHULHOFER, *supra* note 130, at 280.
[256] *Id.*
[257] Ronald J. Berger et al., *Rape-Law Reform: Its Nature, Origins, and Impact*, *in* RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT 231 (Patricia Searles & Ronald J. Berger eds., 1995).

After modifying the current rape statutes, Taiwan also needs reform on the evidential law and criminal procedure rule. Additionally, the training of legal professionals should be changed, too. Legal professionals should be educated with a gender-sensitive approach to make rape trials more just and verdicts more accountable. In its efforts to reach a society which takes sexual autonomy seriously, Taiwan still has a long way to go. Changing the substantive criminal law is just the first step.

國科會補助專題研究計畫成果報告自評表

1. 請就研究內容與原計畫相符程度、達成預期目標情況作一綜合評估

■達成目標

□ 未達成目標（請說明，以 100 字為限）

□ 實驗失敗

□ 因故實驗中斷

□ 其他原因

說明：

2. 研究成果在學術期刊發表或申請專利等情形：

論文：■已發表 □未發表之文稿 □撰寫中 □無

專利：□已獲得 □申請中 □無

技轉：□已技轉 □洽談中 □無

其他：

三、計畫成果

本計畫成果展現於以下三點：

（一）基礎之女性主義法學理論研究

針對美國第二波婦運中之自由女性主義以及基進女性主義之理念與爭辯進行探討，同時以第三波婦運之後現代女性主義作為依歸。嘗試在百家爭鳴的女性主義理論中，透過對於法律體系的批判，來建構出一個完整且簡單明瞭之體系。

（二）性侵害法律改革之回顧

美國從 1970 年代開始，由女性主義學者在各州進行一波波之性侵害法律改革。其中，法律文字的中性化、性交定義的擴張、刪除致使不能抗拒之要件以及性自主權之承認等概念，俱為我國刑法分則於民國 88 年修正之重要內容。惟我國卻鮮少有國內學者完整介紹當年美國進行相關修正時背後之理念。因此，雖法律文字已然修正，但是因為欠缺理論的支持，使得當年推動修法學者的理念無法完整傳承，這也導致實務在操作過程中的「失真」，而使修法之原意大打折扣。本計劃的目的就在於將法律文字的變動與女性主義理論相結合，填補我國性侵害法律改革所欠缺之理論基礎。建構完理論後，再與司法院合作，針對我國之性侵害犯罪之判決進行實證分析。實際分析過去未曾對外開放之性侵害犯罪相關判決，以女性主義理論檢驗修法後十年間，實務界是否有忠實貫徹當年立法者與婦女團體之理念。

(三) 提出將來修法之建議

本文提供一個新的修正方案，建議將規範重點從行為人的強暴脅迫，移轉至被害人的性自主意識，換言之，即是以被害人明示的同意作為判斷之重心。本文相信，一旦如此，將促使法院更仔細地聆聽被害人的證言，並且減少性侵害迷思與性別偏見的使用機會。