RAPE MYTHS IN AMERICAN AND CHINESE LAWS AND LEGAL SYSTEMS: DO TRADITION AND CULTURE MAKE THE DIFFERENCE?

Marietta Sze-chieh Fa

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Marietta Sze-chie Fa*

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I. INTRODUCTION

Violence against women is a systematic, pervasive problem affecting all facets of society. It is an occurrence that can be found in every culture, and often does not receive enough attention from the public. The incidence of rape in particular is very hard to assess, and it occurs much more often than the public believes. Many factors help cause this misperception. One major problem is the reluctance of rape victims to report a crime contrasts sharply with the reactions of victims of other crimes. One must, therefore, ask why women often do not report rape. According to surveys and research, the concept of “Rape Myths” provides a good answer to this question.

The term “Rape Myths” can be described as a view of rape from the point of view of people who have never been threatened or victimized by rape. Typically, “Rape Myths” are constructed in a male-dominated society that does not properly accept the point of view of women. It includes many sex-role stereotypes and attempts to shift blame from the rapist to the victim. Although these myths are overwhelmingly refuted by data and research, they continue to have an impact on every aspect of the legal system’s response to rape allegations as well as insidiously infecting the minds of jurors,
judges, and other who deal with rape and its victims in the United States.¹

Although it is generally accepted that “Rape Myths” affects not only Americans but rape victims in criminal justice systems all over the world, there exist some differences between accepted rape myths in different countries and different criminal justice systems that result in different impacts on rape victims worldwide.

In traditional Chinese society, women have long been suppressed by cultural norms. Because the concept “ chastity” or “virginity” has always been emphasized, rape victims under Chinese traditional society have always been blamed for loosing their “chastity” or “virginity” even when it is not their fault. As a result, compared to western culture, traditional Chinese society seems to have a stricter attitude toward rape victims due to traditional sex-roles that Chinese culture imposes on women.

Thus, a thorough discussion will compare not only American and Chinese culture to see how traditional Chinese values shape rape myths in Chinese societies, but will also compare China and Taiwan’s different experiences. Although China and Taiwan both share five-thousand years of history and tradition, dramatically diverse political and historical experience over the past fifty years has influenced these two contemporary Chinese societies in different ways.

In addition, although men can also be rape victims, I will focus this paper on female victims.² The intent of this strategy is not to perpetuate one of the rape myths that only females can be rape victims, but to emphasize the idea that rape myths are the reflection of a culture. Chapter I give a basic outline of this study’s organization while Chapter II provides a general understanding of the crime of rape and the concept of rape myths. Chapter III includes an examination of rape myths in American society by investigating rape myths in American culture, common law, and the legal system. Chapter IV presents the crux of the argument focusing on rape myths in Chinese society. An introduction to the cult of chastity in Chinese culture will be made in order to explore how it shapes rape myths in historical Chinese rape law and modern Chinese societies.

² According to the National Crime Victimization Survey of America, female victims accounted for 94% of all completed rapes, 91% of all attempted rapes, and 89% of all completed and attempted sexual assaults during 1992-2000.
A comparison between the People’s Republic of China and Taiwan’s rape law and legal system will be presented as well to explore the problem of rape myths in these two contemporary Chinese societies. Finally, Chapter V concludes that different traditions and cultures not only influence the appearances of rape myths in different societies, but also influence the way rape myths impact different legal systems.

II. RAPE: A MISUNDERSTOOD CRIME

A. The Crime of Rape

Rape is an attack that can pose traumatizing and long-term emotional and psychological damage to its victim, and can therefore be understood as one of the most violent and degrading crimes. From the victim’s perspective, it is more than a simple sexual crime or physical assault. “It is an attack on her mind as well as her body, an attack on her whole person, undermining her will and self-esteem.”3 The rapist not only devastates the life, spirit, and physical and emotional well-being of the victim, but also the lives of the victim’s family, spouse, and friends.4 Additionally, because of the sheer viciousness of the crime, the sexual assault adversely affects society as a whole.

However, it is generally known that the incidence rate for rape is much higher than the reported and published incidence rate.5 Unlike other criminal victims, victims of rape are frequently reluctant to report these crimes and often hide the fact that these assaults took place. For example, 42% of female college student rape victims indicated that they never told anyone at all about their incident.6 The Federal Bureau of Investigation Uniform Crime Report indicates that only one in every ten rapes gets reported,7 while ac-


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cording to the National Coalition on Sexual Assault, only one in every 60 rapes gets reported.8

According to the literature, there are numerous reasons for the failure of victims to report. Among the reasons that scholars have found include scenarios in which the victim fears retribution by her assailant,9 that some rape victims are too upset or too embarrassed at the prospect of answering a stranger’s intimate questions about the incident and that they fear a public probe into their prior sexual history, or that they are so ashamed that they do not want anyone to know about it10 and fear society will blame them for provoking the assault by behavior or appearance. Meanwhile others also desire to forget everything about the traumatic experience.11 These reasons for victims’ failure to report and reluctance to prosecute rapists are largely due to societal and official skepticism toward the rape victims, which is often collectively known as “Rape Myth.”

B. Rape Myths

Rape myths cannot be fully understood without first understanding the idea of a myth in general. Myths are commonly held misperceptions that often reflect our deepest cultural traditions, and become a significant determinant of those traditions when once it is established.12 The myth then becomes the ultimate judge of new meanings, creating pressure to select out contrary meanings, the mythic story becoming the only story.13

In our culture, there are a number of widely held beliefs and attitudes concerning the traditional sex role of men and women. These beliefs and attitudes help shape society’s stereotypical views and myths about rape.14 These myths then create a climate hostile to rape victims, allow men to both engage in the act of rape and to

8. Ibid., p. 142.
10. Ibid.
13. Ibid.
justify or rationalize their behavior after the act has occurred. Rape myths are widespread in society and generally accepted by many people, and include the following myths:

1. **Myths about Rape—Rape Is Purely about Sex**

People usually assume that the rapist's behavior is primarily motivated by sexual desire and that the only purpose of rape is to satisfy this sexual need. Rapists are often portrayed as sex-starved. While some feminist and social science research do indicate that rapes are sometimes partly a product of sexual desire, there are other times in which "rape . . . is not only about sex." Rape may also be about rage and anger, about fear or about domination. Most of the studies show that rape is serving primarily non-sexual needs. Rape is usually not a crime of passion, but a crime of violence that bears a close resemblance to violent crime such as assault and robbery than it does to sexual intercourse with a consenting woman. As we have mentioned when we discussed the typology of rapists, it is the sexual expression of power and anger, it is the way the offender expresses and discharges a mood or state of intense anger, frustration, and rage. Most rapists are not sexually deprived; they have other outlets available for their sexual needs. One survey found that many rapists are even married.

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16. There are some women who believe that rape is a sex crime. Camille Paglia indicates that "For a decade, feminists have drilled their disciples to say 'Rape is a crime of violence but not of sex.' This sugar-coated Shirley Temple nonsense has exposed young women to disaster. Misled by feminism, they do not expect rape from the nice boys from good homes who sit next to them in class." (This theory seems to imply that in order to combat the myth that the raps is sex, we create another myth that a "nice boy", without using violence force, cannot rape. However, if we take the position that an "unwanted sex" itself is a kind of violence even without any violence accompany, Pagila's theory could have no stand anymore.) Lee Ellis points out that at least among date rapists, many of the actions taken toward victims are highly suggestive of sexual motivation. (John M. Macdonald, Rape: Controversial Issues 52 (1995))


20. Ross, "Does Diversity in Legal Scholarship Make a Difference?", *supra* note 11.

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This is the most dangerous myth about rape since it ignores the fact that rape is a physical attack. To regard rape as an expression of sexual desire is not only inaccurate but also leads to the mistaken belief that rape does not hurt the victim any more than sex.22

2. Myths about Rapist
   a. Stranger rape and the problem of acquaintance rape

   In the traditional image, the rapist is a “knife-wielding maniac unknown to his attacker”. Many people believe that rape only occurs where a mentally deranged stranger spontaneously jumps out from an alley and attacks the victim, either brandishing a weapon or physically injuring her.23

   However, this stereotype of the stranger rapist has been considered as myth by many authors on the basis of statistical data.24 Numerous research studies have found that the majority of rapes are committed by someone known to the victim.25 According to the National Victim Center's survey data, only 22% of rape victims had been raped by someone they had never seen before, or did not know well;26 and according to one estimate, only 15% of rapes are perpetrated by strangers.27 Another study also reported that 84% of rape victims “knew their attacker.”28

   Scholars use the word “acquaintance rape” to describe this kind of rape where the victim is raped by someone known to her. “Date rape” is a specific type of acquaintance rape where a more defined relationship exists between the two parties than in the case of acquaintance rape.29 The preexisting victim-offender relationship in acquaintance rape and/or date rape creates a unique context different from stranger rape. In these instances, unlike the stranger rape where identity could also be an issue, consent is usually the only issue since the victim already knew the rapist. Except for this

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22. Ibid.
27. Ibid.
29. Allison & Wrightsman, Rape, supra note 18, p. 64.
difference, stranger rapes and acquaintance rapes were seen as equally traumatic.\textsuperscript{30} To be raped by someone you know does not make it less painful or ugly. "A rape is a rape and its consequences cannot be trivialized just because of some prior expectations by the women or prior relationship with the assailant."\textsuperscript{31} Some studies even indicate that acquaintance rape and/or date rape can be more traumatic than stranger rape, since the victim of acquaintance rape may have known and trusted the rapist.\textsuperscript{32}

It is difficult to estimate how many acquaintance rapes and/or date rapes occur since people are often silent about these type of rape incidences and many of them are never reported.\textsuperscript{33} The victim does not report the rape partly because she blames herself for misjudging the character of her boyfriend, partly because of fears that others will not recognize the incident as criminal and feel that nothing will be accomplished in the courtroom,\textsuperscript{34} and partly because she does not regard the crime as a "real rape".

Researchers have indicated that many women might know that they have been abused, but do not think that they have been really "raped". They will respond affirmatively when asked "Have you ever had sex with a man when you didn't want to, because he used physical force against you?" but at the same time offer a firm "no" when asked "Have you ever been raped?".\textsuperscript{35} Several explanations exist in the study concerning why these women refuse to recognize that they have been raped. Some women simply may not believe that they were raped. In addition, "admitting to yourself that you have been raped necessarily means conceding the fact that you have been a "victim"—a very vulnerable place to find yourself."\textsuperscript{36}

b. The crazed rapist

According to the research, most people believe that men commit rape out of sexual frustration and inability to control them-


\textsuperscript{31} Allison & Wrightsman, \textit{Rape, supra note} 18, p. 61.


\textsuperscript{33} Allison & Wrightsman, \textit{Rape, supra note} 18, p. 61.


\textsuperscript{35} Allison & Wrightsman, \textit{Rape, supra note} 18, p. 62.

\textsuperscript{36} \textit{Ibid}, p. 63.
selves, thus reinforcing the notion of their psychopathy.\textsuperscript{37} They believe that rapists are "sick, emotionally disturbed men."\textsuperscript{38} These beliefs reveal that the public strongly embraces an image of rapist as "psychopaths lurking in dark alleys waiting to pounce on any likely victim and inflict their uncontrollable desires upon her."\textsuperscript{39}

In contrast, studies have found that "Rapists are 'normal' men."\textsuperscript{40} Most rapists are neither mentally ill nor compulsive.\textsuperscript{41} Social science studies suggest that "less than 5 percent of rapists are psychotic at the time of the commission of the [rape]."\textsuperscript{42} Many researchers conclude that "men who rape are 'normal' to the extent that psychologists fail to find evidence of abnormality."\textsuperscript{43} They are, from a psychopathology standpoint, what most people would consider a "regular" guy who looks like part of the community, essentially indistinguishable from the male population as a whole.\textsuperscript{44}

But from another view, men who commit rapes do share some identifiable characteristics distinguishing them from the non-rape population. Some of them have an antisocial personality or sadistic personality.\textsuperscript{45} Their most prominent defect is the absence of any close, emotionally intimate relationship with other persons, male or female.\textsuperscript{46} They are frequently unemployed, addicted to drugs and

\begin{itemize}
\item \textsuperscript{39} Jackson, \textit{The Social Context of Rape}, \textit{supra} note 3.
\item \textsuperscript{40} Allison & Wrightsman, \textit{Rape}, \textit{supra} note 18, p. 101.
\item \textsuperscript{41} Wells & Motley, Reinforcing the Myth of the Crazed Rapist, \textit{supra} note 37, p. 157.
\item \textsuperscript{45} Macdonald, \textit{Rape}, \textit{supra} note 34, p. 53.
\item \textsuperscript{46} Groth & Birnbaum, \textit{Men Who Rape}, \textit{supra} note 19, p. 6.
\end{itemize}
alcohol, and are often estranged from their wife and children.\(^\text{47}\) However, those characteristics tend to be socially constructed rather than related to mental illness.\(^\text{48}\)

3. **Myths about Rape Victim**
   a. Women secretly wish to be raped

According to this myth, a rapist often believes that he is not truly acting against the women but rather fulfills her wishes.\(^\text{49}\) The idea behind this belief is that because rape is an act that men do in the name of their masculinity, it is in their interest to believe that women also want rape done in the name of femininity.\(^\text{50}\) Once the proposition that all women secretly wish to be raped has been accepted, a corollary to this myth is the common belief that when a nice girl says “no” to sex, she really means “yes.”\(^\text{51}\) The concept seems to imply that if the will of a woman is strong, or if she is sufficiently agile, she can escape without harm. The belief that “No woman can be raped against her will” also further implies that there is no such thing as forcible rape, and that it is the will of women to be raped.\(^\text{52}\)

This myth could also extend into the proposition that victims of rape are not good girls, but are “fallen women” who provoke their attacker by their dress, their words or their actions.\(^\text{53}\) It is the belief that women bring rape on themselves through their clothing, through being alone, drinking or being out late at night.\(^\text{54}\) In these instances, it is assumed that the victim “asked to be raped.”

However, innocent women do get raped, and, although some women may fantasize about aggressive sex, they do not dream of violence and threats of death or injury. The claim that rape is impossible unless the woman wants it is false because it ignores the

\(^{47}\) Palermo & Farkas, *The Dilemma of the Sexual Offender*, supra note 25, p. 84.

\(^{48}\) Wells & Motley, “Reinforcing the Myth of the Crazed Rapist”, *supra* note 37, p. 158.


\(^{52}\) Brownmiller, *Against Our Will*, *supra* note 50.


violence, expressed or threatened, which often associated with the act.\textsuperscript{55} Psychoanalyst Walt Menninger also distinguished between fantasies of being raped with the facts of rape. “In fantasy a woman can control the situation, whereas in actual rape she loses complete control of her body.”\textsuperscript{56} He further agreed with the feminists that the myth that women secretly wish to be raped persists because men prefer to believe it.\textsuperscript{57}

In sum, these myths that women desire rape, deserve rape or provoke rape, only serve to justify rape and relieve rapists from any guilt or personal responsibility resulting from rape by blaming their lust on the women.\textsuperscript{58}

b. Rape myths minimize the seriousness of rape

Some of these minimizing myths also justify men’s behavior, such as “he paid for her date,” “he was drinking” and “he didn’t mean it.”\textsuperscript{59} Others deny any true harm because the victim “wasn’t a virgin” or she suffered “no bruises.”\textsuperscript{60}

c. Women have a strong incentive to lie about rape

It is the belief that women “cry rape” for revenge, blackmail, jealousy, guilt, or embarrassment.\textsuperscript{61} The notion that women will lie about rape for any of these reasons is firmly entrenched in societal attitudes toward women and rape.\textsuperscript{62} Following this assumption that women make false rape charges, is the belief that it is difficult to defend against a charge of rape. This belief also permeates laws and judicial decisions. Lord Chief Justice Matthew Hale’s old saw that rape “is an accusation easily to be made and hard to be probed, and harder to defended by the party accused though never so innocent” also express that partnership of fears.\textsuperscript{63}

\textsuperscript{55} Massaro, “Experts, Psychology, Credibility, and Rape”, \textit{supra} note 1, p. 400.
\textsuperscript{56} Katz & Mazur, \textit{Understanding the Rape Victim}, \textit{supra} note 24, p. 146.
\textsuperscript{57} Ibid., p. 147.
\textsuperscript{58} Gaffney, “Amending the Violence against Women Act”, \textit{supra} note 49, p. 263.
\textsuperscript{60} Ibid., p. 9.
These myths have also allowed the focus in rape cases to be placed on the victim’s lack of innocence rather than on the guilt of the accused, whether the motive to lie finds voice in woman scorned, in the sexually repressed and fantasizing woman who desires to be raped, or in the unchaste woman who seeks to mask her own promiscuity by crying rape.  

In fact, the actual frequency of false rape reports is estimated to be low 2%—about the same percentage as in other major crimes and the actual problem with reporting rape is quite the contrary—an alarmingly low percentage of rape victims report their victimization.

As the research and studies cited above indicate, all of these myths described above are overwhelmingly refuted by the data, and none of them survives scrutiny and empirical research. In fact, opposite of these claims holds true. But myths and stereotypes such as these have already deprived rape victims of adequate legal protection and have caused rape to be one of the least reported crimes.

III. RAPE MYTHS IN AMERICAN SOCIETY

A. Rape Myths in American Culture

1. America as a Rape-prone Society

While rape is an international problem, “in 1990 the United States led the world in number and rate of reported rapes.” Experiments believe that the United States has the highest incidence rate of forcible rape of any industrialized country. According to United States Department of Justice Statistic Special Report, the rate of rapes in the United States was 20 times higher than it was in Portugal, 26 times higher than in Japan, 15 times higher than in England and 46 times higher than in Greece.

64. Johnson, “Prior False Allegations of Rape”, supra note 62.
65. Allison & Wrightsman, Rape, supra note 18, p. 205.
68. Torrey, “When Will We Be Believed?”, supra note 61, p. 1025.
71. Allison & Wrightsman, Rape, supra note 18, p. 9.
Scholars have been asking why rape is so frequent in a country that is looked upon by some as the model for the rest. In order to answer this question, some scholars classified societies between rape-prone societies and rape-free societies.

In rape-free societies, the act of rape is either very infrequent or nonexistent. Women in these societies are treated with considerable respect because of their female reproductive roles. Gender relations in these societies were marked by significant female power and authority. Violence is also minimized in rape-free societies. The Tuareg of the Sahara Desert, the Pygmies of the Ituri rain forest in Africa, and the Arapesh of New Guinea are the examples.

In the contrast, violence against women may be allowed, or at least disregarded by law enforcement officials in rape-prone societies. Rape in these societies is often a ceremonial act, or it is a device by which men threaten or punish women. Social relations in these societies “were marked by interpersonal violence in conjunction with an ideology of male dominance enforced through the control and subordination of women.”

As for American society, its culture and people’s attitude toward rape can lead it toward a classification of a “rape-prone” society. But, why is American society rape prone? The prevalence of rape myths in American culture might be the main reason.

72. Allison & Wrightsman, Rape, supra note 18, p. 12.
74. Allison & Wrightsman, Rape, supra note 18, p. 13.
75. Ibid.
77. See generally Margaret Mead, Sex and Temperament in Three Primitive Societies, n.p: mentor, 1935.
78. Except this kind of classification, some scholars believe that there exists a “rape culture”. Martha McCaughey defined a “rape culture” as one in which: rape and other forms of violence against women are common; rape and other forms of violence against women are tolerated (prevalence is high, while prosecution and arrest rates are low); victim blaming and racist myths of rape and other forms of violence against women are commonplace; images of rape and other forms of violence against women abound; images of sex and violence are intertwined; women do not enjoy full, legal economic, and social equality with men. See Grana, Women and (in) Justice, supra note 7.
80. Sansay, Rape-Free versus Rape-Prone, supra note 76.
81. Although Sanday places the United States in the middle category of her classification (among the 35% of societies worldwide in which rape occurs, but not so frequently as to be classified as “rape prone”), scholar has disagree with this classification,
Since rape myths reflect sexual stereotyping of women, sexual stereotypes can be viewed as part of the socialization process which fosters rape. They "continue to foster a societal framework conducive to rape, reinforcing social rape myths excusing or minimizing the seriousness of rape."^83

In American culture, women are often portrayed as weak, dependent and more emotional. Girls as they grow into womanhood are taught to be passive. On the other hand, men are portrayed as strong, cool, the source of reason and rationality. And, the positions of men and women in society remain unequal. The idea that aggressive males have a right to dominate females is deeply embedded in the values of American culture that is prevalent in movies, television soap operas, commercials, romance novels or even in children's textbooks. Further, as far as sexual attitudes, women have been socialized to believe that it is unladylike for them to initiate sexual advances to men, to respond to a sexual act without making some type of resistance, and have not been socialized to effectively express their feelings of nonconsent in an assertive way. Men "are expected to be the initiators of sexual encounters, and they have been encouraged by society to enjoy their sexuality and to pursue their sexuality with numerous partners." In short, women are socialized to "resist sexual advances" while men are taught to "initiate sexual activity," thus creating a framework for rape. This notion that men are to be sexually aggressive and women should be sexually passive is the foundation that shapes the concept of rape myths.

and pointed out that such classification deserve scrutiny. See Allison & Wrightsman, Rape, supra note 18, p. 14.

85. Susan Griffin, “Rape: The All-American Crime”, in Duncan Chappell et al., ed., Forcible Rape, supra note 63, p. 60.
86. Taslitz, "Race and Two Concepts of the Emotions in Date Rape", supra note 84.
According to studies, rape myths are quite prevalent among Americans. For example, in a study done in the late 1970s, more than 50% of persons endorsed the notion that most reported rapes are false accusations intended for revenge or cover-up. Similar results were obtained for many other myths. A wide variety of Americans, including citizens, law enforcement officers, and judges, have been shown to hold several kinds of rape myths that can be used to justify rape. Another study looking at the acceptance of rape myths among college students sample also showed that each myth tested was endorsed by at least 17% of the participants, and some were endorsed by as many as 78% of the participants.

This prevalence of rape myths among Americans is consistent with the high incidences of rape in American society. Some scholars conclude that rape culture exists in the United States because both men and women are socialized to regard male aggression as a normal part of sexual intercourse. Furthermore, another researcher also claimed that “we live in a culture that, at best, condones and, at worst, encourages women to be perennial victims, men to be continual predators, and sexual relations to be fundamentally aggressive.” Rape myths, as part of American general culture, thus foster and encourage rape and result in a rape-prone society.

2. Myths of the Black Rapist and Black Victim

Although rape is a cross-cultural crime and rape myths may exist in most societies, rape myth in America has a unique characteristic which makes the issue of rape more complicated due to its historical background. Susan Estrich, in her book Against Our Will, has indicated that “The history of rape in the United States is


clearly a history of both racism and sexism. It is impossible to write about rape without addressing racism. .."96

Despite the fact that 97 percent of all rapes are intraracial, not interracial,97 the myth that rape is most likely to be committed by a black man on a white woman still exists in American society. Davis has pointed out that "as a direct consequence of the persistent insinuation of racism into prevailing social attitude, white women are socialized to harbor far more fear that they will be raped by a Black man than by a white man."98

The myth of the black rapist is based on two commonly held stereotypes about African-American males. The first one is that African-American men possess an exaggerated sexuality and are plagued by irresistible and animal-like urges.99 The fantasy that they have larger genitals and a greater sexual capacity is widespread.100 They are often viewed as little more than sex-obsessed beasts or have been perceived as "a kind of walking phallic symbol"101 in a "savage state of promiscuity."102 Modern studies also reveal continuing images of black men as lazy, violent, dangerous beasts.103

The second notion is that African-American men were of such limited virtue and intelligence that the crime of rape meant nothing to them.104 These stereotypes were used to justify the lynching of at least 3,300 African-American men between 1882 and 1946 in the South105 and have continued to appear in popular culture in America, appearing in movies, novels, and the news media.106

97. Grana, Women and (in) Justice, supra note 7, p. 146.
100. Russell, The Politics of Rape, supra note 89, p. 139.
106. Taslitz, "Rape", supra note 84, p. 36.
Although it is true that the arrest rate for rape for blacks is much higher than it is for whites,\(^{107}\) some data and studies have shown that black defendants have been discriminated by the criminal justice system, and that this discrimination could account for part of the difference.

The most important study concerning the impact of race on the criminal justice system's processing of rape cases was done by Gary LaFree in 1989.\(^{108}\) In this study, LaFree concluded that black male rape defendants are treated more harshly when their victims are white, less harshly when their victims are black. Compared to other defendants, they usually received more serious charges, more likely to have their cases filed as felonies, more likely to receive prison sentences if convicted, more likely to receive longer sentences on the average when their victim is white.\(^{109}\) And this study has been strongly support by historical data, by modern cultural conception of race generally and of race and sexuality's intersection specifically.\(^{110}\)

The myth of the black rapist of white women is the twin of the myth of the bad black women.\(^{111}\) In other words, the flip side of the myth of the black rapist is the stereotype of the promiscuous black women.\(^{112}\)

Black women have been viewed in American society as chronically promiscuous and loose.\(^{113}\) Even today, black women are often stereotyped as oversexed, lazy women, and "the black virgin is nonexistent, an oxymoron, in white mythology."\(^{114}\) "The black-women-

\(^{107}\) See U.S. Census Bureau, Census 2000, Population by Race and Hispanic or Latino Origin for the Unites States (PHC-T-1). See Sourcebook of Criminal Justice Statistics 2002, Table 4.10. (The arrest rates for rape for black and white are 19 per 1000 and 6 per 1000.)


\(^{109}\) Ibid., p. 139-40.

\(^{110}\) Taslitz, "Race and Two Concepts of the Emotions in Date Rape", *supra* note 84, p. 39.


\(^{112}\) Burrell, "Recent Development!", *supra* note 99, p. 92.


as-whore appears nearly as often as black women are to be found in representation of American culture.\textsuperscript{115}

As a result of the intersection of racism and sexism, research has point out that rape becomes a more complicated issue and has strengthened the stereotype that black women are not raped, or shall not be recognized as rape victims,\textsuperscript{116} because they are always willing.

The myth that black women were sexually immoral justified the sexual abuse of female slaves in American history, and resulted in no penalty when the rape victim is black.\textsuperscript{117} "The belief that African-American women are less virtuous and therefore deserve sexual abuse persists, continuing to excuse the sexual violation of these women."\textsuperscript{118}

In American history, the rape of black female slaves was not a crime. Even after slavery, the rapes of black women went unpunished while many men, especially black men, were severely punished for the rape of white women.\textsuperscript{119}

Today, like black men, black women suffer discrimination from the legal system due to the myths imposed on them. The cries of rape by a black woman often lack legitimacy, police often take complaints of black women less seriously both because police believe in the myth of black promiscuity and regard black women as unlikely to tell the truth.\textsuperscript{120} Studies have shown that chances of conviction are greatly reduced regardless of the race of the rapist if the victim is a black woman.\textsuperscript{121} Studies also show that men of all races who are convicted of raping black women are generally sentenced significantly lighter than men convicted for raping white women.\textsuperscript{122}

The discriminatory treatment of the black rapist and the legal indifference to black women victims helps solidify a belief that rape is only heinous if a black man rapes a white woman,\textsuperscript{123} and may not be a serious crime if a white man rapes a black woman. Some schol-

\textsuperscript{115} Taslitz, "Race and Two Concepts of the Emotions in Date Rape", \textit{supra} note 84, p. 42.

\textsuperscript{116} Gill, "Dismantling Gender and Race Stereotypes", \textit{supra} note 32, p. 42.

\textsuperscript{117} Burrell, "Recent Development", \textit{supra} note 99, p. 92.

\textsuperscript{118} \textit{Ibid.}


\textsuperscript{120} Baker, "Once a Rapist?", \textit{supra} note 43, p. 594.

\textsuperscript{121} La Free, \textit{Rape and Criminal Justice}, \textit{supra} note 108, p. 114.


\textsuperscript{123} Baker, "Once a Rapist?", \textit{supra} note 43, p. 595.
ars view this belief as an expression of racial as well as sexual domination, and even a weapon of racial terror.\textsuperscript{124} When a black man rapes a white woman, whites view the crime not against female sexual autonomy, but against white domination.\textsuperscript{125} As a member of white race, white men are "offended by interracial rape not because the white woman has suffered a more egregious violation, but because all of white culture, its 'law' and 'system of values,' has been defied."\textsuperscript{126} As a result, "[t]he white man has used the rape of 'his' women as an excuse to act against Black men,"\textsuperscript{127} "thereby perpetuating the myth that Black men rape White women."\textsuperscript{128} In short, the black rape defendant was punished for raping white women not because they are women, but because they are white.\textsuperscript{129}

On the other hand, when a black woman is raped by a white man, she is being raped not as a woman generally, but as a black woman specifically.\textsuperscript{130} She has to face not only the fear of being a woman, but also the racism expressed against her because of her race.\textsuperscript{131} Furthermore, "[t]heir femaleness made them sexually vulnerable to racist domination, while their Blackness effectively denied them any protection."\textsuperscript{132}

As a result of historical tradition, white men have used the act of rape on black women, and the law of rape to punish black men as an instrument of white supremacy, as well as male domination.\textsuperscript{133} In doing so, they have created a racialized rape myth of black rapist and black rape victim.


\textsuperscript{125} Taslitz, "Race and Two Concepts of the Emotions in Date Rape", \textit{supra} note 84, p. 39-40.

\textsuperscript{126} Baker, "Once a Rapist?", \textit{supra} note 43, p. 608.

\textsuperscript{127} Brownmiller, \textit{Against Our Will}, \textit{supra} note 50, p. 255.

\textsuperscript{128} Gill, "Dismantling Gender and Race Stereotypes", \textit{supra} note 32, p. 42.


\textsuperscript{131} Gill, "Dismantling Gender and Race Stereotypes", \textit{supra} note 32, p. 43.

\textsuperscript{132} Torrey, "Feminist Legal Scholarship on Rape", \textit{supra} note 130.

B. Rape Myths in Common Law

1. Historical Definition of Rape

The word rape is derived from the Latin word *rapere* which means to steal, seize, or carry away.\(^{134}\) Therefore, historically, rape laws were property laws. Rape was not viewed as a crime against the woman, but as an act of theft or seizure of property from the victim’s husband or father.

The punishment of rapists can be traced back as thousands of years before Christ. About four thousand years ago, the Code of Hammurabi, which was carved in Babylon on an obelisk of diorite stone, decreed that any man who raped a betrothed virgin should be slain.\(^{135}\) However, under this code, a married woman who had the misfortune to be raped had to share the blame equally with her attacker. She was guilty of adultery, and was bound and thrown into the river to drown with her attacker, unless she was dragged out by her husband.\(^{136}\)

Early Hebrew law, as set down by Moses, also provided criminal penalties for rapists. It “dealt more thoroughly with the rape of young, unmarried ‘damsels’ than with the rape of married women.”\(^{137}\) However, influenced by the Hammurabi code, the Hebrew law also considered some women to be responsible for their own rapes. When a married woman was raped, she was considered culpable and adulterous, and she was stoned to death along with her attacker at the gates of the city.\(^{138}\) The same punishment was dealt to a virgin who was raped within the walls of the city; she was judged not to have resisted enough, for her screams should have been heard. But if a virgin was raped outside the city walls, where her cries for help might not have been heard, she was judged guiltless. This different treatment based on the location of the rape played an important role in determining rape victims’ guilt in the early English law.

By tracing back to the Code of Hammurabi and later through Hebrew and English law, women’s value as men’s property was measured in terms of their chastity, and rapes represented property

\(^{135}\) Barbara Toner, _The Facts of Rape_, Hutchinson, 1977, p. 85.
\(^{136}\) Brownmiller, _Against Our Will_, supra note 50, p. 19.
\(^{137}\) Warner, “Rape and Rape Laws in Historical Perspective”, _supra_ note 134, p. 4.
\(^{138}\) Brownmiller, _Against Our Will_, _supra_ note 50, p. 19.
damage. However, by the middle Ages in England, rape had become a crime against a woman herself. Punishment in those days was severe, but by marrying his victim, a rapist could still avoid it.

The historical laws of rape began to change during the thirteenth century. European countries extended protection of the law to married women who were raped during this period. The Statute of Westminster was developed in this time, it specified that any man would be found guilty of a felony and put to death if he was convicted of raping a married woman or virgin. In addition, under the law at this time, a man could no longer escape punishment by making the victim his wife, and rape became a crime against society rather than the woman.

2. Definition of Rape before 1970s

Prior to 1970s, most state laws in America that defining rape were still based on a 200-year-old narrow definition evolved under English common law. Under traditional common law, rape was defined as “carnal knowledge of a woman, not one’s wife, by force and against her will,” and carnal knowledge included only penile-vaginal penetration.

The limitation of this definition has been criticized. It allows no consideration of deviant sexual acts against women, nor for homosexual rape, nor the sexual assault of men by women. This narrow ambit also provides a “spousal exemption” for rape, under which a man has not broken the rape law if he rapes his wife, whether they are separated or living together.

143. Dean & deBruyn-Kops, The Crime and the Consequences of Rape, supra note 140, p. 23.
146. Dean & deBruyn-Kops, The Crime and the Consequences of Rape, supra note 140, p. 23.
In addition to the above problems, the "force requirement" in the definition has been discussed and criticized in literature as well. According to this definition, it is not enough that the woman did not consent to the intercourse; the intercourse has to be forced. This force requirement led to an odd and dangerous principle: the resistance requirement.\(^{147}\)

a. "No" is not enough—Resistance requirement

Female nonconsent has long been viewed as the key element in the definition of rape,\(^{148}\) because rape has been thought to be the same act as consensual sexual intercourse, except that one of the participants does not consent.\(^{149}\) Therefore, this essential element distinguishes rape from other non-criminal sexual intercourse.

However, compared to other crimes for which nonconsent is also an element or consent is a defense, rape is unique.\(^{150}\) Only in rape is proof of a lack of consent insufficient to prove nonconsent.\(^{151}\) Take the case of theft for example: a mere showing that the owner of the property never gave the defendant permission to take the property is enough to defeat the consent defense; no showing that the owner actually told the defendant not to take the property is necessary.\(^{152}\) In rape law, however, the "default" position is consent. Proof of the absence of affirmative indication of consent by the victim is not enough to defeat a consent defense;\(^{153}\) Even the victim has expressed nonconsent verbally, under the common law, the prosecution must show that the alleged victim indicated to the defendant through her overt actions—physical resistance.

But why is rape unique? Why is resistance required to demonstrate a rape victim's nonconsent? Common law initially accepted resistance as an appropriate operationalization of nonconsent for several reasons. First, it was considered as an indicator of nonconsent. Second, instead of simply relying on subjective evidence, it


\(^{148}\) Estrich, *Real Rape*, supra note 96, p. 29.


\(^{151}\) *Ibid*.

\(^{152}\) *Ibid*.

\(^{153}\) *Ibid*.
provides an objective standard for nonwitness to assess whether nonconsent has been proved beyond a reasonable doubt.\footnote{154}

However, some scholars believe that it is the result of distrust, influenced by the rape myth that women fabricate accusations of rape.\footnote{155} The accusations of female complaints often are not trusted. Research shows that the false rape charge myth supports the belief that a woman’s degree of resistance should be a major factor in determining if a rape has occurred.\footnote{156} Besides, this requirement also relates to the stereotypes that a woman will say “no” when she means “yes” because, consciously or unconsciously, she wishes to be seduced.\footnote{157} Since women might lie or mislead men, physical resistance is required to prove women’s nonconsent; the complainant’s testimony that “I did not give my consent” is insufficient.\footnote{158}

Under the resistance requirement, “a mere surrender in the face of an assumed superior physical force is not enough. Where the penalty for the defendant may be supreme, so must resistance be unto the uttermost.”\footnote{159} Therefore, in order to prove that a rape had indeed occurred, the victim in most instances must have demonstrated that she did everything possible—everything within her physical and psychological power—to prevent the rape from occurring.\footnote{160} Obviously, this notion was not formed by a realistic view of a woman’s relatively powerless position in society nor through any evaluation of empirical data.\footnote{161} This notion has resulted in an uncodified “reasonable victim” standard for assessing the complainant’s behavior, and is a standard developed by men form the

\footnotetext{154}{Allison & Wrightsman, Rape, supra note 18, p. 201.}

\footnotetext{155}{Susan Ehrlich, Representing Rape: Language and Sexual Consent, n.p: Routledge, 2001, p. 65-66.}

\footnotetext{156}{Torrey, “When Will We Be Believed?”, supra note 61, p. 1039 (citing a 1977 study conducted by Nona J. Barnett and Hubert S. Field which used an Attitudes Toward Rape Questionnaire that asked respondents to rate their degree of agreement or disagreement with statements respecting rape myths).}

\footnotetext{157}{Ross, “Does Diversity in Legal Scholarship Make a Difference?”, supra note 11, p. 816.}

\footnotetext{158}{Tchen, “Rape Reform and a Statutory Consent Defense”, supra note 149, p. 1524.}

\footnotetext{159}{Moss v. State, 208 Miss. 531, 536 (1950); See also State v. Cowing, 99 Minn. 123 (1906).}

\footnotetext{160}{Allison & Wrightsman, Rape, supra note 18, p. 203; LeGrand also points out that rape was the only crime that required the victim’s resistance \textit{up to the point of severe injury} as an indication of nonconsent. (Camille E. LeGrand, “Rape and Rape laws: Sexism in Society and law”, California Law Review, Vol. 61 (1973), p. 919-941).}

\footnotetext{161}{Torrey, “Feminist Legal Scholarship on Rape”, supra note 130, p. 37.
perspective of men and then imposed on women without regard to whether most women actually conform to the standard.\textsuperscript{162}

The resistance requirement of past rape laws was problematic because the primary determining factor of whether a rape has occurred was not the behavior of the alleged rapist, but the complainant’s behavior during the event.\textsuperscript{163} The court does not begin its inquiry by examining the acts and the state of mind of the alleged rapist, but rather by considering the acts and purpose of the female victim.\textsuperscript{164}

Further, this standard does not serve the purpose it intends to. This doctrine does not appear necessary to protect innocent men from false rape charge. Without the requirement of resistance, the question of whether the sexual intercourse was consensual is still a question of fact for the jury to decide based on all of the evidence.\textsuperscript{165}

b. Cautionary instruction—Mistrust of the female complainant

The cautionary instruction in rape cases is an instruction included in the judge’s charge to the jury.\textsuperscript{166} This instruction is originally written by Sir Matthew Hale in the seventeenth century,\textsuperscript{167} who was Lord Chief Justice of the King’s Bench from 1671 to 1676).

Lord Hale believed that rape is “an accusation easily to be made and hard to be proved. . . .”\textsuperscript{168} The inherent message from such a definition is the same as the message in rape myths that women lie about rape and a rape victim’s testimony should be viewed with suspicion. Hale’s caution was subsequently adopted as part of special jury instructions for rape cases and become part of the evi-

\textsuperscript{162} Ross, “Does Diversity in Legal Scholarship Make a Difference?”, supra note 11, p. 819.

\textsuperscript{163} Allison & Wrightsman, Rape, supra note 18, p. 204.


\textsuperscript{165} Ross, “Does Diversity in Legal Scholarship Make a Difference?”, supra note 11, p. 822-23.


\textsuperscript{167} 1 Matthew Hale, The History of the Pleas to the Crown, printed for E. Lynch, 1778, p. 627.

\textsuperscript{168} Ross, “Does Diversity in Legal Scholarship Make a Difference?”, supra note 11, p. 812.
dentary code in most states. As a result, the law requires the jury to examine the testimony of the complainant with caution and the jury was admonished “to evaluate the complainant’s testimony with special care, ‘in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.’”

However, the cautionary instruction has been challenged on grounds that “such an instruction may create in a juror’s mind the impression that the judge thinks the woman is lying.” The truth is that even if rape accusations could be easily made, most are not made at all due to definitional problems of rape, and the combination of “unfounded” cases and jury bias actually results in a remarkably low conviction rate in rape prosecutions. Empirical studies also confirm that false rape charges are not more prevalent than false charges of other crimes. “In other words, Lord Hale had it precisely backwards: rape allegations are not easily made, and they are very easy to defend against.” Therefore, this cautionary instruction which had been adopted by many of the American jurisdictions is only an example of the anti-victim, anti-female bias of the legal system in reference to rape cases.

c. Distrust in evidentiary rule

Male fear of a false rape charge brought by a lying woman is not only adopted as a cautionary instruction to instruct jury, but also is written into the rape laws in the form of several special rules of evidence that are absent from evidentiary rules governing other kinds of crime. These special evidentiary rules include the cor-

170. Dressler, “Where we have been, and where we might be going”, supra note 147, p. 416 (citing Model Penal Code § 213.6 (5) (1985)).
175. Bessmer, The Laws of Rape, supra note 164, p. 125; See also Peggy Reeves Sandy, A Women Scorned : Acquaintance Rape on Trial, n.p: University of California Press, 1996, p. 62 (The author points out that “[Hale’s] treatment of rape accusations was influenced less by rational legal criteria than by such anti-female attitudes. This suggestion is not only by Hale’s judicial treatment of rape but by his handling of one of the most notorious seventeenth-century English witchcraft trials.”)
roboration requirement, the doctrine of "prompt complaint", and
the testimony of victim's prior sexual history.

(1) Corroboration requirement

In many American jurisdictions, corroboration was technically
required in all rape cases either through statute or judicial decision.
Broadly defined, corroboration can be any supplementary evidence
admitted to strengthen or confirm other evidence already entered
into the record.\textsuperscript{177} However, the corroboration requirement rule in
rape cases stands in sharp contrast to traditional rules of evidence.

Generally in England, the evidence of a single witness is suffi-
cient to prove the case against the accused; "the court can act upon
the uncorroborated testimony of one witness, and such require-
ments as there are concerning a plurality of witnesses, or some
other confirmation of individual testimony are exceptional."\textsuperscript{178} But
in rape cases, the victim's evidence alone was incapable of securing
a conviction, even if it is probable and consistent. There must be
some additional confirmatory evidence which implicates the ac-
cused person and tends to confirm his guilt.\textsuperscript{179} Therefore, the prose-
cutor has to prove, apart from the victim's testimony, that the man
accused is the rapist, that there was penetration, that force was ap-
plied, and the intercourse was not a voluntary act on the part of the
complainant.\textsuperscript{180} Under this operation, corroboration is not support-
ing evidence that can be used to strengthen the prosecutor's case; it
is evidence that is always \textit{required} to prove that the alleged rape
occurred.\textsuperscript{181}

The obvious purpose of this requirement is to protect the inno-
cent defendant.\textsuperscript{182} Proponents argue that the presumption of inno-
cence to which the defendant is legally entitled may yield to "the
respect and sympathy naturally felt by any tribunal for a wronged
female," thus resulting in unfair prejudice against the defendant.\textsuperscript{183}

\begin{itemize}
  \item \textsuperscript{177} Bessmer, \textit{The Laws of Rape}, supra note 164, p. 104.
  \item \textsuperscript{178} Seaboyer v. Queen, [1991] 2 S.C.R. 577, 668 (Can.)(L'Heureux-Dube, J.,
dissenting).
  \item \textsuperscript{179} Sue Lees, "Unreasonable Doubt: The Outcomes of Rape Trials", in Marianne
Hester et al., ed., \textit{Women, Violence and Male Power: Feminist Activism, Research and
  \item \textsuperscript{180} Brownmiller, \textit{Against Our Will}, supra note 50, p. 372; See also \textit{Rape: The First
Sourcebook for Women}, supra note 95, p. 126.
  \item \textsuperscript{181} Ibid.
  \item \textsuperscript{182} Bessmer, \textit{The Laws of Rape}, supra note 164, p. 105.
  \item \textsuperscript{183} "The Rape Corroboration Requirement: Repeal Not Reform", \textit{The Yale Law
\end{itemize}
In addition, fear of the false charge is another justification of this evidentiary requirement.

This exception to the general evidentiary rule in rape cases therefore seems best explained "by the stereotype concerns with women's 'complicity' in rape and fabricated rape charges."184 Although this evidentiary requirement was abolished in the 1994 Criminal Justice Act, it is likely that some judges will still continue to practice this requirement in another way.185

(2) Prompt complaint doctrine

The "prompt complaint" doctrine is a doctrine that required the victim to report the rape immediately or right after it occurred.186 Many believed that the court should draw a strong inference of false testimony if a rape complainant did not cry out at the time of the alleged assault or as soon thereafter as possible.187 Hence, a scholar points out that the prompt complaint doctrine functioned as a short statute of limitations.188 In fact, the Model Penal Code did propose the requirement of a complaint within three months as an absolute prerequisite for prosecution.189

This requirement, however, is also a special evidentiary rule in rape trials that permits the prosecution to introduce out-of-court statements made by the complainant shortly after the assault, alleging that the rape occurred.190 Thus, this requirement is another exception to general evidentiary rule that prior consistence statements are inadmissible to prove the truth of the matter asserted and that witness assertions "are to be regarded in general as true until there is some particular reason for impeaching them as false."191

The prompt complaint doctrine, also known as fresh complaint rule, originally evolved form the common-law requirement of "hue and cry," which was based on the expectation that victims of violent

184. Ross, "Does Diversity in Legal Scholarship Make a Difference?", supra note 11, p. 828; See also Estrich, Real Rape, supra note 96, p. 45.
187. Ross, "Does Diversity in Legal Scholarship Make a Difference?", supra note 11, p. 828.
188. Ibid.
191. Ross, "Does Diversity in Legal Scholarship Make a Difference?", supra note 11, p. 828.
crimes would cry out immediately. 192 This doctrine reflects the assumption that woman who was “truly raped” would “naturally” report rapes as soon as possible; prompt complaint rule evidence is necessary to show that the rape victim behaved like a “true” victim. 193 Yet it ignores the fact that there are numerous reasons why women do not report rape promptly. Women may, for example, feel that complaints are hopeless, too embarrassing to discuss with strangers, or they may be traumatized or intimidated into silence. 194 In fact, the data points out that more and more frequently those victims do not always blurt their stories at the earliest opportunity. Thus, researcher indicates that “a rule of evidence to the effect that a failure to make a prompt complaint argues against the existence of a rape is itself counter to the existing evidence.” 195

Besides, this doctrine also reveals the distrusting attitude toward rape victim because it treats the testimony of rape complainants as presumptively false. 196

(3) Prior sexual history

Traditionally, under the common law of rape, the prior sexual history of a rape compliant has been considered as “character evidence” because its predominant effect is to impugn the rape compliant’s character. 197 It serves two purposes in rape trials: to show the woman’s consent and her lack of credibility. 198

Studies have pointed out that the prior sexual history of a rape compliant is relevant to the question of consent comes not form logic but from cultural beliefs. 199 It was assumed that the rape compliant’s prior sexual history was a character trait and a woman with this kind of trait would be more likely to agree to the inter-

197. Ross, “Does Diversity in Legal Scholarship Make a Difference?”, supra note 11, p. 831.
course with defendant.\textsuperscript{200} From legal perspective, traditionally, the evidence of prior sexual history was viewed as the “pattern of conduct evidence.” “This is evidence that the prior sexual history of the complainant shows a pattern of conduct similar to the conduct alleged in the case at bar.”\textsuperscript{201} Under this theory, once a woman has had sexual relations with one or more men, a legal presumption exists that she has consented to sexual relations with all men.\textsuperscript{202}

Consent is to an individual person, however, and not to a circumstance in general.\textsuperscript{203} A woman may refuse all propositions made to her, but finally accept one from a man she likes. Similarly, a woman may have accepted a number of propositions in the past and refuse one from a man she dislikes.\textsuperscript{204} The use of the words “pattern” denies the reality that even if a woman has accepted the advances of one or more men, “this does not affect the likelihood of her resisting the advance of any man unless one assumes the absence of a process of selection.”\textsuperscript{205}

Credibility is always an issue for any witness who gives testimony at any trial. However, it serves as a more important role in the context of a rape trial,\textsuperscript{206} since the victim is often the sole witness.

In common law tradition, counsel was permitted to inquire into personal history to discredit the witness. However, this rule was frequently disputed and come to a limitation that only “acts which have a significant relation to the credibility of the witness” can be attacked during the cross-examination.\textsuperscript{207} In rape cases, evidence of a complainant’s prior sexual relations with other men continued to be deemed relevant to her credibility until the 1970s. Therefore, the evidence of rape complainant’s prior sexual history can be admitted to impeach her credibility.

\textsuperscript{200} Simon, “Sex Offender Legislation and the Antitherapeutic Effects on Victims”, \textit{supra} note 92, p. 512.

\textsuperscript{201} Ross, “Does Diversity in Legal Scholarship Make a Difference?”, \textit{supra} note 11, p. 834.

\textsuperscript{202} LeGrand, “Rape and Rape Laws”, \textit{supra} note 63, p. 78.

\textsuperscript{203} Ross, “Does Diversity in Legal Scholarship Make a Difference?”, \textit{supra} note 11, p. 835.

\textsuperscript{204} Bessmer, \textit{The Laws of Rape}, \textit{supra} note 164, p. 254.

\textsuperscript{205} \textit{Ibid}.


\textsuperscript{207} Ross, “Does Diversity in Legal Scholarship Make a Difference?”, \textit{supra} note 11, p. 836.
This rule is based on the assumption that if a woman is “unchaste”, she is more likely to lie about rape.208 “Once a loose woman, always a liar” was the theory.209 However, there is no evidence to prove that an “unchaste” woman is more likely than a “chaste” woman to lie about rape. Scholars even points out that “[a] woman who is already known to have a bad reputation for chastity has less to lose by admitting that the subsequent acts with other men were consensual.”210 which would support the thought that there should be “no difference between the previously chaste and the previously unchaste in terms of their dispositions to consent to sex and then cry rape.”211 If there is anything different, one can predict that an unchaste woman would treat this incident like all the others and not to make a rape complaint.212

This evidentiary rule therefore fails to serve the two purposes it claims. Its purposes were “to humiliate and degrade the complainant, to prove her unchastity as a means of casting doubt on her truthfulness regarding her complaint, and to allow jurors sub rosa to characterize the female as a sexually promiscuous person undeserving of the law’s protection.”213 It exists as a reflection of rape myths and the distrust of women that they foster.

C. Rape Myths in American Legal System

As we have seen, rape myths are prevalent in American society. Unfortunately, not only are members in society affected by stereotypes and rape myths, but so are the professionals in the criminal justice system. Rape myths are especially dangerous to the victim and society as a whole when they are internalized in the criminal justice systems.214 When interacting with rape victims and rapists, professionals who have internalized rape myths in the crimi-

210. Ibid., p. 266.
211. Ibid.
212. Ibid.
213. Dressler, “Where we have been, and where we might be going”, supra note 147, p. 416.
nal justice system cannot provide the victim with the help she needs.\textsuperscript{215}

Prior to the impact of the rape law reform, studies and data in the 1970s and 1980s found that the legal actors in the criminal justice system treated rape differently. As mentioned earlier, the failure to report in rape cases was much higher than in the case of any other serious crime. Once rapes were reported, many complaints were then treated as unfounded.\textsuperscript{216} Even in the event that a reported rape was founded, data from Washington D.C. indicated that 26% of rape cases were not prosecuted.\textsuperscript{217} Moreover, if the crime was prosecuted, the rapist was not likely to be convicted. The conviction rate in Washington D.C., including convictions by plea bargain, was only 20%.\textsuperscript{218} Furthermore, merely two-thirds of those who were convicted of rape could expect to be sentenced to prison.\textsuperscript{219}

The attrition rate at every level indicates that rape cases do not often end in convictions. One study shows that men who committed rapes only had about a 13% chance of being convicted,\textsuperscript{220} and according to the Senate Judiciary Committee, 98% of rape victims never even see their attackers get caught, tried, or imprisoned.\textsuperscript{221}

Traditionally, rape was not necessary different from other felonies in this regard because those actually convicted of felonies generally comprised a minority of those charged with them.\textsuperscript{222} But, does similar outcome or similar attrition rate really indicate that rape victims have been treated similarly to other victims of felonies?

\textsuperscript{215} Johnson & Sigler, Forced Sexual Intercourse in Intimate Relationship, supra note 15, p. 23.


\textsuperscript{218} Ibid.

\textsuperscript{219} Ibid.

\textsuperscript{220} LeGrand, supra note 160, p. 927.


Scholars had argued that equal outcome doesn’t mean equal treatment. The qualitative evidence about the treatment of rape victims showed that there was more going on here than ordinary felony attrition.223 Rape victims often tell horror stories about the way they were treated by police, prosecutor, and other legal professions. One victim even stated that she felt that the police and prosecutors were "just a bunch of people who wanted to hear dirty stories."224 A study of forty victims reported that every one of them found their court appearance stressful, and that many of them felt that their court experience was as upsetting as the rape itself.225 Another study of seventeen rape trials found that "the extent of trauma suffered by the victim in her contact with the legal system is in large measure due to the attitudes and consequent treatment of the victim by the law enforcement and court personnel with whom she deals."226 From these sources of data, several researchers concluded that the rape victim occupied a unique position in the legal system which treated her with unequalled suspicion and made her feel that she was more on trial than the defendant.

In contrast to the anecdotal literature that focused on the rape victim’s perspective, the empirical literature in 1980s present a more balanced view. Feldman-Summers and Palmer’s research indicated that the frequent complaint of unsympathetic and suspicious treatment by rape victims could be linked to “beliefs held by the criminal justice system members who tend to place blame and responsibility on the victim.”227 Another research conducted by Ledoux and Hazelwood also found that police officers believed that in practice neither prosecutors nor the public (potential jurors) were adequately prepared to play their roles in court. Even judges were believed to be too lenient in the sentences they gave to rapists.228

224. Ibid., p. 1100.
Furthermore, a study conducted in 1985 provided much stronger evidence to support the argument that "equal outcome or equal attrition rate does not mean equal treatment." Alan J. Lizotte began his research by asking how the process of reporting rape to the police differs from that of reporting other forms of assaultive violence.\textsuperscript{229} He found that reporting a rape to the police was qualitatively different form reporting an assault. The victims of rape tended to report to the police when the probability of conviction was high. However, the probability of conviction was not an important factor for victims of assault to report crimes to the police.\textsuperscript{230} This means that only the most serious rapes were reported, whereas less serious assaults were reported.\textsuperscript{231} As a result, the conviction rate for rape cases should be higher than other assault cases and the attrition rate should be lower. The similarity of conviction rate and attrition rate between rape and other crimes actually indicated that criminal justice personnel did hold a higher standard when confronted with rape cases.

Based both on the anecdotal literature and empirical literature in 1970s and 1980s, rape victims did occupy a unique position in the legal system which treated them with unequaled suspicion.\textsuperscript{232} Prior to the rape law reform, the judicial system discriminated, at every stage, against rape victims.\textsuperscript{233} This discrimination has contributed to causing women not to report rapes, police not to take the charges seriously, prosecutors not to file charge, and juries not to convict.\textsuperscript{234} In other words, it was the rape myths held by the justice system that caused strong rape cases to go unpunished. Rape myths make it difficult to establish that a rape has occurred because they help to reinforce skepticism toward rape victims.

\textsuperscript{230} Ibid.
\textsuperscript{231} Ibid.
\textsuperscript{232} Anne M. Coughlin, "Sex and Guilt", \textit{Virginia Law Review}, Vol. 84 (1998), p. 8 (Coughlin provided a different approach to understand the legal system's suspicion toward rape victims. She proposed that "by unraveling our ancestors' belief that all nonmarital intercourse should be criminalized, we may begin to understand...the inclination of courts to approach rape complaints with deep suspicion.").
\textsuperscript{233} Brownmiller, supra note 50.
1. Police Processing

The decision to report a rape is a step most victims might never take. If they do, the first members of the criminal justice system they face are the police. The police are the most important processing agents in rape cases. They are not only rape victims' first contact with the criminal justice system, but are also the only officials who participate from initial report to final disposition. In addition, the initial decisions are made by the police, in many cases without any review by prosecutors. Police have complete discretion in deciding whether to accept the woman's complaint of the crime. The police also decide whether and how much to investigate, a decision that affects the quality of evidence available for trial. The police provide the pool of arrestees from which the prosecution selects defendants. Of 905 cases in the LaFree's research, only 324 (35.8 present) resulted in arrest. Thus, LaFree concluded that more cases screened by the criminal justice system were screened by police than any other officials. Moreover, police exercise this substantial discretion almost invisibly. Unlike jurors, he or she cannot be polled. He or she is allowed to abandon or downgrade a case silently. Therefore, Blumberg and Niederhoffer have concluded that "in practice, the average policemen exercises greater judicial discretion over cases than does a judge."

Since the police in effect have substantial discretion as to whether or not any action is taken to obtain a conviction, police officers' beliefs about rape and the rape victims become crucial in prosecuting rape cases. Unfortunately, police have consistently come under fire for negative and prejudicial attitudes toward rape victims. In 1970s and 1980s, there had been numerous anecdotal

237. Estrich, Real Rape, supra note 96, p. 15.
239. Estrich, Real Rape, supra note 96, p. 15. (Susan Estrich has argued that "[j]udges sometimes are attacked publicly when a convicted defendant receives what appears to be an unduly lenient sentence, but police decide to abandon cases every day and no one knows."
accounts in the literature that reported the police’s mistreatment of rape complaints. Hundreds of rape victims reported that “the way the police treated me was as bad as the rape itself.” Feminists had also been particularly scathing of police attitudes. Brownmiller has argued that “[d]espite their knowledge of law they are supposed to enforce, the male police mentality is often identical to the stereotypic views of rape that are shared by the rest of male culture.”

In addition to the victims’ and feminists’ perspective, there existed evidence that police officers’ attitudes toward rape victims were more like rapists’ than rape crisis counselors that the police were highly suspicious of rape victim. When compared with a student sample, police recruits were also more likely to perceive rape as a sex crime and more likely to point to victim causality in rape. John LeDoux and Robert Hazelwood’s study in 1985 also revealed that police officers were “suspicious of victims who meet certain criteria, such as previous and willing sex with the assailant, or who ‘provoke’ rape through their appearance or behavior.” The police officers also adopted a conventional and stereotypical view of rape as sexual crime and tended to perceive rapists as “abnormal”.

A number of social science research studies in 1970s and 1980s also tried to explore the exercise of discretion by police in making “founded” or “unfounded” decisions about rape reports. One re-

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242. However, studies have indicated that Brownmiller’s argument was apparently mistaken to limit her accusations to male officers. Female officers have found to share the same attitude toward rape victim as male police officers. (Colleen A. Ward, Attitudes toward Rape: Feminist and Social Psychological Perspectives, n.p.:Sage Publications Ltd, 1995, p. 56 ) One study also suggests that the fact that policeman and poliwoman share the same attitude toward rape victims is due more to their training than to the fact that the officer is a man.(Carolyn J. Hursch, The Trouble with Rape, n.p.: Burnham Inc Pub, 1977, p. 120)
246. Ledoux & Hazelwood, “Police Attitude and Beliefs Concerning Rape”, supra note 228, p. 45-46.
247. Ibid., p. 57.
248. Ibid., p. 50-51.
port and two national studies indicated that in most police departments more rapes were considered "unfounded" than other serious crimes. Further, although the official national "unfounding" rates for all rapes was about 8%, the proportion of acquaintance rape complaints that were unfounded were between 65% and 75%.250

The label "unfounded" is police terminology, not a legal term.251 The police may legitimately mark a case as unfounded only if "investigation shows that no offense occurred nor was attempted."252 However, several studies have indicated that the existence of extralegal victim variables such as alcohol or drug use, delay in reporting by the victim, or a previous relationship between the victim and the offender strongly correlates with a decision to unfound.253

An earlier study in Philadelphia also pointed out that the rape victims' "assumption of risk", such as getting into a car, and the promptness of her complaint were important factors influencing the exercise of police discretion.254 Detectives in another study also admitted that they adopted an "assumption of risk" motive for classifying cases as unfounded. They considered "such aspects as whether the victim had dated the offender and willingly gone to his apartment and whether the victim was wearing a short skirt at the time of the incident, or a shirt without a bra underneath."255 Gary LaFree in his 1981's research also supports the previous research. He found that extralegal determinants affected whether police charged a suspect with rape or not. Those extralegal factors included the victim's "misconduct" (hitchhiking, drinking, being alone at a bar, engaging in the sex outside of marriage, or willingly entering the suspect's car, house, or apartment), victim's delay in

251. Gager & Schurr, Sexual Assault Confronting Rape in America, supra note 241, p. 132.
254. Rape in Philadelphia, supra note 244.
filing a report, a prior relationship between victim and suspect, and the absence of weapon. Furthermore, no arrests were made in any cases LaFree studies in which police found victim “misconduct”.\textsuperscript{257}

Finally, another study also suggests that the complaint’s conformity or lack of conformity to sex-role norms may still be a significant factor in the detective’s inclination or disinclination to pursue the complaint.\textsuperscript{258}

Factors associated with policemen’s unfounded decisions, such as rape victims’ "assumption of risk" or misconducts, are not relevant to whether or not a rape has been committed, but are only relevant to the chance of obtaining a conviction in court. However, these factors would deter even more rape victims from reporting the crime if known to them. These factors also suggest that decisions in rape cases were determined, whether strongly or slightly, by the victim’s contributory negligence or perceived bad character. Police did sometimes consider these factors to be valid indicators of whether or not a rape occurred.

2. Prosecutor Processing

Once the police officer has determined the report of rape to be valid, the cases are taken to the prosecutor, who also has a great deal of discretion in making a judgment about whether a rape has actually occurred and whether it was committed by the alleged assailant. Prosecutors have to determine if there is sufficient evidence available to prove the defendant guilty "beyond a reasonable doubt." Because of this standard of proof, prosecutors not only focus on the facts of the case, but also whether the victim "will make a good witness."\textsuperscript{259}

A "good witness" is someone who, through her appearance and demeanor, can convince a jury to accept her account of "what happened." Her testimony should be "consistent", her behavior

\textsuperscript{256} See generally LaFree, "Official Reaction to Social Problems", supra note 235.
\textsuperscript{257} Ibid., p. 592.
\textsuperscript{258} Kerstetter, "Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults Against Women", supra note 253, p. 309 (Kerstetter found that gender-conflict variables appear to be likely to influence the secondary, more informal decisions, rather than the primary decisions, such as the police founding decision and the prosecutorial felony filing decision. Factors that predominate in determining the official reaction to sexual assault complaints and define and control access at the gateway to justice are instrumental and evidentiary.)
\textsuperscript{259} Holmstrom & Burgess, The Victim of Rape, supra note 225, p. 142.
"sincere" and her cooperates in case preparation. Because of this, prosecutors focused on the consistency of the story, the victim's behavior, the victim's reputation and the relationship between the victim and the offender. Prosecutors were more likely to proceed with a case if the victim's account was consistent and unchanged.

Researchers in 1970s found that, like all participants in the criminal justice system, the prosecutors also gave weight to a woman's character, such as her alcoholism. Prosecutors were more likely to justify rejecting a rape case for prosecution on the basis of eyewitness personal credibility and evidence sufficiency problems than in other types of criminal cases. Some scholars argued that the focus on the rape victims' credibility is in fact due to the "one-on-one" nature of the crime. Rape is often witnessed only by the individuals whose competing accounts are at issue. Therefore, it shouldn't be difficult to appreciate why "poor personality credibility" of the complainant is more frequently cited as a basis for the prosecutor's decision. However, a number of researches argued that this high credibility requirement is actually a result of the suspicion toward the rape victim. They believed that rape victims were less frequently believed and more frequently suspected of fabricating a story than other victims.

Like the police, prosecutors also considered rapes committed by strangers to be more serious than rapes committed by acquaintances, and took the previous relationship between the rape victims and accused into account. A national survey of prosecutors in 1974 found that two extralegal characteristics—the circumstance of the initial contact between the victim and the defendant and the relationship between the victim and the defendant—were cited as being as important as other legally relevant factors to the decision of file charges. A 1980 study in the state of Washington found the social

261. Ibid., p. 144.
262. Holmstrom & Burgess, "Rape and Rape Laws in Historical Perspective", supra note 134, p. 144.
263. Williams, The Prosecution of Sexual Assaults, supra note 217, p. 27.
265. Ibid., p. 87.
266. Williams, The Prosecution of Sexual Assaults, supra note 217, p. 27.
267. Battelle Memorial Institute Law and Justice Study Center, Forcible Rape: Prosecutors' Volum I, Dept. of Justice, Law Enforcement Assistance Administration, Na-
interaction of the victim and the offender to be the second most important factor in predicting outcome.268 In the District of Columbia, researchers found that the relationship between victim and accused was substantially more important than the seriousness of the incident in explaining conviction rates: the closer the relationship, the lower the conviction rate.269 To explain prosecutors' attitude toward acquaintance rape, Robin Warshaw suggests that prosecutors' disinclination to take on acquaintance rape is due in part of their own ignorance and prejudices about rape and rape victims, and in part to their belief that jurors will hold the same anti-victim views.270 In other words, "winnability" is still the most important factor to the decision of prosecutor.

Prosecutors' excessive use of "winnability" as a criterion for filing charges had been noted by several studies. One study of prosecutorial discretion to reject rape cases in two West Coast communities in 1989 and 1990 concluded that prosecutors screen out "unwinnable" cases in order to improve their conviction rates.271 Although it is true that no one expects prosecutors to bring unwinnable cases — cases that could not meet the "beyond a reasonable doubt" standard — the prosecutor must also understand that there is something more in the prosecution of rape cases than an individual "win" or "loss".272

At the end, the rape survivors are still the victims of the criminal justice system. Seeing prosecutors not filing the charge often led them to believe that this failure had to do with something they did wrong, when in reality the problem is a system that politically and economically is prejudiced against prosecuting rape.273

3. Juror Decisions

The empirical evidence suggests that the kinds of cases in which police tend to throw out, in which prosecutors are reluctant to file charges, and in which appellate courts occasionally reverse a

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269. Williams, The Prosecution of Sexual Assaults, supra note 217, p. 32.
270. Warshaw, I Never Call It Rape, supra note 66, p. 142.
conviction, are the kinds in which most juries are not likely to convict.\(^{274}\) This reflects that attitudes held by the members of the criminal justice system are also common among jurors. Jurors tend to bring with them fundamental premises with which to interpret facts and attribute blame. Rape myths therefore have an extremely powerful influence over jurors.\(^{275}\) One study shows that when jurors evaluate the evidence in order to attribute blame and assign responsibility, they rely upon familiar rape myths as interpretative resources for assessing and understanding action.\(^{276}\) One scholar of rape trials has also stated that “jurors possess a stultifying penchant for entertaining traditional stereotypes about the nature of male/female sexual relations and for incorporating this inaccurate extralegal evidence in their deliberations.”\(^{277}\)

Gary LaFree has conducted some of the most important works on the outcomes of rape investigations and trials. In his 1985 study,\(^{278}\) consistent with feminist views, it showed that in cases where the man claimed the woman had consented to sex or that no sexual activity had occurred, the jurors were influenced by testimony about a victim’s life style. Jurors were more likely to doubt the defendant’s guilt if the victim had engaged in sex outside marriage, drank or took drugs, or had known the defendant even briefly before the attack.\(^{279}\) These considerations, the researchers noted, “may represent either a legitimate concern with a victim’s credibility or an illegitimate concern with her moral character.”\(^{280}\) In many cases, scholars believe it is the latter.\(^{281}\)

LaFree’s work concurs with the findings of others. When the victim is acquainted with the rapist, the latter is less likely to be charged or convicted.\(^{282}\) Again, some researchers believe that this difficulty in acquaintance rape or date rape is due to its unique evi-

\(^{274}\) Simon, “Sex Offender Legislation and the Antitherapeutic Effects on Victims”, \textit{supra} note 92, p. 507.

\(^{275}\) Torrey, “When Will We Be Believed?”, \textit{supra} note 61, p. 1050.


\(^{279}\) \textit{Ibid.}, p. 400.

\(^{280}\) \textit{Ibid.}, p. 401.

\(^{281}\) Warshaw, \textit{I Never Call It Rape}, \textit{supra} note 66, p. 143.

dentiary problem. However, more scholars believe that there’s something more than the evidentiary difficulties going on in the acquaintance rape trial. Some have indicated that juries are reluctant to convict a man for an acquaintance rape, because they consider it a “lesser” crime than a stranger rape. Others suggest that because jurors unconsciously need to maintain coherency, when confronted with gaps in the evidence (such as the he-said/her-said dispute in acquaintance rape); they fill in these gaps with familiar rape myths.

In addition, according to the most comprehensive study of jury verdicts in American criminal cases, The American Jury, Kalven and Zeisel concluded that jurors, especially in “simple rape” cases, in effect rewrote the law of rape by importing the tort concept of contributory fault or assumption of risk and acquitting the defendant of rape when they perceived that the victim’s conduct helped to precipitate the rape. Therefore, many jurors in rape cases are prejudiced against the prosecution and empathize with the defendant, especially if there is evidence of “contributory behavior” on the part of the victim. “Contributory behavior” includes hitchhiking, dating, and talking with men at parties. In these kinds of cases, the jurors may feel that the woman provoked the rapes, so that the rape, while legally and perhaps morally wrong, were understandable enough to deserve leniency.

Furthermore, Kalven and Zeisel also asked judges if they agreed or disagreed with the jury’s verdict in particular cases. They reported that 60 percent of the simple rape cases that were acquitted by juries would have been found guilty by judges on point of law.

284. Warshaw, I Never Call It Rape, supra note 66, p. 143.
286. Harry Kalven, Jr. & Hans Zeisel, The American Jury, n.p: X, 1966, p. 249. Kalven and Seisel divided their rape cases into two categories, aggravated rape and simple rape. “Aggravated rape” includes cases with extrinsic violence, multiple assailants, or no prior relationship between victim and offender. “Simple rape” includes in which none of these “aggravating circumstances” is present.
288. Ibid.
289. Ibid., p. 254.
4. Among Judges

Judges can be expected to make decisions of consequence to the rape victims, even in the jury trial. He or she has great discretion in decisions about the admissibility of testimony and the choice of instructions given to the jury. Judges may terminate testimony or unintentionally convey his or her evaluation of certain attorneys or witnesses.290

Judges play an important role in the criminal justice system, and it has been believed that they will balance out any inequities toward rape victims resulting from rape myths held by police, prosecutor and jurors. In fact, judges are human, like other participants in the legal system and even worse, they for the most part seem to adopt and enforce the most insulting myths about rape victims.291

While nearly a third of criminal justice system officials said that they thought rape reports were more frequently fabricated than others, judges were particularly skeptical.292 A frequently cited study concerning judges’ attitudes toward rape victims and rape cases was conducted by Carol Bohmer in 1974.293 She found that judges tended to divided rape cases into three categories, based primarily on their evaluations of the credibility of the complaints.294 The first type includes those women they consider “genuine victims.” These largely fit the stereotype of rape with a sex-starved stranger leaping out of the bushes to attack a helpless victim.295 In this type of case, judges gave these women a sympathetic hearing and reacted punitively toward the rapist. However, they displayed quite different attitudes in cases which may be rape according to law but which they classified as “consensual intercourse.” In this type of case, they often believed that the victim was “asking for it” and used terms such as “friendly rape”, “assault with failure to please”, or “breach of contract” to describe the situation.296 In the third type of case, judges believed either that the alleged rape was totally consensual or that the alleged rape did not in fact occur. In these cases, judges did not hesitate to attribute a motive to the vic-

290. Allison & Wrightsman, Rape, supra note 18, p. 183.
292. Marsh ET AL., Rape and the Limits of Law Reform, supra note 264, p. 90.
294. Ibid., p. 304.
295. Ward, Attitudes toward Rape, supra note 242, p. 106.
Rape myths in American and Chinese laws

tim—female vindictiveness and desire to punish a specific man.\textsuperscript{297} Bohmer also found that several judges quoted Lord Hale’s word that rape is the easiest crime to allege and the hardest to prove.\textsuperscript{298}

Concluding her research, Bohmer indicated that judicial attitudes toward rape victims were far less impartial than was frequently supposed. The judges’ comments supported the allegation of courtroom victimization of at least some rape victims.

In addition to Bohmer’s study, another study also indicates that judges do hold some kind of biases against rape victims, especially in acquaintance rape cases. It found that a number of rape trial judges revealed their biases against the acquaintance rape victim and conveyed this bias to the jury by non-verbal cues, such as shaking their head in disbelief while the victim is testifying.\textsuperscript{299}

Since judges play a significant role in the outcome of a trial, rape myths held by judges could be the most dangerous type of discrimination against rape victims in American criminal justice system.\textsuperscript{300}

To sum up, although some studies argued that the difficulty of prosecuting a rape case was due to its unique nature and evidentiary problems, a number of studies in 1970s and 1980s otherwise indicated that the treatment of victims of rape by those within the legal system—police, prosecutors, jurors and judges—was truly unique. For rape victims, there were difficulties not encountered by victims of other crimes. A rape trial can be seen as a barometer of ideologies concerning sexual differences, male dominance and women’s inferiority.\textsuperscript{301} Thus, before the impact of rape law reform, the criminal justice system was not merely failing to protect women; it was victimizing rape victims twice—once from the actual assault and a second time when they encounter negative, judgmental attitudes from police, prosecutors, jurors and judges.\textsuperscript{302}

\textsuperscript{297} Ibid.
\textsuperscript{298} Ibid., p. 304.
\textsuperscript{299} Alice Vachss, Sex Crimes, n.p: Random House, 1993, p. 87.
\textsuperscript{301} Lees, “Unreasonable Doubt: The Outcomes of Rape Trials”, supra note 179, p. 111.
\textsuperscript{302} Simon, “Sex Offender Legislation and the Antitherapeutic Effects on Victims”, supra note 92, p. 515.
D. Combating Rape Myths

1. Rape Law Reform

a. Early attempts at reform—Model penal code

Bartlett and Harris suggest that there are two main waves of rape law reform in the United States. Prior to the wave of reform mainly attributed to the women’s movement in 1970s, the first wave of rape law reform occurred in 1950s. 303

The American Law Institute began an ambitious project to examine the whole American criminal law in the 1950s. 304 Turning their attention to rape, the 1955 draft on sexual offenses of the Model Penal Code attempted to change the definition of rape and its standard of resistance. 305 The sexual offenses section in this draft was an important departure from the traditional common law definition of rape. The abolishment of the element of nonconsent was another attempt to move away from the traditional common law approach to rape. The drafters explained in their comments that this reform is a response to the “disproportionate emphasis” traditional rape law had placed upon the “objective manifestations by the woman.” 306 Consequently, the crime of rape should be defined solely in terms of “force.” The American Law Institute used the term forcible compulsion, which expanded the definition of force and threat, kept the focus upon the defendant; and made the presence of force determinative of whether the woman consented. 307

However, the Model Penal Code was actually not as significant a departure from traditional common law as reformers had hoped. Most of drafters’ recommendations made no break with traditional assumptions. 308 The Code preserved the prompt complaint rule, corroboration requirement, and retained a modified version of


305. Battelle Nem’l Inst. . Law and Justice Study Ctr., Forcible Rape, p. 5-6 (National Institute of Law Enforcement and Criminal Justice Law Enforcement Assistance Administration, Dep’t of Justice, ed., 1978).


308. Schulhofer, Unwanted Sex, supra note 304.
Lord Hale’s cautionary instruction to the jury. It not only continued the marital rape exemption, but further extended it. In addition, while the compulsion is defined in terms of the victim’s submission, the Code does not completely discard the consent standard. Therefore, one scholar has concluded that “[t]he approach of the Model Penal Code and its progeny, while stressing the aspect of force involved in rape, still does not clearly define rape as a crime of force and coercion exerted by the defendant.”

The Model Penal Code 1955 official draft was published in 1962. Despite of its defects, which were criticized by scholars who supported rape law reform, its innovative standard of rape had widespread effects on states. During the 1960s, legislatures throughout the United States extensively revised their criminal laws. By the late 1960s, over 30 jurisdictions had started or completed revisions modeled after the Model Penal Code. This early attempt to reform also led to the second wave of reform in 1970s.

309. *Ib id.; See also* Ross, “Does Diversity in Legal Scholarship Make a Difference?”, *supra* note 11, p. 851.


(1) **Rape.** A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the female is unconscious; or

(d) the female is less than 10 years old.

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.

(2) **Gross Sexual Imposition,** A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:

(a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or

(b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or

(c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.

b. The Michigan law

Following the lead of the Model Penal Code, the next generation of rape law reform activities began in the early 1970s. State legislatures during this period endeavored to assist rape victims by enacting laws aimed at protecting a victim's privacy, while simultaneously combating the societal misperceptions of rape and its victims. Among those reform statutes throughout the nation, Michigan's 1974 Criminal Sexual Conduct Act has been recognized as the most far-reaching of revisions in rape law. It is regarded as a turning point in rape law reform and it has served as a model for twelve states.

Michigan's Criminal Sexual Conduct Act could be described as victim-initiated, and is resulted from efforts of a women's group in Michigan—the Michigan Women's Task Force on Rape. Michigan Women's Task Force on Rape was initially a group of women working in rape crisis centers who found that their efforts to help rape victims were seriously hampered by the rape laws in effect and dissatisfied at the criminal justice system's treatment of rape victims. They drafted the bill, with the help of a lecturer in University of Michigan Law School, and pressured the state legislature to pass the bill.

The reform Michigan statute has four central features. First, it redefines the crime of rape. The new law has the title of "Criminal Sexual Conduct", and it is sex-neutral—extending protection to both females and males. The offender in the law is referred to as the "actor," and the victim as "the victim or the other person." Consequently, rape in this statute covers such crimes as homosexual rape, as well as the molestation of a child, male or female, by a woman. In addition, the conduct of sexual assault is distinguished to two general categories—sexual conduct and sexual penetration. Sexual conduct includes the intention of touching the actor's or the victim's intimate parts or the clothing covering those areas, if the

319. Dean & deBruyn-Kops, The Crime and the Consequences of Rape, supra note 140, p. 23.
touching can be construed as being for the purpose of sexual arousal or gratification. The second category is defined as sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body, but emission of semen is not required. The scholar indicates that this classification eliminated the confusion that had been generated by the old law.

The new law also creates a ladder of offenses based on the seriousness of the offense, the amount of force or coercion used, the degree of injury inflicted, and the age and incapacitation of the victim. This hierarchy of degree of the crime is created for the purpose to encourage prosecutors to prosecute, to allow the jury to find a defendant guilty of an appropriate lesser offense in nonaggravated rape or sexual contact cases, and to increase the likelihood that defendants who are guilty will plead guilty.

The third important feature, perhaps the most significant aspect, of the Michigan statute is the new evidentiary provision. Under the new law, the element of nonconsent is not mentioned and the resistance standard is expressly eliminated. It does not require the victim to resist the attacker under any degree; the crime is defined solely in terms of the defendant's use of "force or coercion." In addition, the new law adopts a strong rape shield law that generally prohibits the introduction of evidence of the victim's sexual reputation, or sexual conduct with two exceptions. These are evidence of past sexual relationship with defendant himself and evidence related to the source of origin of semen, pregnancy or dis-

320. Ibid.
 ease.\textsuperscript{327} The new law also modifies the rules of evidence by stating that corroboration of the victim's testimony is not required.\textsuperscript{328}

Finally, the last feature of the Michigan statute is that the criminal sexual assault can be committed by one spouse against another as long as they are living apart and one of them has filed for separate maintenance or divorce.\textsuperscript{329} However, the new statute still does not protect spouses with continuing marriages.

Although the American Law Institute and some scholars criticized the Michigan Criminal Sexual Conduct Act,\textsuperscript{330} the law did reflect a major rethinking of the common assumptions about rape. Researchers generally agree that this "strong and comprehensive reform law enacted in Michigan was more than a symbolic response to a vocal constituency clamoring for change,"\textsuperscript{331} it "witnessed genuine benefit for victims and needed change in the conduct of police and prosecuting attorneys."\textsuperscript{332}

c. Areas of rape law reform

Michigan's rape law reform interested women's groups and lawmakers in other states, and many states rewrote their own rape law. By 1977, almost half the states had successfully revised their rape laws.\textsuperscript{333} Although there is some diversity in the actual reforms various states concluded, combined with Michigan law reform mentioned in previous part, reformers during the 1970s usually focused on changing four primary areas of laws: the definition of the offense, evidentiary rules, statutory age offenses, and the penalty structure.\textsuperscript{334}

\textsuperscript{327} Cobb & Schauer, "Michigan's Criminal Sexual Assault Law", supra note 317, p. 173; See also Temkin, "Women, Rape, and Law Reform", supra note 318, p. 28.

\textsuperscript{328} Spohn & Horney, "Criminology", supra note 323, p. 866.

\textsuperscript{329} Dean & deBruyn-Kops, The Crime and the Consequences of Rape, supra note 140, p. 23; See also Temkin, "Women, Rape, and Law Reform", supra note 318, p. 28.

\textsuperscript{330} Tchen, "Rape Reform and a Statutory Consent Defense", supra note 149, p. 1539; See also Estrich, Real Rape, supra note 96, p. 84.

\textsuperscript{331} Spohn & Horney, "Criminology", supra note 323, p. 866-67.


\textsuperscript{333} Dean & deBruyn-Kops, The Crime and the Consequences of Rape, supra note 140, p. 28.

(1) Redefinition of the offense

The traditional definition of rape had been criticized as too narrow. Reformers aimed at changing the limited definition of rape to incorporate some of its realities.\(^{335}\) In order to emphasize the idea that rape is a violent crime and not one of uncontrollable passion or desire, and in order to help promote the equality of all citizens, reformers redefined the rape as "sexual assault," "sexual battery," or something similar.\(^{336}\) This redefinition also broadened the definition of the crime beyond its traditional meaning, to include all types of penetration and other sexual contacts.\(^{337}\)

Another type of reform divided rape into a series of degree of seriousness based on circumstance such as amount of force or coercion, the degree of infliction of injury and age differences between victim and offender.\(^{338}\) One of the rationales behind this reform was to increase the conviction rate. It is based on the assumption that juries are often hesitant to impose a heavy sentence on a rapist. By specifying degree of rape, the jury might be more inclined to convict the defendant without worrying that the sentence is too punitive.\(^{339}\) Other research suggests that this reform attempted to draw attention to the objective circumstances to indicate the absence of consent, hence eliminating the resistance requirement.\(^{340}\)

In addition, many reforms expanded the categories of persons to be held accountable or to be protected by law. Most reforms adopted a gender-neutral law to protect victims from female offenders and to protect male victims.\(^{341}\) As of 1980, over half of American jurisdictions had adopted or at least considered a gender-neutral definition of both victim and offender.\(^{342}\) Some reforms removed or modified the spousal exemption, hence sexual assault upon some categories of spouses are now included in the definition of rape in many states.\(^{343}\)


\(^{336}\) Berger et al., "Rape-Law Reform", supra note 334; See also Allison & Wrightsman, Rape, supra note 18, p. 212.

\(^{337}\) Berger et al., "Rape-Law Reform", supra note 334.

\(^{338}\) Ibid.; See also Bourque, Defining Rape, supra note 144, p. 110-11.

\(^{339}\) Allison & Wrightsman, Rape, supra note 18, p. 212.

\(^{340}\) Berger et al., "Rape-Law Reform", supra note 334.

\(^{341}\) Ibid.

\(^{342}\) Estrich, Real Rape, supra note 96, p. 81. (Estrich further indicates problems of these gender-neutral definition.)

At last, some states tried to eliminated the term "consent" by relying on a particular set of circumstances or objective facts to indicate when nonconsent was present (such as the standard of force used by the alleged rapist). This reform is intended to obviate the state's burden of proving the absence of consent, and to shift the focus from the victim's behavior to the offender's behavior. However, one researcher has found that:

Feminist reformers have been divided on the issue of consent terminology.

Although reforms that remove the term "consent" from sex-offense statutes make use of the consent defense more difficult, they are less consistent with the feminist goal of criminalizing a wider range of nonconsensual sexual contacts because the only illegal contacts are those associated with a particular specified set of criminal circumstances. Statutes that criminalize nonconsensual penetration or even nonconsensual touching without requiring the presence of force, weapons, multiple assailants, and so on, attempt to prohibit a broader spectrum of offensive acts.

(2) Evidentiary reform (Rape shield laws)

Evidentiary reform might be the most significant change made in rape law. In order to shift the burden of proof from victims to defendant, and to minimize harassment and humiliation of victims during trials, reformers tried to change the kinds of evidence and the ways in which evidence could be brought into a trial. They first attempted to invalidate special cautionary instructions to the jury in rape cases, and repealed the requirement that the report of rape be made immediately.

344. Futter & Mebane, Jr., "The Effects of Rape Law Reform on Rape Case Processing", supra note 335, p. 78; See also Allison & Wrightman, Rape, supra note 18, p. 213.
345. Bienen, "Rape III", supra note 343, p. 181; See also Johnson & Sigler, Forced Sexual Intercourse in Intimate Relationship, supra note 15, p. 23.
347. Bourque, Defining Rape, supra note 149, p. 111.
348. Ibid.; Allison & Wrightman, Rape, supra note 18, p. 215; Bienen, "Rape III", supra note 343, p. 197; Futter & Mebane, Jr., "The Effects of Rape Law Reform on Rape Case Processing", supra note 335, p. 79
Another focus of evidentiary reform was to reduce or abolish the corroboration requirement. Many states have passed related statutes that eliminate the corroboration requirement for rape.349

The most debated change, and what was seen as the key to the reform movement, was the enactment of statutes that partially or completely eliminated evidence of the victim's prior sexual conduct from the courtroom. These statutes are known as “rape shield laws.” Rape shield laws were intended to prevent socially constructed notions of women's “morality” from playing a role in rape cases.350 Only by this limitation could victims be encouraged to report rapes, cooperate in the prosecution of their assailants, and testify at trial.351 In addition to shielding the complaint from harassing and embarrassing defense inquires, the laws also attempted to prevent judges, and juries' misuse of such evidence—because of a victim’s past sexual history, she must have consented on the occasion in question or is more likely to lie at trial.352

In 1978, congress passed a federal rape shield law, which eventually became Federal Rule of Evidence 412.353 By 1985 all but two states (Arizona and Utah) had adopted rape shield laws.354 Rape shield laws come in all shapes and sizes. The laws range from the less restrictive, which permit evidence of prior sexual conduct if proven to be relevant, to the most restrictive, which generally prohibit such evidence unless it involves a prior sexual relationship between the victim and the defendant.355 Research has divided rape shield laws into different categories. Among the more common exceptions for such evidence that are generally prohibited are evidence of the complaint's prior sexual conduct with the defendant; evidence of the complaint's sexual conduct with third persons to show that a third person could have been the source of semen,

349. Allison & Wrightsman, Rape, supra note 18, p. 215; Bienen, "Rape III", supra note 343, p. 197; Bourque, Defining Rape, supra note 144, p. 111.
353. Anderson, "From Chastity Requirement to Sexuality License", supra note 208, p. 86.
354. Haxton, "Rape Shield Statutes", supra note 351, p. 1219.
pregnancy, or disease; and evidence that rebuts sexual conduct evidence introduced by the prosecution.\textsuperscript{356}

However, researchers have pointed out that there are several inadequacies in the laws, and believe they still fail to defend against the chastity requirement.\textsuperscript{357} Another crucial criticism is that rape shield laws' broad enactments infringe upon the constitutional right of the defendant and violate the dual sixth amendment guarantees of an effective defense: the right to full cross-examination of the complaint insured by the confrontation clause and the right to offer favorable defense evidence by calling witnesses to establish the complainant's prior sexual conduct guaranteed by the compulsory process clause.\textsuperscript{358}

(3) Reforms in statutory age offenses

Definition of statutory rape and penalties are among the most troublesome and unresolved areas of rape law reform, hence legislatures had been extremely cautious in this area.\textsuperscript{359} Reformers and conservatives both seemed to agree upon criminalizing sexual contact offenses involving children and adults, but debates arise when the question of defining consensual behavior among teenagers is the issue.\textsuperscript{360} However, many did believe that the traditional statutory rape laws that criminalize consensual sexual conduct between teenagers under eighteen ignored the realities of social and cultural practice in America in the 1980s.\textsuperscript{361}

As a result, reformers sought to amend the law regarding statutory rape to permit teenagers sex while also providing protection for children. They did so by creating a series of two or more graded offenses that prohibit sexual activity with youths below a specific age, and eliminating the mistake-of-age defense, which has been


\textsuperscript{357} Haxton, "Rape Shield Statutes", supra note 351, p. 1227-28; Anderson, "From Chastity Requirement to Sexuality License", supra note 208, p. 94-97.


\textsuperscript{359} Bourque, Defining Rape, supra note 144, p. 115.

\textsuperscript{360} Bienen, "Rape III", supra note 343, p. 180.

\textsuperscript{361} Ibid., p. 189.
used to avoid the guilt of defendants by claiming that the victim looked older than her actual age.\textsuperscript{362}

(4) Reforms in the penalty structure

Reformers also attempted to change the severe penalty system for rape, which consisted of a death sentence or life imprisonment with no distinction in penalties for different levels of seriousness of crimes.\textsuperscript{363}

A study has affirmatively indicated that juries often seem reluctant to convict when the sentence is too severe, hence reformers believe that juries would be more likely to convict if the punishment was less severe.\textsuperscript{364} Therefore, most reformers sought to enact statutes that reduce extreme penalties for rape, but also to establish mandatory minimum sentences with penalty gradations based on the seriousness of the crime.\textsuperscript{365} For many of these reformers, the certainty of conviction and punishment is more important than the severity of punishment.\textsuperscript{366}

d. The impact of rape law reform

Rape law reform was intended to have both symbolic and instrumental impacts. Symbolically, reforms were intended to reflect women's autonomy in American society and to encourage respect for their diverse roles and behavior. Feminists view reforms symbolizing "a movement away from the conception of women as inferior beings defined by family roles and male ownership toward a view of women as responsible, autonomous persons who possess

\begin{itemize}
    \item \textsuperscript{362} Berger et al., "Rape-Law Reform", supra note 334, p. 226; Futter & Mebane, Jr., "The Effects of Rape Law Reform on Rape Case Processing", supra note 335, p. 79-80.
    \item \textsuperscript{363} Futter & Mebane, Jr., "The Effects of Rape Law Reform on Rape Case Processing", supra note 335, p. 80.
    \item \textsuperscript{364} Allison & Wrightsman, Rape, supra note 18, p. 215; Weir, J. A., The Effects of Focus of Attention, Legal Procedures, and Individual Differences on Judgments in a Rape Case, 1991 (unpublished Ph.D. dissertation, University of Kansas); Berger et al., "Rape-Law Reform", supra note 334, p. 226; Bienen, "Rape III", supra note 343, p. 180. (On the contrary, Bienen points out that the idea that juries and judges will be more likely to convict if penalties are shorter is based more upon conjecture than upon empirical evidence.)
    \item \textsuperscript{365} Futter & Mebane, Jr., "The Effects of Rape Law Reform on Rape Case Processing", supra note 335, p. 80; Berger et al., "Rape-Law Reform", supra note 334, p. 226; Bourque, Defining Rape, supra note 144, p. 113-4.
    \item \textsuperscript{366} Berger et al., "Rape-Law Reform", supra note 334, p. 226; Bourque, Defining Rape, supra note 144, p. 113-14.
\end{itemize}
the right to personal, sexual, and bodily self-determination.”367 Instrumental goals focus on tangible results which included “increasing the reporting of rape and enhancing prosecution and conviction in rape case; . . . improving the treatment of rape victims in the criminal justice system; . . . prohibiting a wider range of coercive sexual conduct; and . . . expending the range of persons protected by law.”368 However, the literature that measures the success of these reforms remains somewhat equivocal.369

Most of the studies evaluating the impact of rape law reform suggest limited effects on the legal processing of rape cases that could be directly attributed to rape law reform.370 Research in the 1980s was conducted in Michigan, California, and Washington. Susan Caringella-MacDonald conducted her research in Michigan to examine whether or not sexual and nonsexual assault offenses were treated similarly under model rape reform legislation. She found that although many of the processing activities of the criminal justice system operate similarly, rape still presents special problems in the areas of evidence availability and victim credibility after Michigan’s strong rape law reform.371 Another Michigan study found that reports of rape increased at a faster rate than reports of any other serious crime after rape law reform in 1974. The criminal justice personnel’s attitude toward rape victims have improved, therefore victims now experience less trauma during the criminal justice process, and “more willing(ness) to follow through on prosecution.”372 Nevertheless, the authors suggest that this result was “independent of the reforms and may have been due to feminist consciousness-raising during the same period.”373

372. Marsh et al., Rape and the Limits of Law Reform, supra note 264, p. 41-43.
Kenneth Polk collected the data from California, and indicated that, at the key starting point of criminal justice processing, police clearance rates for rape remained relatively unchanged between 1975 and 1982. Although he found that there was a strong upward trend for cases of rape to lead to an institutional sentence, this trend seems to be part of the general shift toward harsher penalties for all serious felonies in California through the late 1970s.\(^{374}\) Similarly, a study conducted in King County (Seattle), Washington also found that changes did not produce the expected results. There was little impact on prosecutor's charging after reform.\(^{375}\)

In another comprehensive study of the impact of rape law reform, Cassia Spohn and Julie Horney researched six major jurisdictions, including three with strong rape law reform (Detroit, Chicago, and Philadelphia), and three where the reforms were considered weak (Washington D.C., Atlanta, and Houston).\(^{376}\) The result of this study also found that rape law reforms had no positive effect on rape reporting in Chicago, Philadelphia, or Atlanta.\(^{377}\) There was even a decrease in reported rapes in Washington D.C. Although reporting rates in Houston and Detroit were found to have increased, the study suggests that this increase in reports probably was not caused directly by the substantive content of the rape law reform, but resulted from publicity surrounding the reforms.\(^{378}\)

In addition, although some of the research suggests that the most improved criminal justice response to reform has been an increase in conviction rates,\(^{379}\) scholars have found that this change was only for stranger rape. The conviction rates for acquaintance rape were not seen as any different.\(^{380}\)

Why weren't the rape law reforms more effective? As one prosecutor stated, "Old habits and old attitudes die hard; we can


\(^{375}\) Loh, "The Impact of Common Law and Reform Rape Statutes on Prosecution", *supra* note 268, p. 600-05.

\(^{376}\) Spohn & Horney, *Rape Law Reform*, *supra* note 145, p. 35-36.


\(^{379}\) See generally Loh, "The Impact of Common Law and Reform Rape Statutes on Prosecution", *supra* note 268; Spohn & Horney, "The Laws the Law, but Fair is Fair", *supra* note 355; Marsh et al., *Rape and the Limits of Law Reform*, *supra* note 264, p. 42-4.

change the law but we can’t necessarily change attitudes.”

The studies suggest that many criminal justice officials continued to operate on the basis of traditional assumptions, and that they did not always comply with the statute. “[J]udges in the 1980s continue to think about women and rape in the same way as the law-review writers of the 1950s and 1960s or even the judges of the 1940s.” Decisions regarding rape cases were still subject to a great deal of discretion, and the reforms did not necessarily affect the internal operations of the criminal justice system. However, although not dramatic, both victim-based (National Crime Victimization Survey) and law enforcement (Uniform Crime Reports) data suggest that from the 1970s to 1990 there was a slight (approximately 10%) increase in the proportion of women who reported being the victims of rape. In addition, subsequent to rape law reforms, rape offenders were more likely to be sent to prison.

Scholars have further pointed out that the symbolic message of the rape law reform may be more important than the anticipated instrumental changes. The law not only gives sanctions for violation of rules to serve deterrent function, but also has a “moral or sociopedagogic” purpose to reflect and shape our values and beliefs. Reforms, therefore, “serve important educational and political functions that go well beyond any specific legal revisions that are achieved.” Consistent with these arguments, Spohn and Horney found that most of the criminal justice system participants interviewed strongly supported the reforms and believed the reforms “had resulted in more sensitive treatment of victims of rape” several years after the rape law reforms. Moreover, another researcher strongly believed that:

381. Spohn & Horney, Rape Law Reform, supra note 145, p. 129.
387. Spohn & Horney, Rape Law Reform, supra note 145, p. 175.
[E]ven without empirical data, it is clear that statutory reform in the area of rape has already had an important effect upon public opinion, regardless of any impact upon decision-making or adjudication within the labyrinths of the criminal justice system. Victims, and women generally, are more aware that hospitals have special facilities for rape victims and that hotlines and crisis counseling are available. . . . The passage of rape reform legislation in over forty states makes an important political statement. Even if no rapist is convicted. . . . the fact that some form of rape reform legislation has been passed by most state legislation is itself a significant social comment.\textsuperscript{388}

One of the latest studies’ results departs from previous social science research.\textsuperscript{389} Criticizing the designs and approaches chosen by previous studies, Futter and Mebane concluded that the studies provide little insight into the nationwide effect of rape law reforms.\textsuperscript{390} They examined different aspects of rape law reform in each state and the District of Columbia from 1970-1992, and used statistical methods to analyze the number of reports of forcible rape that police believe are well-founded (“actual rapes”) and the consequent number of arrests during this thirty-year period.\textsuperscript{391} Their goal was to estimate some of the effects that changes in states’ legal provision had on police agencies’ treatment of rape.\textsuperscript{392} In their research, they found that the effects of the rape law reforms have not been limited to the symbolic ones. The research shows that defining sex crimes on a single continuum, abolishing “the marital exemption”, limiting the admissibility of evidence of victim’s prior sexual conduct at trial, and denying a mistake of incapacity defense all significantly increased the number of convictions in “actual rapes.”\textsuperscript{393}
Thus, the authors concluded that there are real, instrumental, significant positive effects due to reforms in particular legal provisions.\textsuperscript{394}

\textsuperscript{388} Bienen, “Rape III”, \textit{supra} note 343, p. 209-10.
\textsuperscript{389} See \textit{generally} Futter & Mebane, Jr., “The Effects of Rape Law Reform on Rape Case Processing”, \textit{supra} note 335.
\textsuperscript{390} \textit{Ibid.}, p. 85.
\textsuperscript{391} \textit{Ibid.}, p. 73.
\textsuperscript{392} \textit{Ibid.}, p. 94.
\textsuperscript{393} \textit{Ibid.}, p. 111.
\textsuperscript{394} \textit{Ibid.}
2. Rape Trauma Syndrome Testimony

Despite the research conducted by Futter and Mebane, many scholars still believe that rape law reform has not had a strong effect on the criminal justice system. Some scholars continue to hope that the application of rape trauma syndrome testimony can remedy this failure of rape law reform.395

a. A brief history of rape trauma syndrome

Rape Trauma Syndrome is a general term to describe typical responses experienced by a victim of rape. The term Rape Trauma Syndrome originally came from a 1974 study conducted by Ann Wolbert Burgess and Lynda Lytle Holmstrom.396

Working in a Boston hospital emergency room, Burgess and Holmstrom interviewed all of the rape and attempted rape victims within thirty minutes of a call from the hospital and followed up the initial interviews with phone counseling or home visits. They studied the physical, behavioral, and psychological responses displayed by women seeking treatment for rape or an attempted rape.397 After a year-long study, they concluded that the rape victims they examined exhibited a two-phase group of symptoms, which they called “rape trauma syndrome.” Their model consists of an “acute phase and long-term reorganization process that occurs as a result of . . . rape or attempted . . . rape.”398

According to their research, the rape victims will go through the acute phase immediately following the attack. During this phase, the victim’s lifestyle is totally disrupted as a result of the rape. The most prominent symptom in this stage is extreme fear. The victims may also experience a wide range of emotions, including humiliation, embarrassment, revenge, anger, and self-blame. The acute phase also may include physical symptoms, such as soreness, bruising, headaches, sleeplessness, skeletal muscle tension, fatigue, gastrointestinal irritability, and genitourinary disturbance.399

The reorganization phase begins when the woman begins to reestablish her lifestyle, usually about two to three weeks after the

397. Ibid., p. 981-82.
398. Ibid., p. 982.
399. Ibid., p. 982-83.
attack. This phase generally consisted of increased motor activity, rape-related phobias, nightmares, and difficulties maintaining close relationships. Changing residence is very common among rape survivors; many of them also change their telephone number. Many of the women developed “traumatophobia”—a defensive reaction to the circumstances of the rape. Those who were attacked while sleeping in their beds reported fear of being indoors while those attacked outside of their home reported fear of outdoors. Others developed fear of being alone, fear of crowds, and fear of people behind them, depending on the circumstances of their assaults. Rape victims in this phase can manifest symptoms at various points throughout their recovery: some may not have any symptoms until months or even years after the rape. Moreover, symptoms could also persist for decades, or even throughout a woman’s lifetime.

Subsequent research adopted the nomenclature of Burgess and Holnstrom, but frequently reached conclusions not entirely consistent with those of “Rape Trauma Syndrome.” However, it is important to note that the early studies of the psychological aftereffects of rape victims were designed primarily to observe and understand the rape reaction for treatment purposes, not to demonstrate some causal like between rape and specific responses. Therefore, “the studies do not reflect the scientific precision necessary to establish causation.”

In the late seventies, researchers began to criticize the methodology used in the early studies. These researchers have pointed out that research prior to 1979 failed to provide for control groups of nonvictims to which the victims’ response could not be compared, nor did they use “standardized, reliable instruments for measuring responses to rape.” Katz and Mazur also identified six specific methodological flaws of the earlier studies. Furthermore, the conclusions reached by various studies also serve to undermine the reliability of the research before 1979 since those early studies sim-

400. Burgess & Holmstrom, “Rape Trauma Syndrome”, supra note 396, p. 983-84.
402. Katz & Mazur, Understanding the Rape Victim, supra note 24, p. 3-27.
405. Katz & Mazur, Understanding the Rape Victim, supra note 24, p. 4-27.
ply could not identify a specific psychological response to rape and the results frequently contradicted one another. 406

However, although the studies prior to 1979 do not provide a solid foundation for rape trauma syndrome testimony due to their methodological shortcomings, Burgess and Holmstrom’s study “acted as a historical catalyst that motivated other trauma researchers to conduct controlled empirical studies on the psychological reactions to rape using control groups, larger sample sizes, long-term assessments, and objective assessment measures.” 407 While the earlier studies focused on describing stages of recovery, these empirical studies have conceptualized rape trauma syndrome as a range of specific symptoms characterizing a woman’s physical and emotional response to rape, rather than as a syndrome. According to these empirical studies, rape victims often experience depression, anxiety, guilt, fear, and social and sexual problems much more frequently than do nonvictims and victims of other traumatic events. 408 This finding indicates that these empirical studies did confirm many of earlier studies’ observations.

b. Rape trauma syndrome in the courtroom

By the late seventies, mental health and social science research on rape trauma syndrome had grown tremendously. Prosecutors began to use expert witnesses to testify that rape complaints suffered from rape trauma syndrome. Expert testimony on Rape Trauma Syndrome typically consists of a description of the common after-effects of rape and an opinion that a particular complainant’s behavior is consistent with having been raped. This testimony is most often used in rape trials in which the defendant admits that sexual intercourse occurred but asserts that the complainant consented. It can serve to corroborate the prosecutor’s or complainant’s claim that intercourse was not consensual. 409

406. Lawrence, “Checking Allure of Increased Conviction Rates”, supra note 403, p. 1672.


Courts around America have differed with respect to the admissibility of testimony to that effect, and the resulting controversy has generated legal debates. Opponent literature argues that focusing on rape trauma syndrome in a criminal trial diverts the jury's attention away from the facts of the case and shifts attention from the defendant's actions to the victim's reactions. Supportive literature argues that expert testimony on rape trauma syndrome can satisfy the requirements of federal rules of evidence. In addition, it can educate participants in criminal rape trials and provide them with a new framework to understand rape, rape victims, and rapists when confronted with victims and situations which do not fit into familiar myths about rape.

In practice, a growing number of courts have allowed introduction of expert testimony about rape trauma syndrome when it is used to educate jurors. By far the most broadly accepted uses of Rape Trauma Syndrome evidence in a rape trial is to explain rape victims' behavioral patterns that might be viewed as inconsistent with a claim of rape.

Studies show that jurors enter the courtroom with many misassumptions and biases that will make them peculiarly unresponsive to a woman's claim that the intercourse was nonconsensual. Another research study also indicated that the nonexpert—jurors were not well informed on many key rape-related issues and were significantly less knowledgeable than the expert groups. Courts have


411. Susan Stefan, “The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law”, Northwestern University Law Review, Vol. 88 (1994) p. 1273; See also Lawrence, “Checking Allure of Increased Conviction Rates”, supra note 403 (Lawrence held that the use of rape trauma syndrome in the criminal process may allow “Courts once again...focus on the victim's character and conduct rather than the defendant's. This focus would eviscerate the goal of the rape reform movement of treating rape like other violent crimes.”)


413. Garrison, “Rape Trauma Syndrome”, supra note 395.


also stated that "because false rape myths affect common understand-
ing, the various patterns of response among rape victims are not within the ordinary understanding of the average juror."417 The testimony on rape trauma syndrome is thus offered to help jury—to provide context so that jurors can appreciate the range of responses to rape.418 Courts have generally accepted the strong probative value of evidence that indicates that the alleged victim acted in a way not inconsistent with being a rape victim.419

In addition, a number of states have also allowed testimony of rape trauma syndrome to be admitted where the defendant contends that the sexual intercourse was consensual. These states held that the presence of rape trauma syndrome in a victim can be relevant to whether a rape took place.420 In State v. Marks, the Kansas Supreme Court held that "if the presence of rape trauma syndrome is detectable and reliable as evidence that a forcible assault did take place, it is relevant when a defendant argues the victim consented to sexual intercourse."421 In State v. Kinney, rape trauma syndrome was admitted to respond to defense claims that victim's behavior was consensual sex because it was inconsistent with rape.422 The West Virginia Supreme Court, in State v. McCoy, also held that qualified expert testimony on rape trauma syndrome is relevant and admissible when the consent is a defense in a rape trial.423

However, expert testimony of rape trauma syndrome is still controversial.424 A researcher has indicated that "[r]ape trauma syndrome lacks the scientific precision to prove causation because studies have not been able to demonstrate particular syndrome and rape; not all victims of rape react the same way...and other factors unrelated to the rape can also affect psychological...trauma after a

417. Delufo, "Resisting "Ultmost Resistance", supra note 285, p. 438; People v. Tay-
Div. 1999)
Ariz. 59, 699 P.2d 1290, 1294 (Ariz. 1985); People v. Bledsoe, 36 Cal.3d 236, 203
Cal.Rptr. 450, 681 P.2d 291, 298 (Cal. 1984); People v. Fasty, 829 P.2d 1314, 1317 (Colo.
420. State v. Marks, 647 P.2d 1292, 1299 (1982); State v. Kinney, 726 A.2d 833, 842
421. Marks, 647 P.2d at 1299.
422. Kinney, 726 A.2d at 842.
423. McCoy, 366 S.E.2d at 737.
424. State v. Saldana, 324 N.W.2d 227, 230 (Minn. 1982); Taylor, 552 N.E.2d at 138-
39.
rape."\textsuperscript{425} In addition, use of the term "rape trauma syndrome" has been confusing since it implies that a rape has occurred.\textsuperscript{426} Hence, most courts have specifically held that when rape trauma syndrome is introduced to prove that a rape occurred, it is unduly prejudicial.\textsuperscript{427} The Minnesota Supreme Court held against the admissibility of expert testimony on rape trauma syndrome in \textit{State v. Saldana}, and \textit{State v. McGee}. The court held that the testimony did not help the jury and produced an extreme danger of unfair prejudice.\textsuperscript{428} In \textit{People v. Taylor}, the New York Court of Appeals held that "rape trauma syndrome evidence by an expert might create such an inference in the minds of lay jurors...that the defendant would be unacceptably prejudiced by the introduction of rape trauma syndrome evidence for that purpose alone."\textsuperscript{429}

Courts have also argued that the expert testimony on rape trauma syndrome is not helpful because it could trigger a time-consuming "battle of experts" that could distract the jury from its task.\textsuperscript{430} The jury's province could also be invaded by admitting the expert testimony, which essentially offering an opinion on complainant's credibility by corroborating the complainant's story.\textsuperscript{431}

Helen J. Landerdale, in her comment on the admissibility of expert testimony on rape trauma syndrome, has pointed out that courts exclude the expert testimony on rape trauma syndrome on the ground that it will mislead the jury do not appreciate the jury's ability to evaluate testimony by mental health professionals. Jurors are also capable of evaluating the methods used by rape trauma

\begin{itemize}
\item \textsuperscript{425} Deltufo, "Resisting "Ultmost Resistance", \textit{supra} note 285, p. 439.
\item \textsuperscript{426} To avoid the controversy of rape trauma syndrome, many courts used PTSD in stead of rape trauma syndrome. Posttraumatic stress disorder (PTSD) was initially recognized by psychologists working with veterans of Vietnam War and was officially defined by the American Psychiatric Association in 1980. The forth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) characterizes rape-related PTSD as an identifiable set of stress-induced symptoms. (\textit{See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV, 4TH ed., n.p: American Psychiatric Association, 1994.})
\item \textsuperscript{427} \textit{Saldana}, 324 N.W.2d at 229; \textit{Taylor}, 552 N.E.2d at 139; \textit{State v. McGee}, 324 N.W.2d at 232, 233 (Minn. 1982).
\item \textsuperscript{428} \textit{Saldana}, 324 N.W.2d at 229-30 (In \textit{Saldana}, the court held that "[p]ermitting a person in the role of expert to suggest that because the complainant exhibits some of the symptoms of rape trauma syndrome, the complainant was therefore raped, unfairly prejudices the [defendant] by creating as aura of special reliability and trustworthiness.")); \textit{McGee}, 324 N.W.2d at 232, 233.
\item \textsuperscript{429} \textit{Taylor}, 552 N.E.2d at 139.
\item \textsuperscript{430} \textit{Saldana}, 324 N.W.2d at 229-30.
\item \textsuperscript{431} \textit{State v. Taylor}, 663 S.W.2d 235 (Mo. 1984).
\end{itemize}
experts.\textsuperscript{432} Moreover, effective cross-examination could also reduce the danger of misleading the jury.\textsuperscript{433}

Though the use of the term “rape trauma syndrome” itself is still controversial in the courtrooms, rape trauma syndrome testimony’s probative value has been recognized by several studies. Studies point out that expert testimony on rape trauma syndrome is actually relevant, helpful and reliable.\textsuperscript{434} Furthermore, as mentioned, the expert testimony on rape trauma syndrome “could be an important tool with which to educate the jury about actual characteristics of rape victims, to limit the influence of jurors’ misperceptions about legitimate rape victims, and thereby to ensure that the jurors’ evaluation of the facts is as accurate as possible.”\textsuperscript{435} In sum, it is valuable because it can open jurors and judges’ minds to alternative understandings of rape\textsuperscript{436} and it provides an opportunity to eliminate sexism and rape myths in the courtroom.\textsuperscript{437}

\textbf{IV. RAPE MYTHS IN CHINESE SOCIETY}

\textbf{A. Behind Rape Myths—the Cult of Chastity in Chinese Culture}

High value placed on chastity has been recognized as one of the primary reasons for perpetuating rape myths. According to the rape myths that “no woman can be raped against her will”; good (chaste) women don’t get raped; rape victims are those unchaste

\begin{footnotesize}
\begin{enumerate}
\item Landerdale, “The Admissibility of Expert Testimony on Rape Trauma Syndrome”, \textit{supra} note 412, p. 1388-92. (Landerdale argues that “rape trauma syndrome does not involve any mysterious and unfathomable testing procedures. Experts’ descriptions and conclusions about the emotional and psychological conditions of victims are based on observations made during face-to-face examinations of the victim...Jurors reasonably can be expected to understand and to evaluate the significance of defects in the clinical method employed during these sessions.”)
\item Landerdale, “The Admissibility of Expert Testimony on Rape Trauma Syndrome”, \textit{supra} note 412, p. 1388-92.
\item See generally Landerdale, “The Admissibility of Expert Testimony on Rape Trauma Syndrome”, \textit{supra} note 412; Massaro, “Experts, Psychology, Credibility, and Rape”, \textit{supra} note 1, p. 400.
\item Landerdale, “The Admissibility of Expert Testimony on Rape Trauma Syndrome”, \textit{supra} note 412, p. 1399.
\item Anderew E. Taslitz, \textit{Rape and the Culture of the currtroom}, n.p: NYU Press, 1999, p. 132; \textit{Bledsoe}, 36 Cal.3d at 247-48 (The court held that “expert testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constrains of popular myths.”)
\item \textit{Ibid.}
\end{enumerate}
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women who provoke their attacker by their "fallen" conduct, we can find that the value of chastity has been implied in these rape myths. Introducing evidence of the "unchastity" (prior sexual conduct or history) of the victim to discredit rape victims' testimony is one example.

Since chastity helps to form rape myths, and rape myths reflect the traditional value of chastity, we must admit that the value of chastity indeed plays an important role in rape myths. By exploring the value of chastity in specific cultures, we might gain a deeper understanding of rape myths in different cultures and therefore realize how rape myths work within different societies.

1. The Conception of Female Chastity in Early China

The requisite of female chastity can be traced back to ancient times in Chinese recorded history. Chastity was a woman's preeminent virtue. It was indispensable for a proper man-woman relationship, and was essential in the traditional Chinese ethical system.438

In the traditional Chinese ethical system, the family, not the individual, was considered the basic unit of society. In the family, the proper man-woman relationship was established by marriage. This produced the father-son, elder brother-younger brother relationship, which extended to the ruler and subject, and defined friendships in the society as a whole. The foundation of the ethical system therefore lies in the family.439

For the purpose of avoiding domestic trouble and ensuring an uninterrupted family line, it was therefore deemed crucial for women to lead a blameless life. Chastity served as a cardinal virtue.440

In the Chinese language, chastity is represented by two characters, chen (貞) and chieh (節). "Chen denotes being proper, appropriate, pure, uncontaminated, and faithful. When applied to a woman... it may signify virginity, proper female manners, and a woman who chooses not to remarry; or, in general, it may just indicate a virtuous woman."441 Traditionally, Chieh had a broad meaning, and was often used to portray proper moral conduct. However, the use of chieh, as in the term chieh-fu (pure type of woman), was restricted to widows who did not remarry in the late imperial pe-

439. Ibid., p. 16.
441. Ibid., p. 19.
period. Being represented by chen and chieh, chastity in Chinese language conveyed a basic quality of fidelity. Although fidelity is a moral principle that requires both husband and wife to abide, it gradually came to be stressed more for the female as a double standard had been developed throughout the traditional period.442

In pre-Qin period, the attitudes toward chastity appeared to be very relaxed. Song Yu's poem" Zhao Hun" (Summoning the Soul) describes how in the state of Chu443 "men and women sat together without discrimination."444 A researcher has indicated that this relaxed attitude toward the relationship between men and women is due to the need for a labor population. Only women from the upper class have the sense of chastity.445

However, the Qin and Han446 dynasties attached more importance to female chastity than earlier Chinese society, especially after the establishment of centralized autocracy. For rulers of the Qin and Han dynasties, control over female chastity "was an important component in the government's attempt to implement a social hierarchy and stabilize society."447

The state during the Qin dynasty paid great attention to this issue and pointedly referred to it in stone stele inscriptions.448 The succeeding Han dynasty began dispensing rewards for chaste women. Such honors and awards later became common in successive dynasties.449 In the late Western Han,450 the demand that women

442. Ibid., p. 9-20.
443. Chu Dynasty: 1066-256 B.C.
444. LIN, "Chastity in Chinese Eyes", supra note 438 (Chastity in the later periods usually requires conscious segregation of the sexes. Lin has indicated that "[c]onscious segregation of the sexes was thought to be crucial for preventing adultery... In order to guard against any improper sexual pursuit, almost all physical contact between the sexes was to be avoided." It was a general principle that "male and female, in giving and receiving, do not allow their hands to touch.").
448. For example, one of the inscriptions read: Set the Rites concerning men and women in order, so that they carry out their respective duties, the inside and the outside are separated, and everything is pure and clean.
450. Period of Division, including Western Han, Eastern Han and Six Dynasties periods: A.D. 220-589.
maintain chastity became very strict. *Lien Zhuan* (Biographies of Honorable Women) by Liu Xiang\(^{451}\) reflects the social attitude toward female chastity which encouraged a woman to retain chastity by not remarrying after her husband's death.\(^{452}\) From the Eastern Han on, the concept of female chastity gradually spread through popular culture and was no longer limited to moralists and theorists.\(^{453}\)

Later, during the Six Dynasties period, the concept of female chastity in society was in some degree weakened because of the chaotic political situation and frequent wars. In order to strengthen the country by increasing the population more rapidly, the government sometimes forced widows to remarry. In addition, one of the dynasties even sent widows to soldiers who had performed meritorious service.\(^{454}\)

After the Six Dynasties, China was once again unified as a single country. Scholars generally believe that, compared to other dynasties in Chinese history, women enjoyed the highest status during the Sui Tang period, and during the Tang period in particular.\(^{455}\) Women in this period had the right to choose spouses, and divorce their husbands; even though traditionally the husband is usually the only person who can initiate a divorce. Furthermore, it was very common for divorcees and widows to re-marry, as this was not condemned by society.\(^{456}\)

Chastity and Virginity were not major issues during this period. Unmarried women often had affairs with their lovers before they got married. Even married women could date their lovers outside of their homes and this practice was more often seen among the nobility in the community.\(^{457}\)

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\(^{451}\) LIU hsiang (77-6 B.C.), was an active writer during the late Western Han, and his most famous works include *Xinwu* and *Lien Zhuan*.


\(^{453}\) *Ibid*.


2. **The Conception of Female Chastity in Late Imperial China**

As we have mentioned previously, the honoring of chaste widows dated from the Han dynasty and became a popular cultural practice in late imperial China. Throughout this evolution, the Song dynasty has been recognized as a critical turning point in attitudes toward female chastity.\(^{458}\) By the Song dynasty, there was some change concerning the conception of chastity. Cheng Yi (1033-1107), one of the founders of Neo-Confucianism, phrased the well known and widely-cited proverb on remarriage.\(^{459}\) He said: "To die of hunger is the smallest matter, while to lose chastity is the biggest matter."\(^{460}\) According to the proverb, the widow should not remarry even if she had to face starvation or death. Although this proverb has been frequently cited by other Neo-Confucian philosophers, it did not begin to have a significant impact on real behavior until the Ming dynasty.\(^{461}\)

The dynasties following the Song dynasty include the Yuan, Ming and Qing dynasties. During these three dynasties, judicial and social sanctions discouraging widow remarriage and rewarding chaste widows became a hallmark of the moral education programs sponsored by the throne.\(^{462}\)

Influenced by the Idealist School of the Song dynasty Confucianism, women in the Yuan dynasty made a great effort to avoid remarrying after the death of their husbands. Some even killed themselves to retain their chastity. In the eyes of these women, the morals and ethics were so sacred and chastity so precious that they would not exchange them for a second marriage even for the purpose of carrying on the family line.\(^{463}\) The Yuan emperors con-

\(^{458}\) Chien CHIAO, "Female Chastity in Chinese Culture", *Bulletin of the Institute of Ethology*, p. 205, 208; See also AN, The Enforcement and Practice of Women’s Chastity in Ming Dynasty, *supra* note 445.

\(^{459}\) For research on the relationship between Neo-Confucianism and women’s sense of chastity in Song dynasty, *see generally* CHU, The Research on Neo-Confucianism and women’s chastity in Song Dynasty, *supra* note 455.

\(^{460}\) Chiao, "Female Chastity in Chinese Culture", *supra* note 458, p. 210 (citing Chengshi Yishujuan 22 Xia [Volume 22 of The Book left by the Cheng Clan]).


ferred honors on these chaste widows, and the system of rewarding chaste widows became more mature during the Yuan dynasty.464

During the Ming dynasty,465 emperor T’ai Tsu466 confirmed these qualifications467, and added the reward of forgiving the labor service owed by a chaste widow’s household. This decree encouraged chaste woman with both imperial honor and economic reward, and consequently, its effect was far-reaching.468 In 1511, the Ming also began to honor “chaste martyred women who ha[d] avoided pollution by criminals.”469 Therefore, women who died by assault or suicide in the course of a rape attempt without being penetrated by the rapist were to be commemorated with official monuments and their burial expense would be paid by the state.470 As a result, choosing death over surrender of the husband’s sexual monopoly was raised to the level of martyrdom.471

Some scholars have concluded that this kind of cult of female chastity in the Ming dynasty, which encouraged women to choose death, rather than survive in order to protect their “purity” from being “polluted” by a rapist could be called a “cult of marital fidelity”. There is no doubt that such a cult of marital fidelity was unprecedentedly prevalent in the Ming dynasty.472 Furthermore, the methods of suicide used in observance of marital fidelity illustrate how the cult of female chastity in the Ming dynasty became such a cruel and unreasonable cult for advocating the virtuous woman. Suicide committed by widows473 was not a common phenomenon in other societies, but has had transformed itself from a tragic incident

466. Emperor T’ai Tsu is the first emperor of the Ming dynasty.
467. These qualifying criteria were maintained until the Qing dynasty. After 1723, it was only necessary to have maintained fidelity for fifteen years and to have attained at least forty. Some time later, probably early in the nineteenth century, the limit was further reduced to ten years. In 1871, all deceased widows who had, while alive, maintained fidelity for a minimum of six years were entitled to awards. (Mark Elvin, “Female Virtue and the State in China”, Past and Present, Vol. 104 (1984), p. 124)
469. Sommer, *Sex, Law, and Society in Late Imperial China*, *supra* note 469.
470. Ibid.
471. Ibid., p. 169.
473. Since the situation rape victim face is usually a criminal emergency, there would not be any particular suicide methods.
claiming everyone's sympathy into a cruelly inhuman act encouraged and applauded by others. 474

During the Qing dynasty, a woman's chastity continued to be determined by the Qing state according to her response to challenges such as the death of her husband or a rape attempt. 475 Furthermore, Qing state also established local "temples of chastity and filial piety" where canonized martyrs would have tablets erected for sacrifices in their honor. 476 Candidates for chaste martyrdom included a widow who killed herself to follow her husband to the grave, a woman who committed suicide to follow her betrothed (fiancé) to the grave, a widow who had resolved to raise her sons and preserve her chastity, but then hanged herself because relatives were forcing her to remarry, a woman who committed suicide in response to non-coercive sexual propositions, and a woman who committed suicide in refusing a rape attempt. 477

However, the cult of female chastity and fidelity still seems to have gained even greater emphasis during the Qing dynasty, since the Qing state had established "temples of chastity" in order to perpetuate the memory of virtuous widows and maidens as examples for the people to follow. 478

In sum, barring lifelong widowhood, the cult of female suicide, which evolved during Ming and Qing dynasties, can be considered an extreme form of the observance of the Chinese female chastity and virtue of marital fidelity. 479 During these two periods, countless eulogistic articles were written to bestow praise on virtuous devotees, but not a single one of them cast any doubt on the worthiness of their unnecessary deaths. Thus, we can find how tightly this spiritual shackle of female chastity clamped on the Chinese mind throughout their five-thousand-year culture and history. 480

B. Rape Myths in Chinese Rape Law

1. The Evolution of Rape Law and Female Chastity

The Chinese legal term, qiang jian, which translates into English as "rape", literally means "coercive illicit sexual inter-

474. TIEN, Male Anxiety and Female Chastity, supra note 472, p. 48.
475. Sommer, Sex, Law, and Society in Late Imperial China, supra note 464, p. 168.
476. Ibid., p. 170.
477. Ibid.
478. TIEN, Male Anxiety and Female Chastity, supra note 472, p. 126.
479. Ibid., p. 147.
480. Ibid., p. 65.
course." Although it is commonplace today to define rape and other acts as criminal precisely because they violate a person’s rights, late imperial Chinese jurists thought of rape in terms of pollution, the pollution of descent lines, of commoner status, and especially of female chastity.

Opposed to qiang jian, consensual sexual intercourse could also be illegal. In the Tang code, the main difference between coercion and consensual sexual intercourse was that a woman who had been coerced would not receive punishment while a woman who had consented to illicit sex would share the guilt and be punished.

Under the Ming and Qing statutes against illicit sexual intercourse, the coercion intercourse referred to the sudden pollution of a female, who had maintained her chastity. Therefore, the prerequisite for sentencing a rapist to the full penalty of strangulation was that his victim had “maintained her chaste purity”.

The earlier dynasties had probably shared the basic assumption that the harm caused by rape depended on the victim’s record of chastity. But from the Yuan dynasty through the Qing, the ideological import of female chastity increased precipitously and the legal discourse of rape was transformed in the process. Moreover, a systematic increase in the penalties for rape was another obvious manifestation of the influence of the increasing cult of female chastity.

During the Tang-Song period, the rape of a female of equal legal status as the rapist had been punished by penal servitude. After the Northern Song, the penalties for rape had increased to the imposition of the death penalty.

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481. Sommer, *Sex, Law, and Society in Late Imperial China*, supra note 464, p. 66.
482. Ibid., p. 67.
484. Sommer, *Sex, Law, and Society in Late Imperial China*, supra note 464, p. 68; HUANG liu-hung also indicated that “The purpose of imposing the death penalty is to reward [the victim’s] resolve to maintain chaste purity and also to shame wives who are evil and licentious.” (Liu-hung HUANG, *A Complete Book Concerning Happiness and Benevolence*, Univ of Arizona Pr, 1984.)
485. Ibid.
486. Ibid.
487. T’ang lu shu yi (The Tang Code with Commentary), Beijing (1990); Sung hsing t’ung (The Song Penal Code), Beijing (1990); Ch’ingyuan t’iao fa shih lei (Laws of the Qingyuan Period), Beijing (1990).
488. Sommer, *Sex, Law, and Society in Late Imperial China*, supra note 464, p. 70.
During the Ming dynasty, the government had begun to canonize "chastely martyred wives and daughters" who died by murder or suicide while resisting rape. The Ming cult was inherited by the Qing dynasty and much elaborated.

Since during the Ming and Qing periods the highest standards of chastity were established, women were more willing than ever to die rather than suffer pollution through sexual contact with someone other than her husband, the growing ideological importance of chastity had raised the stakes in rape cases.\(^{489}\) For the victim, there was the heightened emphasis on chastity as the definition of her worth, and for the rapist, there was the strong possibility of punishment by death. The imposition of the death penalty for rape was explicitly justified by the pollution of chastity suffered by the rape victim.\(^{490}\) Further, the death penalty was not designed simply to punish those who used force to satisfy their animalistic desire, but as a means of discouraging debauchery of womanhood.\(^{491}\)

2. Rape Myths in Historical Chinese Rape Law

Applying the modern concept of rape myth in Chinese historical rape law, we can find several statutes and ideas that constitute rape myths. However, myths about the rape victims resulting from the cult of female chastity throughout Chinese history are the most serious, and therefore, warrant the most attention.

For the crime of rape to be established in the Qing dynasty, the rape victim had to provide evidence that she had struggled against her assailant. Such evidence included: (1) a witness, either an eyewitness or people who had heard the victim's cry for help; (2) bruises and lacerations on her body; and (3) torn clothing.\(^{492}\) These requirements made it very difficult for rape victims to prove that they were raped, and reflected the assumption that women often lie

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\(^{489}\) Regarding the subject of rape, HUANG liu-hung's advice to his fellow magistrates reflected the cynical attitude of Qing judicial officials in handling the rape cases. He wrote that "when a woman is confronted with a rapist and her reputation is at stake, she will disregard her safety and yell for help. . . . Despite the physical abuse, her intention of keeping her chastity prevails." Therefore, most of the Qing judicial officials believe that a chaste woman would prefer to die rather than being raped. (HUANG, A Complete Book Concerning Happiness and Benevolence, supra note 484, p. 441-43)

\(^{490}\) Sommer, Sex, Law, and Society in Late Imperial China, supra note 464, p. 70.

\(^{491}\) HUANG, A Complete Book Concerning Happiness and Benevolence, supra note 484, p. 438.

about sexual assaults. Moreover, when violence had been used initially, but subsequently the woman had submitted "voluntarily" to the act, the case was not considered rape, but one of "illicit intercourse by mutual consent." This notion of tacit consent introduced in the Qing rape law suggests that lawmakers of Qing believed that sexual assault could be pleasurable for the woman. "Thus, when she stopped struggling, it was seen as a sign that she actually enjoyed the sexual encounter, and the whole incident acquired a different complexion. Instead of being treated as a victim of sexual assault, the woman was branded a fornicator and punished accordingly." In addition, the admission of the rape victim's prior sexual history and conduct to prove her consent and her lack of credibility reflects the myths that "unchaste women consent to intercourse indiscriminately and that unchaste women lie." In other words, an unchaste woman could not be raped.

Throughout Chinese history, we find that Chinese historical rape law shared this myth about the chastity of the rape victim but at a more serious level.

In Ming-Qing law, even if a woman could prove the rapist's coercion and her own resistance, many judges in the Qing dynasty would still make an issue of the victim's sexual history, and then proceed to downgrade the grievousness of the crime. Subsequently, this reduced the sentence for the rapist by one degree, from strangulation to life exile. Therefore, an unsatisfactory record of chastity meant that an attacker would not receive the full penalty of death prescribed by the statute on rape.

Although there's no specific law to deal with the offense of sexual assault on "unchaste" woman in the Qing code, "the rape law of 1646 did provide a guide of sorts for the presiding judges." Under the 1646 law, if the rapist himself had witnessed his victim's illicit sexual activity before attacking her, the assault could not be

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493. Ibid. (Vivien Ng indicated the historical background of this stringent definition. She pointed out that "one of the early concern of the new dynasty was the large number of lawsuits, both legitimate complaints as well as false accusations. . .Top government officials considered this to be an undesirable development. . .It is probable, therefore, that the stringent definition of rape was part of the general effort to discourage litigious tendencies among the populace.")

494. Ng, "Ideology and Sexuality", supra note 492, p. 64.

495. Ross, "Does Diversity in Legal Scholarship Make a Difference?", supra note 11, p. 828.


497. Sommer, Sex, Law, and Society in Late Imperial China, supra note 464, p. 73.

498. Ng, "Ideology and Sexuality", supra note 492, p. 65.
considered rape, "because the woman was already a fornicator." For his penalty, it would be 100 blows of the heavy bamboo which was more severe than that prescribed for ordinary consent, yet many degrees less than the strangulation mandated for forcible rape. For gang rape, the code added that if the victim "was a woman who has previously committed offenses of illicit sex," then the rapists would receive penalties reduced by several degrees. This confirmed the principle that even gang rapists deserved death only if their victim had been chaste.

These statutes in the Qing code are good examples of rape myths implied in Chinese rape law which put the victim's chastity on trial and focused on the victim's record of chastity and conduct. Under rape myths in common law, to put a rape victim's chastity (prior sexual history or conduct) on trial is to prove that she might be more likely than other "chaste" women to consent to intercourse and to lie about rape. However, Chinese rape law not only focuses on consent and truth-telling but also assumes that prior unchaste activity will influence the ultimately penalty for the rapist's crime. Although rape myths in common law and Chinese rape law are based on different concerns, they do share the same rape myth that "unchaste women could not be raped and unchaste women suffer no harm from rape." These myths were even more serious and had a greater impact in Chinese rape law as compared to common law, since they only work as an evidentiary rule at trial. In addition, they intangibly influence legal participants in the criminal justice system under a common law jurisdiction, while they were explicitly regulated in the Chinese criminal law which favored the rapist whose victim was unchaste.

C. Rape Myths in Contemporary Criminal Law and Legal System

1. Rape Myths in Taiwan Criminal Code

The full name of the Criminal Code of Taiwan is "the Criminal Code of Republic of China." (hereinafter Taiwan Criminal Code) It was enacted in 1928 and came into effect in 1935. It had been

499. Ibid.
500. Sommer, Sex, Law, and Society in Late Imperial China, supra note 464, p. 73.
501. Ibid., p. 74.
enforced in China for 10 years before the Kuomintang (alternatively translated as the Nationalist Party, hereinafter KMT)\textsuperscript{503} government was defeated by the communist party and moved to Taiwan in 1949. This criminal code inherits its content from the new Qing Code,\textsuperscript{504} while its body and structure refer to the criminal code of Germany and the criminal law of other European countries as well.

The Taiwan Criminal Code has been reformed 16 times since 1935. The latest reform was in January 2005. Among these reforms, the most important one which involved the rape law in Taiwan was in 1999.

Before 1999, rape in Taiwan Criminal Code was defined as the act of “forcing women to have carnal relations by violence, coercion, drugs, hypnotism, or other means to the degree that was irresistible.”\textsuperscript{505} This definition had been criticized for several flaws which reflected, what we now call, the concept of rape myths.

First, rape in Taiwan Criminal Code before 1999 was classified as a crime against society, rather than a crime against the person. This implied that the interest protected by the crime was not a victim’s personal right or choice, but the ethics of society. The act was criminalized because it went against good etiquette or ethics in the society which prohibited any sexual intercourse outside the marriage.\textsuperscript{506} Rape should be punished because it destroys the “moral order of sex” and causes damage to the integrity of sexual custom.\textsuperscript{507} Further, based on our understanding about rape law in Chinese history, rape had been considered as pollution of female chastity. Because of this tradition, if there is anything that the Taiwanese rape law intends to protect for a rape victim before 1999, it would be the rape victim’s chastity or her reputation rather than a person’s sexual autonomy. In sum, as a result of historical and cultural values, this classification reflected Chinese misunderstanding of rape, because it emphasized rape as a sexual crime which will destroy women’s chastity, instead of a violent crime against an indi-

\textsuperscript{503} The Kuomintang is a political party founded with the initial aim of overthrowing the corrupt Qing Dynasty and establishing the Republic of China.

\textsuperscript{504} Daqing Xinxinlu Chaoman [New Qing Code]

\textsuperscript{505} Taiwan Criminal Code art. 221 (1).


\textsuperscript{507} Pang-hsü Li, Research on Specific Types of Sexual Assault—Take Sexual Assault Prevention Law for Example, 2002, p. 49 (unpublished master thesis, National Chung Cheng University)
vidual's right. This classification also places too much moral judgment on the crime itself and on the victims, thus it confuses people's understanding about the reality of rape. It sometimes further misleads Taiwanese people to believe that rape is a "crime passionel," and the rape victims should also feel ashamed of themselves.

Second, the subject of the crime of rape was limited to the female before 1999. This definition, which excluded the male victim, shared the most popular myth about rape victim: only women can get raped. For several reasons, we should not be surprised to know that Taiwanese rape law shares this rape myth. Most of the people around the world believed that it is impossible for a male to be raped, so did Chinese people. Besides, the crime of rape in Chinese society is so deeply related to the female chastity that nobody would believe that a man could even have a "chastity" issue, and possibly be a victim of rape. Moreover, one of the reasons that the act was criminalized was because people worried about the pureness of the blood relationship in a man's family. Women might get pregnant by rape. And the child, whose father is not the mother's husband, would destroy or pollute the blood relationship in the family. However, there's no such kind of danger when a male is raped, therefore there is no need to extend the subject of the crime of rape to male. Even if there's actually a man forced by a woman to have sex, it would be an obscene act, not a rape based on Taiwanese court's opinions.

Third, the rape myth that only a stranger or any male except the husband could rape was also reflected in this statute. The term "sexual intercourse" in this article was interpreted as and limited to sexual intercourse outside marriage. As a result, a husband cannot rape a wife; a wife cannot be raped by her husband. Thus the husband was exempted from the crime of rape in Taiwan Criminal Code before 1999. Like the American law before rape law reform, this exemption is also based on the presumption that the woman

508. WANG, "The enactment and process of laws governing sexual assault cases", supra note 506; Ch'ung-wen HOU, The evaluation of Sexual Assault Prevention Policy in Taiwan, 1998, p. 31 (unpublished master thesis, National Chung Hsing University)

509. Fu-Sheng HSU, "Over-all Survey on Rape", Ching-hsueh ts'ung- k'an (Police Science Quarterly), 1992, p. 76.

510. Ibid., p. 75.

consented to be a man's sexual partner when she married him.\footnote{MacNamara & Sagarin, Sex, Crime, and the Law, supra note 5, p. 30.} Once they are married, the wife bears the duty to have sexual intercourse with her husband; therefore, the husband can force his wife to have sex with him even if it is against his wife's will. Moreover, this duty has been implied in Taiwanese Civil Law as well. According to Article 1001 of Taiwan Civil Code, the husband and the wife are under mutual obligation to cohabit. If either one of them ignores this obligation, the other can still bring an action for the restitution of the conjugal community.\footnote{Chung-hua Ming-kuo Ming-fa [Civil Code of the Republic of China] art. 1001 [hereinafter Civil Code of the ROC]; Chung-hua Ming-kuo Ming-shih Sung-fa [Civil Procedure of the Republic of China] art. 577, 578.} As a result, this article had been interpreted to mean that sexual intercourse between married couples is a duty that is protected by the law explicitly.\footnote{Ch'ung-li HUANG, "Review of Rape Law and Reform Recommendation", Chung-yang ching-ch'a ta-hsueh hsueh-pao (Journal of Central Police University), 1998, p. 31.} This article in the Taiwan civil code had been the most popular cited legal reason to support the idea that men could never rape their wives in Taiwan.\footnote{Shan-t'ien LIN, "Rape and Gang Rape", "Hsing-shih fa-hsueh tsa-tzu" (Criminal Law Journal), Vol. 23 (1979), p. 10; Chung-mou HEN, Hsing-fa ke-lun (Definition of specific crimes), Published by the author, 1970, p. 257; Chien-hung CH'U, Hsing-fa fen-tse shih-lun (Interpretation of specific crimes), Taipei: Taiwan Shang-wu, 1986, p. 611-612; Tun-ming Ts'AI, Hsing-fa ke-lun (Definition of specific crimes), Taipei: San-Ming, 1981, p. 353; T'ien-Kuei KAN, Hsing-fa ke-lun (Definition of specific crimes), Taipei: Wu-Nan, 1987, p. 364.} As stated previously, Chinese people believe that the interests protected by rape law are "female chastity," victim's reputation and the ethics of society. These interests could only be violated when the sexual intercourse is outside the marriage. As a result, men could never actually rape their wives since neither one of these interests could possibly be damaged when a man forces his wife to have sex with him.\footnote{HUANG, "Review of Rape Law and Reform Recommendation", supra note 514; Chih-Lung CH'EN, "Spouse Rape: Comment on Article 221, Paragraph 1 of Criminal Code", Hsing-shih fa-hsueh tsa-tzu (Criminal Law Journal), Vol. 31 (1987).}

Fourth, the influence of rape myths has contributed to the requirement of "resistance evidence". It is always required, and sometimes even "utmost resistance" has to be proven in order for it not to be considered consensual intercourse. The second most important requirement is evidence that rape did occur, hence proving that the woman did not lie about the rape. This idea of rape myths
was also reflected, and even more seriously, in a Taiwanese rape statute which stated that the degree of violence, coercion or other means which rapists use must be "unresistible" to constitute a rape. The Taiwanese statute not only implied that resistance is required to determine whether rape actually occurred but also reinforced the myth that "if a woman wants to, she can successfully resist rape, unless the force or other means used by rapist was unresistible." Therefore, only in the case of an unresistible situation, can women get raped. If the violence used by a rapist was resistible, even if there is resistance evidence, it cannot be called rape. Further, this highest "unresistible" requirement also reflected traditional Chinese high standards involving a chaste woman's willingness to die rather than suffer pollution though sexual conduct with someone other than her husband.

Not surprisingly, this requirement had been criticized as being too strict to convict the rapist, and putting a woman in a dangerous situation to risk her life to resist a criminal. It also had been criticized for transferring court's attention from defendant's conduct to victim's behavior.

Fifth, according to Article 226, Paragraph 2 of Taiwan Criminal Code, a rapist should be given a higher penalty if a rape victim committed or attempted to commit suicide as a result of shame. This article seems to be very unique appearing only in Qing Criminal Code and Taiwan Criminal Code. One can easily find the cult of chastity implied in this article. It assumes that rape victims would feel "shame," and this "shame" has always been understood as "loosing chastity" under the Chinese interpretation. It further suggests that a chaste woman would commit suicide as a result of the shame of losing her chastity, and the rapist should be held responsible for her death. However, this article misunderstands that it is the unreasonable standards imposed on women and the social values and attitudes toward unchaste women that resulted in women's

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518. LIAM, "Comment on Contemporary Rape Law and the Route to the Rape Law Reform", supra note 517; WANG, "The enactment and process of laws governing sexual assault cases", supra note 506, p. 23.
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shame, and, further, in their death. Thus, although the purpose of this article was meant to provide a higher penalty to rapists in order to deter potential rapists, it obviously reflects how the Chinese had long misunderstood the crime of rape and how the value of chastity had been rooted in Chinese society and even embodied in the law.

Finally, the most controversial issue about the crime of rape in the Taiwan Criminal Code was the prosecution of the crime itself. Under Article 236 of Taiwan Criminal Code before 1999, rape was a crime where the prosecution may be instituted only on complaint. Perpetrators of rape were only tried when the victims were willing to file suits against them. Therefore, without a complaint from a rape victim or other complainants, a prosecutor could not initiate the prosecution. Furthermore, the complainant, usually the rape victim, can withdraw her complaint before the first hearing. The rational for this unique prosecution of rape crimes was originally to protect women. The legislature held that since rape involved the victim’s “privacy” and usually causes great harm whether physical or psychological, prosecution initiated by a prosecutor regardless of victim’s will would cause further harm to the rape victim and impact her reputation. Besides, due to a rape victim’s crucial role in prosecuting the rapist, it would be very difficult to prosecute a rapist without a rape victim’s cooperation. The legislature therefore decided to let the rape victim or her family have the full authority to make her or his own decision.

Supporters argued that this article entitled women to a right, not a duty, to decide whether to prosecute or not and hence better served the purpose of respecting a rape victim’s will. However,

521. Criminal Procedure of the ROC art. 238.
524. Criminal Procedure of the ROC art. 234.
525. HSU, “Comment on Rape Law Reform”, supra note 522; Shan-T’ien LIN, Hsing-fa ke-lun (Definition of Specific Crimes), Taipei: Published by the author, 1995, p. 363.
this article actually reflected social stereotypes and myths, namely that because of “losing chastity,” rape victims need to have further protection. It also implied that a woman’s reputation could be seriously damaged if the public know she is a rape victim, and therefore indicates that what rape law really cares about is primarily a female’s chastity. Thus, this article misleads people’s understanding about the crime of rape again, and enhances Taiwanese people’s belief that rape is a disreputable crime and that both the prosecution of the crime and the rape victim should be treated differently.

Moreover, though I do not deny that the intention of the legislature is to protect the woman, it ignores the fact that a rape victim's interest could be better served through changing the attitude of the society, not by entitling rape victims to a right to give up prosecuting the perpetrator. To sum up, this unique prosecution requirement not only did not serve the purpose of protecting rape victims, but, on the contrary, fostered traditional values which had long been imposed on women and further misunderstanding about rape.526

2. Rape Myths in the Taiwanese Legal System

In addition to the rape myths reflected in the Taiwan Criminal Code, rape myths held by the legal professional might have a much more direct impact on rape victims. Legal professionals who have internalized rape myths not only cannot provide the victim with the help she needs, but also can cause secondary harm to the victim. Therefore, without investigating the rape myths in the Taiwanese Legal System, the influence of rape myths on Taiwanese society cannot be thoroughly explored.

Since the concept of the rape myth is a modern development in western countries, there is only a small amount of literature focused on this issue in Taiwan. However, in Taiwan as in America, rape is a crime that is seriously underreported. According to research, only 10 to 14 percent of rapes were reported to police in Taiwan.527 This data shows that the problem of underreporting in Taiwan is even more serious than it is in the United States where an average of 36 percent of rapes was reported to police from 1992 to 2000.528 Researchers have also indicated that the reason for this serious un-

526. Ibid.
527. Fu-yuan HUANG, Police and Female Victims: A Victiminological Observation of the Reapone of Ploice System, 2000, p. 120.
derreporting involves female victims' concerns about their chastity and reputation, which have been influenced by Chinese traditional culture and rape myths.529

Further, according to another study, the conviction rate of rape in Taiwan is only about 17%, 530 which is less than the governmental conviction rate in the United States at around 20%. In addition, based on a survey conducted by the Modern Women Foundation, most of the rape victims in Taiwan were disappointed with the Taiwanese legal system. They felt that they were not treated properly by the legal system; their cases were not taken seriously as indicated by the prosecutor's frequent requests that women drop their charge and settle with the rapists. Suspicions toward the rape victim throughout the Taiwanese legal system make it impossible for a woman to believe that she can achieve justice in this kind of legal system.531

Studies have indicated that police and prosecutors in the Taiwanese legal system during the process of investigation and prosecution held similar rape myths found in the American criminal justice system. Based on a survey of rape victims, about one-fifth of rape victims complained about unhelpful attitudes displayed by the police, including disregarding their claims and outright discriminations.532 Another study also found that police and prosecutors' attitudes toward rape victims depend on the victims' occupation or appearance. If a victim is a prostitute or does not look like a "good" woman, police and prosecutors are inclined to be suspicious of her complaint. Further, if a rape victim and a rapist are friends or acquaintances, police and prosecutors are inclined to believe that the complaint is more likely revenge or the result of "lover's quarreling" rather than a real rape.533

In addition, the Modern Women Foundation also conducted a series of surveys on the Taiwanese legal system itself. One of their studies focused on the criminal law attorneys who handled sexual assault cases. The study asked for the attorneys' opinion on how the

529. Huang, Police and Female Victims, supra note 527.
532. Huang, Police and Female Victims, supra note 527, p. 131.
legal system dealt with the sexual assault cases after the passage of the Sexual Assault Prevention Law. The purpose of the study was to explore whether the legal system had improved in dealing with sexual assault cases three years after the Sexual Assault Prevention Law had been implemented. Based on the study, 50% of the criminal law attorneys in the survey believed that most of the prosecutors lacked interviewing skills, and therefore were not very good at questioning rape victims. About 23-24% of the attorneys in the survey indicated that prosecutors often held a disdainful attitude toward rape victims and asked about rape victims' sexual history which was unrelated to the case. 18% of the attorneys in the survey even pointed out that prosecutors discriminated against the rape victims' occupation, as well as their level of education.

These studies all suggest that police and prosecutors in the Taiwanese criminal justice system still believe, to some degree, in rape myths about the crime of rape as well as rape victims. Not taking rape cases seriously resulted from their belief that rape was nothing more than sex. Believing that good woman cannot be raped causes their coolness and disdainful attitude toward rape victims.

As for the trial, unlike that of American common law jurisdiction, the Taiwanese legal system is a civil law system which has no jury and only judges responsible for the whole trial process. Therefore, judges' attitudes toward rape victims become the only way to thoroughly examine how rape myths affect the trial. Although there has not been much research focused on this issue, the aforementioned study conducted by the Modern Women Foundation did uncover some findings in this area. Based on their study, 53% of the attorneys in the survey indicated that most of the judges could not understand rape victims' emotional reaction after the rape, and thus caused additional harm to rape victims. 22% of the attorneys in the survey pointed out that judges will go as far as asking the rape victim to stop and criticize their behavior when confronted with rape victims' unexpected emotional reaction during trial. In addition, 26% of the attorneys in the survey indicated that judges, like the prosecutors, often asked about rape victims' sexual history. 18-19% of the attorneys in the survey pointed out that judges often

534. Legal System & Sexual Assault, supra note 531, p. 2.
535. Ibid., p. 4.
536. Ibid., p. 5.
537. Ibid., p. 6.
held a disdainful attitude toward rape victims discriminating on the basis of occupation and the educational level.\textsuperscript{538}

Another study also found that one of the reasons rape victims is reluctant to report the crime is the fear of embarrassment during the trial.\textsuperscript{539} It also indicates that rape victims often feel additionally victimized when they face the skepticism of judges. Judges, although less often than police and prosecutors, did sometimes doubt rape victims' complaints as a result of their belief in popular rape myths.\textsuperscript{540}

In 2002, understanding the legal system's impact on rape victims, the Ministry of Interior of Taiwan authorized National Taipei University to conduct research on the trial of sexual assault cases. The research gathered 667 decisions from Apr. 21, 1999 to Apr. 31, 2000. The purpose of the research was to analyze the reasons for not-guilty sexual assault decisions, and explore the factors that affect conviction in rape cases.\textsuperscript{541} According to the study, although the "resistance requirement" had been loosened after the rape law reform in Taiwan; physical injury on the victims' body is still often the only standard to prove her or his unwillingness to participate in the sexual assault encounter. Based on the study, one of the most popularly cited reasons for reaching the conclusion that the victim lied about rape, and thus acquit a defendant in a sexual assault case, is "the victim didn't resist when she had the chance to resist" or "the victim didn't escape when she had the chance to escape."\textsuperscript{542} The study also found that even in a case where the defendant is convicted, they will get the lowest sentence possible when there's no sign of physical injury on the victims' body.\textsuperscript{543}

Analyzing the court's rationale for not-guilty sexual assault decisions could also reveal Taiwanese judges' deep misunderstanding about rape and rape victims. In addition to acquitting the defendant based on the victim's nonresistance, Taiwanese judges often took rape victims' "normal behavior" after the incident as an anom-

\textsuperscript{538} Ibid.
\textsuperscript{540} Ibid.
\textsuperscript{541} Graduate School of Criminology, National Taipei University, Empirical Research on the Factors that Influence the Trial and the Result of Sexual Assault Cases 3 (July 14, 2003)(unpublished research report on file with author) [hereinafter Empirical Research on Sexual Assault Cases].
\textsuperscript{542} Ibid., p. 142.
\textsuperscript{543} Ibid., p. 88.
aly of how a rape victim “should” behave after the tragedy. A rape victim that didn’t report the crime to the police immediately after the incident; a rape victim who continues her normal life without showing any sign of abnormality after the incident; a rape victim who still had contact with the rapist after the incident; and a rape victim who was a prostitute, were all likely to be classified as “suspicious victims”. Often they were not trusted by Taiwanese judges and therefore the result was a not-guilty verdict.544 These decisions all revealed Taiwanese judges’ lack of knowledge regarding the crime of rape, and reflected the truth: they were deeply influenced by rape myths, to the point where rape myths became a ruling standard when confronting rape cases.

3. *Rape Myths in the Criminal Law of People’s Republic of China*

China had gone through a dramatic change after the Communist Party of China won the Chinese Civil War545 and took over the mainland of China in 1949. Since then, China and Taiwan have developed separately. Controlled by the Communist Party of China, mainland China began its socialist legal system after the establishment of the People’s Republic of China (hereinafter PRC). Influenced by socialism, Chinese criminal law developed differently than the Taiwanese system. Women surprisingly enjoy a better status under Chinese law than under Taiwanese law. Scholars believe that this is the result of the women’s liberation movement led by MAO Zedong.546

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545. The **Chinese Civil War** (Literally “Nationalist-Communist Civil War”) was a conflict in China between the Kuomintang (Chinese Nationalist Party; KMT) and the Communist Party of China (CPC). It began in 1926 when the KMT, led by newly-appointed Generalissimo Chiang Kai-shek put a stop to leftist and Communist party-infiltration by purging these members from Nationalist membership. It ended in 1949. On October 1, 1949, Mao Zedong proclaimed the People’s Republic of China. Chiang Kai-shek and 600,000 Nationalist troops and 2,000,000 refugees, predominantly from the government and business community, fled from the mainland to the island of Taiwan, and there remained only isolated pockets of resistance. In December 1949, Chiang proclaimed Taipei, Taiwan, the temporary capital of the Republic of China and continued to assert his government as the sole legitimate authority in China. (available at http://en.wikipedia.org/wiki/Chinese_Civil_War)
546. MAO Zedong (December 26, 1893 – September 9, 1976) was the chairman of the Communist Party of China (CPC) from 1943 and the chairman of the Central Committee of the Communist Party of China from 1945 until his death. Under his leadership, the CPC became the ruling party of mainland China as the result of its victory in the Chinese Civil War. On October 1, 1949, Mao declared the formation of the People’s
As a socialist, the leader and the founder of the new government of the PRC, MAO Zedong, made a firm commitment to guarantee equality between women and men after the revolution of 1949. A famous quotation by MAO Zedong reflects the determination of the government to raise women’s status: “Women hold up half of sky.” Furthermore, the basic law implemented when the PRC was established in 1949 stated:

The People’s Republic of China shall abolish the feudal system which holds women in bondage. Women shall enjoy equal rights with men in political, economic, cultural, education and social life. Freedom of marriage for men and women shall be put into effect (Article 6)

Therefore, Chinese women in mainland China experienced rapid progress in terms of gender equality after 1949. They were no longer bound by the family, arranged marriages, and concubinage. They could enjoy free marriage, free divorce, and economic independence after the Communist Party of China adopted two of the most important legislative documents in 1950: the Marriage Law and the Land Law.

Furthermore, as a result of the women’s liberation movement, women’s “labor force participation rate” in mainland China remained high, and women’s representation in higher educational institutions was high as well. In fact, one study indicates that “[i]f we use female force participation as the indicator to measure gender equality, China would be one of the most egalitarian countries in the world.”

In addition to increase in educational and labor participation, MAO Zedong’s women liberation movement also influenced changes in contemporary Chinese law. One of the best examples is


548. Ibid., p. 3.

549. According to a study by Bauer at al, 70 % of Chinese women who married between 1950 and 1965 had jobs, and 92 % of Chinese women who married between 1966 and 1976 had jobs. (Bauer, John, WANG Feng, Nancy E. Riley, and ZHAO Xiaohua, Gender Inequality in Urban China, Education and Employment, Modern China, Vol. 18 (1992), p. 333-370.)

PRC’s Marriage Law. The Marriage Law of People’s Republic of China was the first law adopted after the founding of the PRC in 1949. The law abolished the feudal marriage and family system that featured compulsory arranged marriages, superior social status of men over women and neglect of children’s rights and interests. As a result, PRC’s Marriage Law has been recognized as a much more advanced marriage law regarding the gender equality compared to Taiwanese family law. While Taiwanese women have been struggling with unfairness in Taiwanese family law for over 50 years, women in mainland China already enjoyed equal status in the home as early as 1950.551

This same influence can also be found in PRC’s Criminal Law. In 1950, the Legal Affairs Committee of the Central People’s Government in mainland China began to draft a criminal code. However, owing to various reasons, the draft of the criminal code was not promulgated, and drafting of the criminal law was suspended several times.552 China’s first criminal law was adopted by the National People’s Congress (NPC) on 1, July 1979.

According to article 139 of the Criminal Law of the People’s Republic of China (hereinafter 1979 Criminal Law), “whoever rapes a woman by force, threat or other means shall be sentenced to fixed-term imprisonment of not less than three years and not more than ten years.”553 Rape in China’s 1979 Criminal Law was classified as a crime violating a citizen’s personal and democratic rights, not classified as a crime against society as Taiwan did. The interest protected by the law is women’s personal rights and sexual autonomy. For an act to be considered a rape in mainland China, proving the degree to which a woman resists is not as strict as it is in Taiwan or in America. According to an official document issued by The Ministry of Public Security, the Supreme Court, and the Ministry of Justice of People’s Republic of China, proving women’s resistance is not a necessary requirement for proving rape. Courts need to investigate each case carefully and decide each case by its unique

circumstance when there's no evidence of resistance or when a victim's resistance is not very obvious.\textsuperscript{554}

Most of the literature also points out that, in China, women's resistance can not be the only standard to judge whether the act is against a victim's will.\textsuperscript{555} To judge whether the act is against a woman's will, there is a need to look into a rapist's behavior, not a victim's conduct.\textsuperscript{556} The need to prove resistance in rape cases would be too difficult for the rape victim and therefore become a disadvantage for the protection of the woman's right.\textsuperscript{557} Another study extends this notion indicating that the "resistance requirement", especially the "unresistable requirement" that requires a woman to risk her life to protect her chastity, represents a feudal society's discrimination against women.\textsuperscript{558}

As a result, to decide whether the act constituted a rape, a woman's resistant behavior or her express denial should not be the only consideration. Instead, there is a need to consider whether the woman could resist, had the knowledge to resist, or had the courage to resist etc.\textsuperscript{559} Different woman have different characters, and would react to the same tragedy in different ways. Therefore, a need to investigate each case very carefully based on its own circumstances and participants is determined case by case. Although it is true that there would not be any resistance in a consensual case,

\textsuperscript{554} See Supreme Court, the Ministry of Justice, and the Ministry of Public Security's Solutions to the Problems of Applying Law in Rape Cases (Apr. 26 1984).


\textsuperscript{556} HE & CH'U, Hsing-fa hsiu-cheng tsui-ming ching-shih, supra note 555.

\textsuperscript{557} HAN, Chi' in-fan nu-hsing jen-shen ch'uan-li fan-tsu yen-chiu, supra note 555; Research on the Criminal law, supra note 555.

\textsuperscript{558} HAN, Chi' in-fan nu-hsing jen-shen ch'uan-li fan-tsu yen-chiu, supra note 555.

\textsuperscript{559} Crimes Violating Property and Personal Rights, supra note 555; LI & YSU, Ysui-ming shih-yung hsin-chieh, supra note 555.
it does not mean that no resistance necessarily indicates that the act is consensual.\textsuperscript{560}

Although the flexible resistance requirement was created in PRC's 1979 Criminal Law, it still shared some of the most common rape myths that can be found in western countries or Taiwanese Criminal Code. First, the victim of the crime was limited to the female, and only a male can commit a rape. The rape myth that only a stranger or any male other than a husband could rape was also perpetuated in PRC's rape law. The sexual autonomy protected by article 139 of PRC's 1979 Criminal Law was interpreted as a woman's refusal to have sexual relations with anyone other than her husband.\textsuperscript{561} Therefore, a woman cannot claim sexual autonomy when the predator is her husband. The husband was also exempt from the crime of rape under PRC's 1979 Criminal Law.\textsuperscript{562}

Apart from these commonly shared rape myths, PRC's 1979 Criminal Law still had unique characteristics as compared to Taiwanese Criminal Code. Due to MAO Zedong's women liberation movement and the Cultural Revolution from 1966-76,\textsuperscript{563} combating the feudal system and thus improving the equality between men and women has remained one of the most important issues in mainland China. As a result, PRC's 1979 Criminal Law appeared to be a criminal law that took the protection of women's rights more seriously, and had a better understanding of rape victims.

\textsuperscript{560} HE & CH'U, Hsing-fa hsiu-cheng tsui-ming ching-shih, supra note 555.


\textsuperscript{563} The Great Proletarian Cultural Revolution (Literally "Proletarian Cultural Great Revolution", "Great Cultural Revolution", or "Cultural Revolution") in the People's Republic of China was a revolutionary upsurge by Chinese students and workers against the bureaucrats of the Chinese Communist Party. The purpose of the cultural revolution is to destroy an old world and build a new one. It was launched by Communist Party Chairman MAO Zedong in 1966 to secure Maoism (known domestically as Marxism-Leninism-Mao Tse-tung Thought) in China as the state's dominant ideology and eliminate political opposition. Though MAO himself officially declared the Cultural Revolution to have ended in 1969, the term is today widely used to also include the period between 1969 and the arrest of the Gang of Four in 1976. (available at http://en.wikipedia.org/wiki/Cultural_Revolution)
when compared with Taiwanese Criminal Code. The cult of chastity that can be found in Taiwanese Criminal Code seemed to have totally disappeared in PRC’s 1979 Criminal Law. Many Chinese studies claim that the conception of chastity is a symbol of a feudal tradition which needs to be abandoned in contemporary Chinese society.\footnote{564}

PRC’s 1979 Criminal Law was amended in 1997. This reform brought about an expansion of the criminal law from 192 articles to 452 articles.\footnote{565} The statute of rape also moved from article 139 to article 236. However, the content of the rape statute remained the same.\footnote{566}

4. Rape Myths in the PRC’s Legal System

The Chinese Communist Party set up the three-level-two-instance system nationwide after declaring the founding of PRC in 1949. The three-level-two-instance system includes a three-tire court system. At the bottom are the county People’s courts and municipalities directly under the central government; at the second level are province People’s courts; and at the top are the People’s Supreme Court and all of its subsidiaries.\footnote{567} However, the three levels of the people’s courts were expanded into four after the First People’s Congress passed the Constitution of People’s Republic of China, the Judicature Act of People’s Republic of China, and the Procuratorate Act of People’s Republic of China in 1954. The enactment of these three laws was seen as a milestone in the construction of the Chinese socialist judicial system. Since then, the four-level-and-two-instance system has remained the basic legal construction of PRC’s judicial system.\footnote{568}

According to the Constitution and the 1954 Organic Law of the People’s Courts of PRC, the four levels of people’s courts are at the top the Supreme People’s Court with three local people’s courts beneath it. These local courts consist of basic-level people’s courts,
intermediate people’s courts, and the superior people’s courts. In trying criminal cases, the people’s courts of PRC assert that the second instance, or second trial, is the final trial. This means that all cases that are accepted by local people’s courts at various levels, excluding cases involving the review of death sentences, will come to an end after being tried by people’s courts at two levels. In addition, second-instance judgments and orders of the court shall be seen as final decisions of the case, and the parties can not file appeals or present protests against the final decision.

Compared to the Taiwanese and American judicial system, PRC’s four-level-two-instance judicial construction is not the only unique characteristic of the Chinese socialist legal system. Although, according to the Constitution, the people’s courts exercise trial power independently in accordance with the provision of the law and are not subject to interference by any administrative organization, public organization or individual, this independence belongs only to the people’s court itself, not the judge. Therefore, the decision of a judge is not the final judgment. For a decision to become finalized, it must be approved by the president of the people’s court. In addition, the Judicial Committee also oversees the trial.

The “independence” of the people’s courts have therefore long been doubted by both Chinese and western societies. Under the Chinese Communist Party’s rule, the people’s courts are believed a part of the state’s administrative organization. A judge is nothing more than a regular official in a state department. There’s no specific requirement or procedure to go through to become a judge: even military officers or other state officials become judges. As a result judicial independency, regulated in the Constitution of PRC becomes meaningless. The people’s courts of PRC are integrated with the state’s administrative organization to some extent.

569. Ibid., p. 12.
570. Legal System of the PRC, supra note 552, p. 249.
571. Ibid., p. 286.
574. Ibid.
In addition to the people's courts exercising their trial function, the Chinese socialist legal system also includes people's procuratorates, or prosecutors exercising their procuratorial power, and the public security department exercising their investigation power. However, there hasn't been any research done to investigate legal professionals' attitude toward rape victim in China. The conception of rape myths is still a new idea for the Chinese people. None of the research in China has introduced or discussed rape myths, or has become aware of rape victims' special situation in the criminal justice system. Therefore, only through some secondary sources can we find some clue of how much rape myths have influenced PRC's legal system.

As mentioned earlier, MAO Zedong's women liberation movement and the Cultural Revolution destroyed China's thousand-year feudal mindset throughout society and further improved the equality between men and women in mainland China. Women enjoyed a better status under Chinese Law than under Taiwanese law, and the conception of chastity became a symbol of a feudal tradition that needed to be abandoned. This kind of attitude could also be found in PRC's judicial system.

According to a Supreme People's Court's opinion in 1951 concerning the crime of rape, the purpose for criminalizing and punishing the crime of rape is to protect a woman's right, and NOT to punish the rapist for causing a rape victim's chastity to be lost, as in feudal times. The Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security also indicated that a woman's reputation could not be taken into account when judging whether the act was against a woman's will. They asserted that even "bad women" could be raped. In addition, they pointed out that proving women's resistance was not a necessary requirement for proving rape. Thus, courts were required to investigate each case carefully and decide each case by its unique circum-

575. See Tsuikao Jenmin Fayuan Hsinan Fenyuan Kuanyu Ch'ienchientsui chi Lianghsing Went'i te Yichien (Supreme People's Court Southwestern Branch's Opinion regarding the Crime of Rape) (June. 1, 1951).
stance when evidence of resistance did not exist or when a victim’s resistance was not very obvious. 577

Although the legal professionals’ attitude toward rape cases and rape victims in practice remains unknown, the Supreme People’s Court’s attitude toward the crime of rape offers some indications of the trends. Resulting from MAO Zedong’s women liberation movement and the emphasis on men and women’s equality, the people’s courts were instructed by the Supreme People’s Court to handle rape cases carefully. Furthermore, in order to combat the feudal mindset, the Supreme People’s Court has consistently emphasized that people should relinquish the connection between the conception of chastity and the crime of rape. As a result, the cult of chastity that had been deeply rooted in Chinese society for a thousand years has now been totally abandoned by PRC’s criminal law as well as by their judicial system.

D. Combating Rape Myths

1. Amendment of the Rape Law in Taiwan

In terms of rape law reform and sexual assault prevention work, Taiwan’s experience is similar to that of European countries and America; as such work is closely related to the development of the women’s rights movement. The development and establishment of women’s rights in Taiwan over the past decade is believed to be one of the major successes of Taiwan’s social movements. Following women’s groups’ advocacy of and actions on women’s rights issues since the 1980s, the government placed a stronger emphasis on systematic processes after the mid-1990s to provide substantial and concrete safeguards for women’s rights. The amendments to the criminal code and the passage and enforcement of the Sexual Assault Prevention Law were two of women’s rights advocates’ most important achievements.

a. Sexual assault prevention act

The first time the draft of the “Sexual Assault Prevention Act” was proposed to the Taiwanese congress on March 17, 1994, when legislator PAN Wei-kang (the founder of the Modern Women’s Foundation and the former executive of Women’s Right Promotion Foundation) submitted it during the seventh meeting of the third session of the 2nd Legislative Yuan. However, the “right to sexual

577. Ibid.
autonomy” mentioned in the Sexual Assault Prevention Act” led to debate among male lawmakers, especially concerning around the “right to sexual autonomy between spouses.” Male lawmakers lashed out at the draft and denounced it as “a bill that destroys domestic harmony.” In the eyes of these lawmakers the common tenet that “marital spats are quickly solved in bed” is not surprisingly interpreted to mean that sexual intercourse between husband and wife is the key to solving marital conflicts. In the end, the draft of the “Sexual Assault Prevention Act” was frozen for two and a half years until it was finally unfrozen by the PENG Wan-ru murder incident.

In November 30, 1996, the director of the women’s affairs department of the Democratic Progress Party (hereinafter DPP), PENG Wan-ru, was raped and killed after a DPP party convention in Kaohsiung. This tragic event “sparked a public outcry against the widely perceived lack of protection given to women in Taiwan,” and triggered a slate of protests by women’s groups across the island. General election for the Third Legislative Yuan was coming up, and due to consideration of the female vote, the bill did not trigger as much controversy as it did during its third round of deliberations in the Legislature. Consequently, it was adopted much quicker than one would have imagined. Some people believed that it was the election pressure and social pressure over the PENG Wan-ru incident that accomplished the “Sexual Assault Act.” However, the passage of the act had taken the first step in improving measures on violence against women, and can been seen as the beginning of the rape law reform in Taiwan.

The Sexual Assault Prevention Act was enacted to control and prevent sex violation crime and to protect the interests of the victims of sexual violation. It provides the most substantial protective measures for women’s safety and explicitly defines the role of public involvement regarding safety in the private realm. With this law, preventative measures for sexual violation entered into a brand

578. There are two major political parties in Taiwan, one is KMT, and the other is DPP.
581. Hsinch’inghai Fantsui Fangtzufa(The Sexual Assault Prevention Act)art. 1 (1997) [hereinafter Sexual Assault Prevention Act].
new stage. It requires a Sexual Assault Prevention Committee created by the Ministry of the Interior to develop sex violation control and prevention policies; to coordinate, monitor and evaluate the performance of sex violation control and prevention bylaws by all concerned agencies; to monitor local governments in creating sex violation handling processes, control and prevention services, and medical networks; to supervise and promote sex violation control and prevention education; and to engage in other matters related to sex violation control and prevention.

The Sexual Assault Prevention Act also requires the central government to establish a database of fingerprints and DNA of known sexual offenders who have been convicted. It obliges local governments to create sex violation control and prevention centers to provide 24-hour emergency rescue, general and emergency diagnosis and therapy, and assistance in injury diagnosis and certification for rape victims. In addition, local governments are also required to provide legal and psychological supports for victims; to coordinate with teaching hospitals to create and maintain a dedicated medical mission to treat rape victims; to promote education, training and propaganda on sex-violation control and prevention; and to provide other measures as may be required by sex-violation control and prevention.

In addition, the law set up several standards for the hospital and clinic, the media, and the legal system to follow when dealing with sexual assault cases.

Hospitals and clinics can not refuse diagnosis or therapy and have to execute a diagnosis certificate for the victim of sex viola-

583. See generally Sexual Assault Prevention Act.
584. Sexual Assault Prevention Act art. 4.
585. Sexual Assault Prevention Act art. 7.
586. Sexual Assault Prevention Act art. 6.
587. Sexual Assault Prevention Act art. 9-17.
tion. 588 "Regulations on Medical Treatment of Sexual Assault Events" was enacted pursuant to the provision of Paragraph 1, Article 11 of the Sexual Assault Prevention Act. 589 Based on this regulation, hospitals and clinics have to regard the victims as Grade 1 patients for emergency treatment and give them priority in medical treatment. 590 In order to protect sexual assault victims, and make them more comfortable during treatment, hospitals have to assign nurses to accompany the victim when providing diagnosis and treatment, as well as protect the privacy and safety of the victim. 591 To ensure that the sexual assault victims are treated properly, a medical group is established by the hospital to handle sexual assault cases specifically. The members of the medical group have to include physicians, nurses, and social workers, and the group has to provide further education for the medical and nursing personnel to handle sexual assault events, reviewing the diagnosis and treatment flow. 592

For the media, the Act is most concerned with the privacy of the sexual assault victims. Thus, any advertisements, publications, radio and TV broadcasts, internet, or any other medium are prohibited to report or document the name of the victims, or any other information that may be sufficient to identify the victims. The managing director and the originator may be subject to a fine or penalty for any offense against this provision, and the publication, report, or documentation in question could be confiscated. 593

For the legal system, the Act requires the court, the prosecutors' department, and police administration to appoint full-time staff to handle sex-violation crime reports. It also forbids the exposure of a victim's prior sexual history, 594 and sets up several special procedural rules for sexual assault cases. Generally, a complainant appeared in court to provide evidence for investigation, yet there was no single statute in Taiwan Criminal Procedure that authorized

588. Sexual Assault Prevention Act art. 9.
589. Hsingo Ch'inghai Shihchien Yiliaotsoya Ch'ulichuntse (The Regulations on Medical Treatment of Sexual Assault Events) art. 1 [hereinafter Medical Treatment of Sexual Assault].
590. Medical Treatment of Sexual Assault art. 2.
591. Medical Treatment of Sexual Assault art. 4
592. Medical Treatment of Sexual Assault art. 8.
593. Sexual Assault Prevention Act art. 10.
594. According to article 16, paragraph 4 of the Sexual Assault Prevention Act, any defendant or his/her attorney-at-law in a sex-violation crime shall not interrogate or present any evidence showing the victim's prior sexual history with any one other than the defendant unless deemed necessary by the judge.
the complainant to have the right to appoint an agent to make statements at trial without the complainant's appearance before 2003. Even in practice, when the court allowed the complainant to appoint an agent to represent him or her in court, the agent did not have the right to examine the materials in case files and the evidence.\footnote{595} However, the Sexual Assault Prevention Act entitles the complainant of a sexual violation crime to have the right to appoint an agent to represent her in court, and further authorizes the agent, if he or she is an attorney-at-law, to have the right to examine files and exhibits, and to take transcripts or photos in the course of trial.\footnote{596}

In addition, according to general criminal procedure, a spouse, lineal blood relative,\footnote{597} collateral blood relative\footnote{598} within the third degree of kinship,\footnote{599} head of the house,\footnote{600} members of the house or a statutory agent of an accused can apply to the court for permission to act as the assistant of the accused.\footnote{601} This provision did not apply to the complainant.\footnote{602} However, in order to encourage the

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\footnote{595} Kung-li LAI, "Sexual Assault Cases on Trial and the Amendment to the Evidentiary Rule of the Criminal Procedure", \textit{Fa-hsueh ch'ung-k'an} (China Law Journal), Vol. 192, p. 95; LIU, Research on Specific Types of Sexual Assault, \textit{supra} note 507.

\footnote{596} Sexual Assault Prevention Act art. 12.

\footnote{597} According to Article 967, Paragraph 1 of Civil Code of the ROC, the lineal relative by blood is the relative by blood of a person from whom that person is descended or who is descended from that person.

\footnote{598} According to Article 967, Paragraph 2 of Civil Code of the ROC, the collateral relative by blood is the nonlineal relative of a person who is descended from the same common ancestor as that person himself is.

\footnote{599} According to Article 968 of the Civil Code of the ROC, the degree of relationship by blood between a person and his lineal relative by blood shall be determined by counting the number of generations upwards or downwards from himself [as the case may be], one generation being taken as one degree. As between the person and his collateral relative, the degree of relationship shall be determined by the total number of generations counting upwards from himself to the common lineal ancestor and then from such common ancestor downwards to the relative by blood with whom the degree of relationship is to be determined.

\footnote{600} According to Articles 1122, 1123 and 1124 of Civil Code of the ROC, a house is a community of relatives who live in the same household with the object of maintaining the common living permanently, and each house should institute a head. The head of a house shall be elected from among the community of the relatives. If there is no such election, the headship shall fall on the person who is the highest in rank [of relationship]; or where the ranks are equal, on the person who is senior in age.

\footnote{601} Criminal Procedure of the ROC art. 35.

\footnote{602} The Legislature Yuan passed an amendment to the Criminal Procedure of the ROC in 1998 to entitle all criminal victims to have his or her relatives or social workers accompany in the course of investigation. However, this amendment only limited to the course of investigation, not extended to the trial.
sexual assault victims to face the criminal justice system and to eliminate the second harm caused by the legal system, the Act authorizes the complainant of a sexual violation crime to have his or her statutory agent, spouse, lineal blood, or collateral blood relative within the third degree of kinship, parent, members of the house, or social worker accompany him or her in the course of investigation or trial.\textsuperscript{603}

Last, but not the least and probably the most important of all, the Act makes sexual assault trials private unless the victim agrees to a public hearing.\textsuperscript{604} Previously, according to the "Court Organization Act", all trials were public hearings, which were a significant deterrent to women speaking out.

Besides these special procedural rules regulated in the Act, several regulations for the legal system to handle sexual assault cases were enacted by Judicial Yuan, Ministry of Legal Administration, and Ministry of the Interior pursuant to the Paragraph 1, Article 11 of the Sexual Assault Prevention Act.\textsuperscript{605} In order to avoid the police, prosecutors, courts, social administration, and medical treatment from separately questioning the victim, and thus causing secondary psychological harm to the victim due to repeated presentation of the case, the Ministry of the Interior enacted the "Operational fundamentals for Relieving the Victims of Sexual Assault Cases from Repeated Presentation" in 2000. It was amended in 2002, and became one of the most important guidelines for legal and medical personnel to follow when dealing with sexual assault cases.

The Sexual Assault Prevention Act was amended in 2005. The amendment has expanded the number of articles in the Act from twenty to twenty-five. This amendment has acted to both set up and expand several detailed procedural protection rules for personnel who deal with rape victims, and has established a correction and treatment system for sexual offenders.

\textsuperscript{603} Sexual Assault Prevention Act art. 13.
\textsuperscript{604} Sexual Assault Prevention Act art. 16.
\textsuperscript{605} Judicial Yuan enacted the "Regulations for the Court to Handle Sexual Assault Cases" in 1997; Ministry of Legal Administration enacted the "Regulations for the Prosecutors to Handle Sexual Assault Cases" in 1997; Ministry of the Interior enacted the "Regulations for the Police Department and Sexual Assault Prevention Center to Handle Sexual Assault Cases" in 1998, and enacted the "Operational Fundamentals for Relieving the Victims of Sexual Assault Cases from Repeated Presentation" in 2000.
b. Amendments to the criminal law

Three years after the passage of the “Sexual Assault Prevention Act”, the legislature also passed amendments to criminal law, which included many dramatic changes in rape law. This reform was also the result of women’s groups’ advocacy. Women’s groups believe that women’s legal status had long been discriminated against, and that this discrimination could only be amended by criminal law reform. Therefore, amendments to criminal law, especially rape law, were considered a method to achieve gender equality. As a result, this reform was deemed to have a symbolic meaning that it helped to establish and incorporate women’s human rights into the law.606

Generally, drafts of amendments are usually submitted by the government. The draft of this amendment, however, was submitted by 60 legislators led by legislators XIE Qi-da and HWANG Guozhong.607 Under pressure from women’s groups, the draft passed very quickly. It didn’t undergo too much discussion, and was passed mainly by the political parties, KMT and DPP’s, negotiations. It took less than a year for the draft to be passed and enacted.608

According to this amendment, several important and controversial provisions have been amended. First, based on the new rape law in the Taiwan criminal code, rape is no longer classified as a crime against society but as a “crime against one’s sexual autonomy”. This change is very critical, since it finally removes the deeply rooted moral judgment from Taiwanese Rape Law, and gives people a new understanding of the crime of rape.

Second, in its definition of rape, it adopts the word “sexual intercourse” instead of the word “carnal relations”, which in Chinese has a more negative meaning and usually is understood as a sexual relationship outside of marriage. The definition of “sexual intercourse” has also been expended. It is no longer restrained to the connection of sexual organs, but also includes the following listed sexual acts that are not based on rightful purposes: insertion of a reproduction organ into the anus or mouth of another person; insertion of a body part or object other than the reproduction organ

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607. LEGIS. YUAN REP. VOL. 88 NO. 13 p. 164 (Taiwan. 1999).
into the reproduction organ or anus of another person.\(^{609}\) Furthermore, it also adopts sexually neutral legislation so it can include both male and female victims.\(^{610}\)

Third, it eliminates the resistance requirement.\(^{611}\) This reform results from the new understanding of rape. Since the crime of rape is now understood as a crime against one’s personal sexual autonomy, any means that used against one’s will is enough to constitute a sexual assault. Legislators believed that if the “unresistible” requirement remained, it would restrain the content of “sexual autonomy”. They also refereed to the Criminal Law of Germany and Japan, and found that the “unresistible” requirement was a unique requirement which only appeared in Taiwan’s Criminal Code. The “unresistible” standard was not adopted in order to manifest legislators’ intention that as long as one’s sexual autonomy is violated, it is rape.\(^{612}\)

Most importantly, except for when rape happens between spouses, the amendment abolishes the requirement that prosecution can only be initiated through the complaint of victims or other complainants.\(^{613}\) Under the amendment, rape is now automatically a prosecutable offence. This reform was the most controversial one and aroused a lot of debate. People against the reform argued that this reform would deprive a rape victim’s decision-making power to choose between prosecution or not. Rape victims, therefore, have to face cruel criminal procedure and are forced to reveal their privacy matters to the public regardless of their will. Opponents believed that it would probably result in secondary harm to rape victims and fail to serve the purpose to protect them.\(^{614}\) However, women’s groups believed that, as a crime, when its prosecution could be initiated only by complaints, rape had become a significant threat to society. The conviction rate for the crime of rape was very

\(^{609}\) Taiwan Criminal Code art. 10 (5) (1999).

\(^{610}\) Taiwan Criminal Code art. 221 (1999).

\(^{611}\) Ibid.

\(^{612}\) TS'AI, “An Introduction to the Amendment to the criminal Code”, supra note 606, p. 45.

\(^{613}\) Taiwan Criminal Code art. 236 (1999).

\(^{614}\) KAN, Definition of specific crimes, supra note 515, p. 369; LIN, Definition of specific crimes, supra note 525, p. 363; LIU, “A new interpretation of the crime of Sexual Assault Based on the Amendment to the Rape Law in 1999”, supra note 608, p. 88.
low, and a lot of rapists went unpunished because it was not an automatically prosecutable crime.\textsuperscript{615}

In order to emphasize the violent nature of the crime of rape; to eliminate the idea that it is a disreputable crime; and to show concern for women’s safety as a whole instead of scrutinizing an individual rape victim’s willingness, the position held by women’s groups prevailed in the end.\textsuperscript{616} Rape was finally amended as an automatically prosecutable offence after decades’ debate.

This amendment was not only a dramatic change in rape law, but was also considered a big step in the women’s movement in Chinese society. It worked to break down the traditional cult of chastity throughout the Chinese history as well as the shackles of “reputation” it had created for Chinese women. It also tried to revise misunderstandings about the reality of rape and eliminate rape myths in criminal law.\textsuperscript{617}

Furthermore, the legislature believed that only by amending rape law could the public be educated and to realize the reality of rape. Through public education, rape myths prevalent in Chinese culture and society could be eliminated, and Chinese women could be released from the notion of “chastity”.

In 2005, the Taiwanese legislature passed another amendment to the Criminal Law. However, this amendment has had a much greater impact on the correction and treatment system for sexual offenders rather than focusing on the interests of the sexual assault victims.

2. \textit{Expert Testimony in Taiwan}

Although rape trauma syndrome had been developed and used in the American courtroom for decades, this concept was not introduced to Taiwanese society until the late 1990’s.\textsuperscript{618} Still today it is rarely used as testimony in the Taiwanese courtroom.

\textsuperscript{615} HUANG, “Review of Rape Law and Reform Recommendation”, \textit{supra} note 514, p. 41; WANG, “The enactment and process of laws governing sexual assault cases”, \textit{supra} note 506, p. 24-25; TS’AI, \textit{supra} note 606, at 47.

\textsuperscript{616} WANG, “The enactment and process of laws governing sexual assault cases”, \textit{supra} note 506, at 24-25; TS’AI, “An Introduction to the Amendment to the criminal Code”, \textit{supra} note 606, p. 47.

\textsuperscript{617} TS’AI, “An Introduction to the Amendment to the criminal Code”, \textit{supra} note 606.

\textsuperscript{618} Fu-Yuan HUANG, “An Study on Character and Trauma Theory of Forcible (Gang) Rape Victim”, \textit{ChungYang Ching Ch’a TaiHsueh HsuehPao} (Journal of Central Police University), Vol. 34 (1999), p. 227-261; Kuo-yung FAN, “A Literature Review on
The function of an expert witness is very different in a Taiwanese courtroom under its civil law jurisdiction. Instead of being chosen by the parties, an expert witness is selected by a presiding judge, commissioned judge, or prosecutor as an assistant in the Taiwanese courtroom. Under the civil law system, Taiwanese judges lead the whole trial and tend to believe that the expert witness is only one piece of evidence that they need to consider. In fact, Taiwanese judges are used to ruling on a controversial issue based on their own experience and evaluation rather than an expert witness’s opinion. This long-time ignorance of the importance of the expert witness and the expert witness’s opinion finally caused a joint protest led by more than 50 women’s organizations when a panel of Taiwanese high court judges refused to admit five experts’ testimony in a sexual assault case in 2001.

In one prevalent case that occurred in 1999, Pastor TANG Tai-sheng was charged with sexually assaulting his teenage followers during gatherings for communion. It was alleged that between 1986 and 1999, Tang continued sexually assaulted the teenage girls at his home in Taoyuan County. The girls claimed that Tang asked them to strip in his wife’s presence before he engaged them in sexual misconduct. Tang denied the allegations but was found guilty of obscenity in the end and sentenced to more than three years in prison by the district court. He later won his appeal, however, and was acquitted of all charges by the Taiwan High Court in 2001.

In its second review of the case, the High Court judge panel reversed the lower court’s conviction and decided TANG Tai-sheng was not guilty of the charge. In handing down the not-guilty verdict, the High Court judges reasoned that Tang’s act did not constitute a criminal offense because the victims failed to adequately resist his advances. In addition, there was no conclusive evidence indicating that he forced himself on the women. The judges be-

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619. Criminal Procedure of the ROC art. 198.
622. Pa-shih-pa Nien Sutzu ti Ch’ipawu Hao P’anchueh (Taiwan Taoyuan District Court, 1999)
623. Pa-shih-chiu Nien Shang-keng-e-tzu ti yi-yi-ssu-san Hao P’anchueh (Taiwan High Court, 2000) [hereinafter TANG Tai Sheng]
lieved that Tang’s use of the victims’ trust and respect to achieve his “sexual discipline” did not amount to irresistible force.  

During the appeal, the High Court judge panel also concluded that the opinions provided by the prosecutor’s five experts were only “advisory” and did not necessarily carry enough weight to constitute “facts” in the case. The five experts chosen by the prosecutor were a founder of a psychological magazine, a psychiatrist; a senior clinical psychologist; and two professors from universities. They were asked to evaluate the victims’ trauma responses after the alleged event. Although they all found significant evidence of post-traumatic stress, their expert opinions were not adopted by the High Court. In fact, the judges even refused to subpoena them.  

Women’s rights advocates lashed out at the High Court judges in this case for acquitting Tang and accused the judges of neglecting professional opinions offered by expert witnesses. CHI Hui-jung, the Chief Executive Director of the Garden of Hope Foundation (GHF), argued “the not-guilty verdict not only was a blatant transgression of women’s legal rights, it was an insult to the intelligence of the public at large.” Scholars also criticized the High Court Judges for not being aware of the importance of expert witness’s testimony on rape victims’ trauma responses in sex-related criminal offenses.

Although the Taiwan Supreme Court overruled the High Court ruling in 2002, they asserted that the decision of the High Court judges in the case of TANG Tai-sheng was not unique, but instead reflected the general attitude held by Taiwanese courts. As long as Taiwanese judges believe that they can rule every issue in sex-related criminal offenses based on their own experience, and without any help from expert witnesses, rape victims will never be

624. T’ANG T’ai Sheng (Taiwan High Court, 2000)  
625. Ibid.  
627. T’ANG T’ai Sheng (Taiwan High Court, 2000)  
628. The Garden of Hope Foundation (GHF) is a non-profit organization for victims of sexual assault.  
630. Chiu-shih-i Nien Tu T’ai-Shang-tzu ti Shih-Wu Hao P’anchueh (Taiwan Supreme Court, 2002)  
fully understood and protected by the legal system, and the goal of combating rape myths will never be achieved.

V. CONCLUSION

As one of the most violent and degrading crimes, the reality of the crime of rape is that rape and the fear of rape operate cross-culturally as a mechanism of terror that control women and force women to depend upon men for protection.632 Rape contributes to a social, emotional, and political environment in which women's bodies, lives, experiences, and realities are improperly restrained.633 Being a victim of such a violent social, emotional, political, and physical crime, the pain that a rape victim suffers is often much more serious than that of victims of other crimes. This serious damage, whether physical or psychological, comes not only from the crime itself, but also as the result of rape myths held by society and the subsequent attitudes toward victims of rape.

Unlike other crimes, rape involves not only those who are victimized, but also general societal attitudes toward sex-role behavior and sexuality.634 Therefore, rape myths, as a "prejudicial stereotype, or false beliefs about rape, rape victim, and rapists,"635 can be considered a reflection of sex-role stereotypes within cultures: they reflect the sex roles of women in a society and are intertwined with cultural sexist stereotypes.636 Because of this, rape myths in different societies and cultures have different appearances and influences.

Rape myths in American culture are the reflection of the sex-role stereotype that men should be sexually aggressive while women should be sexually passive. Men in America are expected to pursue their sexual satisfaction aggressively, while women in America have been socialized to believe that it is unladylike for them to initiate sexual advances toward men and to respond to a sexual act without making some type of resistance. As a result, American women have not been socialized to effectively express their feelings of nonconsent in an assertive way.637 These social re-
alities create a framework for rape and are therefore the foundation of rape myths in America.

As opposed to Chinese society, the history of rape in the United States is also a history of both racism and sexism. The stereotypes that only black men rape and black women are not raped still exist in modern American society.\(^{638}\) Black defendants and black complainants continue to suffer discriminatory treatment in the American legal system.\(^{639}\) Therefore, as a result of the intersection of racism and sexism, rape myths in America have a unique characteristic which makes the issue of rape extraordinary complicated.

A reflection of this prevalent rape myth can be found in American common law before the 1970s where there was both a cautious definition of rape and uniquely restricted evidentiary rules which applied only in rape cases. Rape victims were limited to females, and a husband was exempted from rape charges. Only in rape was proof of "lack of consent" insufficient to prove nonconsent. Resistance was always required to prove that a rape occurred. Cautionary instruction, originally adopted from the Lord Chief Justice Sir Matthew Hale, was part of special jury instructions for rape cases and became part of the evidentiary code in most states. As for other special evidentiary rules that only applied in rape cases: corroboration was not supporting evidence used to strengthen the victim's case, but as evidence required to prove the alleged rape occurred; rape victims bore an extremely short statute of limitations due to the prompt complaint doctrine that worked in the legal system; and the female complainant had to suffer the pain of revealing her prior sexual history in court because the legal system believed that a rape victim with a notorious sexual history was such a bad woman that she would say yes to every man, making her complaint a lie. However, none of the rationales supporting these special evidentiary rules, which had been adopted in America for decades, had ever been proven. Empirical research, however, found the contrary. Due to these results, evidentiary rules of the past are now

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638. Davis, Women, Culture, & Politics, supra note 98.
believed to be motivated by rape myths and a subsequent distrust of rape victims in the American legal system.

When compared with the United States, China has its own history, culture, and beliefs concerning rape. Rape myths in Chinese society must be understood in the context of the cult of female chastity evident throughout five-thousand years of Chinese history. The emphasis on female chastity can be traced back to a time when female chastity was considered to be the personal possession of males.640 Although western culture emphasizes female chastity as well, Chinese emphasis on female chastity became extraordinary and finally formed a cult of female chastity.

Following the progress of the civilization and the establishment of the moral system in China, chastity became a women’s preeminent virtue, and was essential in the traditional Chinese ethical system. The concept of female chastity during each Chinese dynasty swung back and forth between one which was tolerant of the requirement of female chastity to one which was harsh, completely determined by the autocratic political system. It was not until late imperial China, the cult of female chastity was firmly established. The government began encouraging lifelong widowhood and honoring chaste martyred women who had chosen death rather than be polluted by a rapist.641 Special memorial temples of chastity and filial piety enshrining the tablets of virtuous women were established during the Qing dynasty, and began to appear everywhere. These are all considered an extreme form of the observance of Chinese female chastity and the virtue of marital fidelity.642

The increasing emphasis on female chastity during the late imperial China was also reflected in the evolution of Chinese rape laws. It is reflected in the increase in penalties for rape based on the victim’s chastity during Ming-Qing dynasties.643 As a result, the death penalty placed on the rapist during the Ming and Qing dynasties was not designed simply to punish those who used force to violate a woman’s body and social morality, but as a means of exalting the virtue of chastity and discouraging debauchery of womanhood.

Even in modern Chinese society, in the contemporary Taiwanese criminal law, one can still find articles that reflect the cult of chastity. Before rape law reform in Taiwan, rape was classi-

640. Gender Relations in Chinese Culture, supra note 447.
642. Ibid., p. 147.
643. Sommer, Sex, Law, and Society in Late Imperial China, supra note 464, p. 73.
fied as a crime against society which should be punished not only because it violated a woman’s rights, but also because it destroyed the moral order of sex and caused damage to the integrity of sexual custom. In addition, the degree of violence required by Taiwan statutes to constitute rape stated that the act must be “unresistible;” there are higher penalties for a rapist if his victim commits suicide as a result of her shame; and rape was a crime where the prosecution may be instituted after a complaint in order to protect the rape victims’ reputation (precisely to protect women from public knowledge of their defiled chastity).

Over time, the cult of female chastity in Chinese culture became the most important factor in shaping rape myths in Chinese society. For instance, society blames rape victims for losing their chastity and rape victims feel shame and guilt for not preserving their chastity. The cult of chastity obscures both sides’ understanding of the reality of rape and continues to mislead the society, as a whole, who view rape as a sexually incident rather than a violent crime in which the victim’s “chastity” is irrelevant.

Additionally, due to the cult of female chastity, rape myths in Chinese society have been explicitly stated within statutes throughout historical Chinese rape law and contemporary Taiwan criminal law. Meanwhile in America, rape myths only implicitly influenced legal participants or could be seen in evidentiary rules in the courtroom before rape law reform in the 1970s.

Yet surprisingly, the cult of female chastity seems to have lost its effect on another contemporary Chinese society—People’s Republic of China. Although PRC and Taiwan do share the same five thousand years of tradition and culture, they have developed separately after the Communist Party of China took over the mainland of China in 1949. Due to the influence of socialism, MAO Zedong’s women’s liberation movement, and the Cultural Revolution, the conception of female chastity was deemed a symbol of a feudal tradition that needed to be overthrown in mainland China. As a result, PRC’s Criminal Law appeared to have a better understanding of rape victims as compared with Taiwanese Criminal Code. The cult of chastity that had been deep rooted in Chinese traditional culture and reflected in Taiwanese Criminal Code seems to have totally disappeared in PRC’s Criminal Law.

Therefore, I conclude that, although PRC and Taiwan, as a part of contemporary Chinese society, share a common tradition and culture, the last 50-year’s different historical experience has resulted in different social values and attitudes. The cult of chastity
that shapes rape myths in Chinese society has been seriously criti-
cized and overthrown by the Communist Party in mainland China,
but was inherited and continues to be perpetuated by the Kuomin-
tang in Taiwan.

As for legal systems, rape myths work differently in different
legal systems. Under common law jurisdiction, as in the United
States, rape myths can exist in the minds of police, prosecutors, ju-
rors, and judges and hence influence their attitudes toward rape vic-
tims. Before rape law reform, both high attrition rates at every
level of the criminal justice system and the general discrimination
against rape victims in the United States indicated that rape myths
were prevalent among legal participants. This prevalence resulted
in the discrimination against rape victims at every stage of the judi-
cial system, and thus caused women not to report rapes, police not
to take the charges seriously, prosecutors not to file charge, and
juries not to reach verdicts. Strong rape cases, therefore, often went
unpunished in the end.

In the 1970s, after the rape law reform movement began in the
United States, the criminal justice system's attitude toward rape vic-
tims finally improved. Although this improvement could not be di-
rectly attributed to rape law reform, the feminist consciousness-
raising during the same period and the publicity surrounding the
reforms seemed to help increase the number of reported rapes as
well as improve the treatment of rape victims.

As for legal systems in Chinese society, Taiwan and PRC are
both classified as under civil law jurisdiction. However, PRC has its
unique characteristic since its legal system is a socialist legal system
as well. Influenced by socialism and Mao Zedong's women libera-
tion policy, legal participants in PRC's four-level-two-instance judi-
cial system are instructed by the Supreme People's Court to handle
rape cases carefully (not suspiciously), and to overthrow the con-
ception of female chastity in rape cases.

Different from mainland China, and as another representation
of civil law jurisdiction, research in Taiwan has found that rape
myths do indeed exist in the minds of many police and prosecutors,


645. Bryden & Lengnick, Criminal Law: Rape In the Criminal Justice System”, supra note 6, at 1227-28; Spohn & Horney, Rape Law Reform, supra note 145, at 101-02.
and thus influence their attitudes toward rape victims. At a trial in Taiwan, unlike in the United States, there is no jury so the rape myths held by jurors are not a problem under the Taiwanese legal system. However, because a judge in the Taiwanese civil law system is the only person who dominates the whole trial as well as its outcome, rape myths held by such a judge would have more impact on the result of a rape case than in a similar situation with a common law judge. Further, according to some studies, judges in the Taiwanese legal system do share the same misunderstanding about rape that police and prosecutors do, and sometimes even make these misunderstandings their own ruling standard when confronting rape cases, thus resulting in an even lower conviction rate of rape cases in Taiwan. Even after rape laws were amended in the mid-1990s, studies conducted in 2001 and 2002 show that rape myths were still prevalent among Taiwanese legal participants. The case of TANG Tai-sheng in 2001 also reflected Taiwanese judges' lack of knowledge regarding the crime of rape as well as their disregard for the relevance of expert testimony in sexual assault cases.

Research also indicates that the problem of underreporting is more serious in Taiwan than in western countries. Women in Taiwan are more unwilling to report rape than women in America. Taiwanese women worry about the impact on their reputation and are afraid of societal blame for being "unchaste." The serious problem of unwillingness to report in Taiwan, again, reflects how the cult of chastity in traditional Chinese culture, which has been inherited by Taiwanese society, fosters rape myths, misunderstandings about rape, and misunderstandings about rape victims in contemporary Chinese society.

In sum, rape myths, as the reflection of the sex roles of women in a society, are intertwined with cultural sexist stereotypes of wo-

646. HUANG, Police and Female Victims: A Victiminological Observation of the Reapone of Poice System, supra note 527, at 131.
647. TSENG, Police Attitude Toward Rape Victims, supra note 533; Graduate School of Criminology, National Taipei University, Empirical Research on the Factors that Influence the Trial and the Result of Sexual Assault Cases 75–82 (July 14, 2003) (unpublished research report on file with author) [hereinafter Empirical Research on Sexual Assault Cases].
648. HUANG & LU, Practical Research regarding the Connection Between Rape Myths and the Crime of Rape, supra note 530.
649. See generally Legal System & Sexual Assault, supra note 531 & Empirical Research on the Factors that Influence the Trial and the Result of Sexual Assault Cases, supra 647.
men in society. Rape myths clearly reflect cultural and societal values toward both males and females. Therefore, one must examine a society's tradition and culture in order to recognize the widespread existence and influence of rape myths in different countries and societies. Even in Chinese societies, the last 50-years of dramatic differences in historical experience resulted in two diverse societies. The Chinese Civil War not only divided Taiwan and China, but also led two countries to take different paths, both politically and culturally. Due to MAO Zedong's women liberation movement and the Cultural Revolution, the cult of chastity that had been tightly clamped on the Chinese mind throughout their five-thousand years of history was overthrown and abandoned in PRC's law and legal system. However, on the other side of the straits, Taiwan inherited both the best and the worst of the traditional Chinese culture. The tradition of the cult of female chastity has been inherited by Taiwanese society, and thus misled the Taiwanese understanding of rape. As a result, rape myths become deeply rooted in Taiwanese culture and have seriously affected Taiwanese rape laws and subsequently the Taiwanese legal system. Therefore, as compared to America and PRC, rape victims under the Taiwanese legal system suffer the most. They not only have to suffer the similar suspicions and discrimination as rape victims in the American legal system, but also have to bear China's five thousand-year-old burden of female chastity. In light of the evidence provided, Taiwanese rape victims have become the most oppressed criminal victims in these three countries.
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