

論文

When No Does Not Mean No: The Legislative Impetus Behind Montana Sex Crime Law Amendments & Its Implications for Japan

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Abstract: In 2017, both Japan and Montana in the United States amended sex crime laws. While Montana, among other changes to the law, has opted to remove the force requirement from its rape law, Japan has maintained its force requirement. This paper will review the main points of the legislative hearings for the sex crime law amendments in Montana and compare them with Japan's stance concerning these points. Through this comparison, the paper will evaluate how Japan can utilize legislative evidence from Montana in order to improve its sex crime law.

アブストラクト：2017年、日本と米国のモンタナ州はともに性犯罪法を改正した。モンタナ州は、強姦罪の暴行脅迫要件を削除し、これに代えて不同意を要件としたのに対して、日本は、暴行脅迫要件を維持した。本稿では、モンタナ州の性犯罪法改正に対する立法聴聞会での主要な議論を検討し、この点に対する日本の議論との比較を行う。この比較を通じて、日本の性犯罪法を改善するため、モンタナの立法資料をどのように活用できるかを分析し、あるべき改正の方向性を提示する。

I. INTRODUCTION

“No does not mean no in Montana,”⁽¹⁾ said Attorney General Tim Fox during the legislative hearing for sex crime laws in Montana. In 2017, Montana's Law and Justice Interim Committee (hereinafter “the interim committee”) proposed a series of amendments to its sex crime laws (Senate Bill 17, 26, 29 and 30).⁽²⁾ The interim committee sought to bridge the gap between the “antiquated”⁽³⁾ Montana law and the reality of various sex crimes.⁽⁴⁾ More specifically, Senate Bill 17 proposed the elimination of the requirement that made juvenile sex offenders automatically register for the sex offender registry, in order to address so-called “Romeo

(1) *Revise Laws Regarding Sexual Crimes (Short Title): Hearing on S.B. 29 Before the H. Judiciary Comm.*, 69th Leg. (Mont. 2017) (Statement of Attorney General Tim Fox).

(2) *See* S.B. 17, S.B. 26, S.B. 29 & S.B. 30, 2017 65th Leg. (Mont. 2017).

(3) *Id.* at 2

(4) SJ 24: Study of Sexual Assault in Montana, Rachel Weiss, (for the Law and Justice Interim Committee) (Mont. 2015).

and Juliet” cases where teenagers have romantic relationships.⁽⁵⁾ Senate Bill 26 proposed a maximum penalty of no more than five years of imprisonment or fine not exceeding \$10,000 in cases where (1) the perpetrator is eighteen years of age or younger, has never committed other acts of sexual violence and used no force during the alleged sexual act, and (2) the victim is fourteen years of age or older.⁽⁶⁾ Senate Bill 30 proposed the extension of the statute of limitations for sex crimes involving victims under the age of eighteen from ten years to twenty years.⁽⁷⁾ Finally, Senate Bill 29 proposed a general revision to laws related to sex crimes.⁽⁸⁾

Most importantly, Senate Bill 29 proposed the removal of the force or threat requirement that needed to be proven under the old statute. Although the lack of consent element was already a part of Montana’s sexual assault and sexual intercourse provisions before the 2017 amendment, the laws in effect required force or threat because “lack of consent” was defined to mean that “the victim is compelled to submit by force against the victim or another.” Therefore, the interim committee proposed a new definition for “consent” in Senate Bill 29 as “words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact.”⁽⁹⁾ The bill also provided for an additional crime of aggravated sexual assault for sexual intercourse by the use of force. All of these bills were passed, revising the old Montana sex crime laws on many fronts and effectively making Montana one of the *true* consent states in 2017.

In the same year, the legislature of Japan also amended its sex crime laws. To address concerns that Japan’s sex crime laws are outdated and do not reflect the realities of sex crimes,⁽¹⁰⁾ Japan made a significant reform to its sex crime laws that had remained largely unchanged since 1907.⁽¹¹⁾ While the amendment brought about meaningful changes, such as the revision of the definitions and the increase of minimum penalty for sex crimes, some experts view that Japan’s sex crime laws still need to be improved further.⁽¹²⁾

This paper will review Montana’s legislative evidence that was used in support of the amendments and analyze the evidence with Japan as the point of comparison. Specifically, the paper will analyze why Japan and Montana made opposite decisions when it came to choosing between the force/threat element and the lack of

(5) Revise laws related to juvenile offenders and registration as sex offender (short title), S.B. 17 *Before the H. Judiciary Comm.*, 69th Leg. (Mont. 2017).

(6) S.B. 26, 2017 65th Leg. (Mont. 2017).

(7) S.B. 30, 2017 65th Leg. (Mont. 2017).

(8) S.B. 29, 2017 65th Leg. (Mont. 2017).

(9) MONT. CODE ANN. § 45-5-501 (West).

(10) See, e.g., 齋藤梓・大竹裕子 [Saito & Otake] 「当事者にとっての性交「同意」とは一性暴力被害当事者の視点から望まない性交が発生するプロセスをとらえる—」年報公共政策学13号 (2019年) 186頁.

(11) 刑法の一部を改正する法律 [Revisional Law to a Part of Criminal Law], Law no. 72 of 2017 : 第二十二章わいせつ, 姦淫及び重婚の罪 [Crimes of Obscenity, Rape and Bigamy], KEIHO [KEIHO] [Pen. C.], 1907, Ch. 12, (Japan).

(12) See, e.g., 島岡まな [Shimaoka] 「性犯罪の保護法益及び刑法改正骨子への批判的考察」慶應法学37号 (2017年) 24頁-36頁.

consent element in their 2017 amendments. As both Japan and the state of Montana amended their sex crime laws during a similar point of time yet made contrasting decisions about the amendments, this comparison will provide useful information in regard to the legislative reasoning behind different definitions of rape as well as the respective effectiveness of the amended laws. In particular, this paper will focus on the evidence and arguments mentioned during the hearing for the aforementioned Senate Bill 29. The points of consideration for sex crime definitions in each jurisdiction are noteworthy because the definitions are one of the significant ways how the amended laws differ. An analysis of the elements of sex crimes is also significant because of the ongoing academic and social discussions regarding how sex crimes should be defined in Japan. This analysis can provide meaningful food for thoughts about which definition of sex crimes are the most appropriate.

Finally, the paper will argue why a lack of consent element, as opposed to a force element, is an ideal requirement for rape for Japan. Before delving into the discussion, it should be noted that while every state in the United States has its own criminal code, Montana, a state, and Japan, a country, cannot be compared on a completely equivalent level. It should also be clarified that in the discussion of force/threat requirement, the focus of this paper will be on the crime of rape, namely, the comparison between Montana's sexual intercourse without consent provision⁽¹³⁾ and that of Japan (Article 177). While both jurisdictions have provisions for lesser offenses, for the purpose of effectively evaluating the force and the consent elements, this paper will leave the discussion about these other provisions for another time. Lastly, in the interest of first resolving the challenges associated with the fundamental definition of the generally applied rape provision, the paper will not discuss sexual crimes against minors that are governed by different provisions, as it will impossibly broaden the scope of this paper.

II. MONTANA

1. Montana's Law on Sexual Crimes Before the 2017 Amendments

The interim committee, with the recommendation of the 2015 legislature, enacted SJ 24: Study of Sexual Assault in Montana.⁽¹⁴⁾ On June 25, 2015, the committee adopted a study plan that consists of a total of twenty-five hours of activities, including the review of information related to sex crimes, the state of current sex crime prosecution in Montana, and the statistics on sexual assaults.⁽¹⁵⁾ The purpose of this study was to identify the shortcomings of the current law and develop recommendations for amendments.⁽¹⁶⁾ Through a comprehensive review conducted in the study, the committee made a set of recommendations to Montana's sex crime laws

(13) MONT. CODE ANN. § 45-5-503 (West).

(14) SJ 24, *supra* note 4.

(15) SJ 24: Study of Sexual Assault in Montana, Rachel Weiss, (for the Law and Justice Interim Committee) (Mont. 2015).

(16) *Id.*

through Senate Bill 17, 26, 29 and 30.⁽¹⁷⁾ In particular, through Senate Bill 29 that was mentioned during the introduction, a significant change has been proposed to the definition of “lack of consent.”

Even before 2017, Montana’s statutes related to sex crimes on the surface seemed to require a lack of consent, stating “(1) A person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault⁽¹⁸⁾,” and “(1) A person who knowingly has sexual intercourse with another person without consent or with another person who is incapable of consent commits the offense of sexual intercourse without consent...”⁽¹⁹⁾ However, both of the statutes applied the definition of “lack of consent” as defined by §45-5-501 (definitions), which, before the 2017 revision, defined “lack of consent” as, among others, “the victim is compelled to submit by force against the victim or another...”⁽²⁰⁾ Force was defined as “(a) the infliction, attempted infliction, or threatened infliction of bodily injury or the commission of a forcible felony by the offender; or (b) the threat of substantial retaliatory action that causes the victim to reasonably believe that the offender has the ability to execute the threat.”⁽²¹⁾ Therefore, Montana, by using the definition, had de facto required force or threat of infliction of bodily harm in their rape and sexual assault laws.

Therefore, in 2017, amendments sought to resolve the paradox in the definition of “lack of consent”⁽²²⁾ by applying the textual meaning of consent. This change in definition was significant in that, instead of the superficial application of lack of consent standard that in fact required force or threat, the Montana legislature finally amended their law to apply the literal and ordinary meaning of “lack of consent” to its sex crimes.

2. Legislative Hearing for the Amendments

During the hearing for the bills on March 24, 2017, the proponents of the bills, many of whom were members of the interim committee, provided the information as to why they believe it is necessary to pass these bills. The sections will cover the testimonials and practical insights from the interest holders in the sex crime issues, trauma research behind victims’ responses during the attacks, and the social science research about characteristics of sex crime perpetrators. The points made by proponents for the bills will be substantiated if offered without identifying sources.

(17) S.B. 17, S.B. 26, S.B. 29 & S.B. 30, *supra* note 2.

(18) Mont. Code Ann. § 45-5-502 (West).

(19) Mont. Code Ann. § 45-5-501 (West); *See* 2017 Montana Laws Ch. 279 (S.B. 29) for additions and deletions to the statute per the amendment.

(20) *Id.*

(21) *Id.*

(22) *See* page 9.

a. Realities of sexual violence: learning from the professionals

During the hearing of the bills, legal practitioners, as well as other interest holders such as a trauma specialist and a member of Coalition Against Domestic and Sexual Violence, provided their testimonies about the experiences of handling sexual assault cases and shared their opinions about how the laws should be amended.⁽²³⁾ Hearing about the practical experiences and limitations of the law helped the legislature of Montana consider whether their past version of sex crime laws was not adequate in properly handling the sex crimes in the state.

First, legal practitioners shared how they have experienced the shortcomings of past law in their practice. The prosecutors and the Attorney General emphasized that the rape statute needs to be changed to adopt a more ordinary meaning of consent, as it made it impossible to prosecute a whole class of rape cases where force was not used.⁽²⁴⁾

A prosecutor at Missoula County, Jennifer Clark, testified that there is a relationship between the perpetrator and the victim in ninety-nine percent of the cases she sees as a prosecutor.⁽²⁵⁾ In these acquaintance rape cases, she argued, the break of trust when the perpetrator continues to sexually advance on the victim even after the victim had conveyed her refusal, should be considered an inherent force. Despite the large proportion of acquaintance relationships in rape cases, sexual assault is considered mostly only in the context of stranger rape. Prosecutor Suzy Boylan also affirms that while people may think that rape occurs when a rapist jumps out of a bush and attacks a person, rape in reality often occurs between people who know each other, adding to the importance of understanding rape in all relevant contexts.⁽²⁶⁾

The consequences of ignoring acquaintance rape is a failure to properly consider the important components of acquaintance rape, such as the break of trust, that is essential for understanding the nature and context of such rape. As a result, the circumstances of acquaintance rape during which a perpetrator can pressure a victim to commit sexual acts without using force are often overlooked. Ignoring cases of acquaintance rape inevitably cause the lack of proper consideration for the dynamics of rape cases in which perpetrator knows he does not need to use force. In this regard, the prosecutors illustrate the “typical cases” as acquaintance rape to show what sexual assault cases look like in reality.

Additionally, Prosecutor Boylan contends that a small group of dangerous men commit a high number of sexual assaults.⁽²⁷⁾ She explains that these men know how to find vulnerable victims and how to make them

(23) *Revise Laws Regarding Sexual Crimes (Short Title): Hearing on S.B. 29 Before the H. Judiciary Comm.*, 69th Leg. (Mont. 2017).

(24) *Id.*, (statement of Attorney General Tim Fox & Prosecutor Jennifer Clark).

(25) *Id.*

(26) *Id.* (statement of Prosecutor Suzy Boylan).

(27) *Id.*

vulnerable; they know that they do not have to physically attack the victim or use force.⁽²⁸⁾ Sex offenders often consider factors such as general physical appearance, vulnerability, age, personality, and behavior when they select a victim.⁽²⁹⁾ More specifically, a perpetrator may consider four attributes: the desirability of the target, the inertia of the target, the visibility, and the accessibility of the target.⁽³⁰⁾

Literature about target selection in sex crimes supports that perpetrators select “vulnerable” victims. A perpetrator may consider various factors to determine that a target is vulnerable. Upon finding that women who suffered child abuse or previous sexual assaults are more likely to be current victims of acquaintance rape but not of stranger rape, Pazzani suggested that the people can develop learned helplessness when they are exposed to repeated abuse, thus becoming vulnerable targets.⁽³¹⁾ The study further suggests that perpetrators are able to gauge and take advantage of a victim’s vulnerability, and they know when a victim is unable to recognize the dangerous situation and remove himself or herself from it.⁽³²⁾

Perpetrators also consider other factors, such as their relationships with the victim and the living conditions of the victim, when choosing their targets. For example, women living alone with children, those with alcohol or drug problem often become the target, and offenders use money or gifts to lure the victim to their residence or workplace and use alcohol or drugs to reduce the victim’s “resistance or inhibition.”⁽³³⁾ When offenders target vulnerable victims, they know they do not have to use physical force. Therefore, the perpetrators who fall under this category had been able to avoid legal consequences under Montana’s old sex crime laws. Specifically, in a case where a perpetrator commits sexual assault without using physical violence by taking advantage of his relationship with the victim, he would not be found guilty under the old Montana law even when it is clear that the sexual act has been committed against the victim’s will. Prosecutor Clark commented, “the hardest thing to do as a prosecutor is to tell a victim ‘yes, you were raped, but legally, you were not.’”⁽³⁴⁾ Proponents for the amendment argued that changing the law to require a showing of a true lack of consent would lead to proper punishment for these perpetrators and bring justice for the victims.

Finally, in order to highlight the flaws of the past law, prosecutors presented cases where the courts have

(28) *Id.*

(29) At 45, Maria Rebocho & Patricia Silva, *Target selection in rapists: The Role of Environmental and Contextual Factors*, 19 *AGGRESSION & VIOLENT BEHAV.*, 1, 42, 49 (2014).

(30) *Id.* at 43; ROGER BURKE, *AN INTRODUCTION TO CRIMINOLOGICAL THEORY* (2d ed. 2005).

(31) At 743, Lynn Pazzani, *Violence The Factors Affecting Sexual Assaults Committed by Stranger and Acquaintances*, 13 *VIOLENCE AGAINST WOMEN*, 7, 717, 749 (2007).

(32) *Id.* at 742.

(33) At 46, Rebocho & Silva, *supra* at 29; *see also* Eric Beauregard & Benoit Leclerc, *An Application of The Rational Choice Approach to The Offending Process of Sex Offenders: A Closer Look at the Decision-Making*, 19 *SEXUAL ABUSE: J. RESEARCH & TREATMENT*, 19, 115, 133 (2007).

(34) *Hearing on S.B. 29, supra* note 23 (statement of Prosecutor Jennifer Clark).

found perpetrators who committed sexual acts against victims' will not guilty because there was no use of force.⁽³⁵⁾ One of the most highlighted cases was *State v. Thompson*⁽³⁶⁾ in which a principal of the high school intimidated the victim, a student, by saying that she would not be able to graduate if she does not give in to the sexual assaults. Montana Supreme Court, acknowledging that the victim has been taken advantage of by the defendant's position, held, "[w]ith a good deal of reluctance, and with strong condemnation of the alleged acts, we affirm... (the decision of not guilty by the District Court)."⁽³⁷⁾ Prosecutor Clark suggests the case caused the Montana legislature to include retaliatory action to the definition of the force and served as an exemplary case that demonstrates the fundamental flaw to the force requirement. She further suggests that since it is not feasible to continue including more and more definitions to cover different situations that did not involve force but nevertheless should be regarded as rape, Montana needs to remove the force or threat element from their sex crime laws.

b. Realities of sexual violence: learning from the statistics

The myth that rape would be committed by a violent stranger has been the "classic rape narrative"⁽³⁸⁾ in the United States despite that this type of rape is "a statistical outlier—so different from the norm as to be exceptional rather than typical."⁽³⁹⁾ Research shows that in a typical case, "[r]apists usually find verbal coercion, alcohol, and pinning [sufficient] and need not resort to overt physical violence,"⁽⁴⁰⁾ nor does sexual assault always involve a "perfect" victim⁽⁴¹⁾ who fits the stereotype of a woman who is not sexually promiscuous and is able to withstand public scrutiny of her behavior.

During the hearing, Prosecutor Boylan quoted the statistics conducted by Rape, Abuse & Incest National Network (hereinafter "RAINN") to support that rape is perpetrated by a non-stranger in most cases.⁽⁴²⁾ According to the RAINN report based on the National Crime Victimization Survey by the United States Department of Justice, eight out of ten rapes are committed by a person known to the victim. More specifically,

(35) *Id.*

(36) *State v. Thompson*, 243 Mont. 28, 31 (1990).

(37) *Id.* at 33.

(38) Anderson illustrates the "classic rape narrative" as following: "A fair young woman is walking home alone at night. Grey streetlamps cast shadows from the figure she cuts through an urban landscape. She hurries along, unsure of her safety. Suddenly, perhaps from behind a dumpster, a strange, dark man lunges out at her, knife at her throat, and drags her into an alley where he beats her until she bleeds and threatens to kill her. The young woman puts up a valiant fight to protect her sexual virtue, but the assailant overcomes her will and rapes her. Afterwards, she immediately calls the police to report the offense". At 645, Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitude towards Acquaintance Rape Victims*, 13 NEW CRIM. L. R., V., 4, 645 (2010).

(39) *Id.*

(40) *Id.* at 651. *See also Id.* at 646.

(41) *Id.* at 651.

(42) *Id.*

39 percent of the crimes are committed by an acquaintance, 33 percent are committed by a person in a current or former intimate relationship, and 19.5 percent are committed by a stranger.⁽⁴³⁾

The statistics mentioned above are extracted from the national survey conducted by the United States Department of Justice. The National Crime Victimization Survey records the national statistics of various crimes. In 2018, 734,630 rape or sexual assault were reported, an increased number from 1.4 victimizations per 1,000 persons age 12 years or older to 2.7 in 2018.⁽⁴⁴⁾ The yearly reports also repeatedly show that the three out of four victims knew the offender.⁽⁴⁵⁾ The rate of rape and sexual assault cases committed by strangers on average were reported to be 21 percent from 1994 to 1998, 25 percent from 1999 to 2004, and 22 percent from 2005 to 2010.⁽⁴⁶⁾ 55 percent of rape and sexual assault cases occurring between 2005 and 2010 occurred at or near the victim's home.⁽⁴⁷⁾ These statistics support that, as the prosecutors' pointed out during the hearing, sex crimes often do not involve strangers attacking a stranger in a dark alley.

Statistical research also supports Prosecutor Boylan's comments that the perpetrators tend to be repeat offenders. The Bureau of Justice Statistics conducted a nine-year follow-up study of cases in which the prisoners have returned to the prison for a conviction of rape or sexual offense. According to the study, prisoners who had previously served time for rape or sexual assaults were more than three times as likely to be re-arrested for rape or sexual assault compared to those who have served time for other crimes, with 7.2% of those who have served time for rape being re-arrested for rape or sexual offense.⁽⁴⁸⁾ Moreover, Andrew Harris and R. Karl Hanson, in their study of sexual recidivism using the data from 10 follow-up studies, showed a recidivism rate of 14 percent in five years and 24 percent in 15 years for those who are convicted of rape.⁽⁴⁹⁾ While further research needs to be conducted to demonstrate high recidivism rates by sex crime perpetrators with certainty,⁽⁵⁰⁾ the statistics

(43) Rape, Abuse & Incest National Network, *Perpetrators of Sexual Violence: Statistics*, RAINN (Dec. 22, 2019), <https://www.rainn.org/statistics/perpetrators-sexual-violence>, citing Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *National Crime Victimization Survey, 2010-2016* (2017).

(44) OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., DEPT. OF JUST., *CRIME VICTIMIZATION SURVEY, 2014-8*, (2018).

(45) OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., DEPT. OF JUST., *FEMALE VICTIMS OF SEXUAL VIOLENCE, 1990-2010*, (2013).

(46) *Id.*

(47) *Id.*

(48) OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., DEPT. OF JUST., *RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP, 2005-2014* (2019); Patrick Langan, Erica Schmitt, & Matthew Durose, OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., DEPT. OF JUST., *Recidivism of Sex Offenders Released From Prison in 1994*, <http://www.bjs.gov/content/pub/pdf/rsorp94.pdf>.

(49) Andrew Harris & R. Karl Hanson, *MINISTER OF PUB. SAFETY & EMER. PREPAREDNESS, SEX OFFENDER RECIDIVISM: A SIMPLE QUESTION* (2004).

(50) Roger Przybylski, OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING & TRACKING, *ADULT SEX OFFENDER RECIDIVISM*, 1, 5 (2015).

presented by currently available research support that sex offenders have a higher chance of sexual recidivism.

The Repeat Violent Victimization Report also demonstrates that the victims of violent crime are more likely to experience the same type of assault, reporting that the percent of rape or sexual assault victimizations to the repeat victims of rape or sexual assault to be 63.5 percent.⁽⁵¹⁾ This supports Prosecutor Boylan's argument that the perpetrators often know the victims and know how to identify vulnerable victims.

c. Consent as a clear and effective legal element

Lastly, prosecutors comment on the concept of consent. First, Prosecutor Clark emphasizes that consent is easy to understand and evaluate. It is also not difficult to demonstrate consent in a court. She explains that the concept of consent is not confusing because the definition in the amendment is the textual definition, the standard meaning for most people. She argues that through conduct and words, people engaging in sexual conduct "need to be able to read each other and understand whether consent has been conveyed." While consent needs not to be an affirmative yes, people engaged in the sexual activity need to understand the situation they are in.

Additionally, Prosecutor Boylan compares the proposed rape statute with other criminal provisions with the consent element, such as theft and unauthorized use of motor vehicle, to emphasize that to establish consent for these other criminal provisions, it is sufficient to ask the victim if the victim has given the consent. Through an example, she illustrates how the consent element for sex crimes should be a straightforward concept as it is in these other provisions. For theft, one simply asks if you consented to have your property taken away. If not, there has been no consent.

Prosecutor Boylan asks to consider an example in which a woman walks out of a bar alone at night. A man walks toward her and says, "give me your purse," she says no. When he repeats this request in more menacing ways, she freezes because she is scared, or she realizes that she could be hurt. She eventually gives him her purse, and afterward, she reports to the police. Prosecutor Boylan asks to imagine this: after the police ask questions such as whether he has hurt her or threatened her or whether she has fought back or if she has been drinking, the police say, "Sorry, we know he took the purse, but it is not theft. Because the law of theft requires that we prove he used some kind of force or you were incapacitated." Through this analogy, she illustrates the inadequacy of the rape law that contains the force requirement.

d. Neuroscience & research on trauma

Alanna Sherstad, a trauma specialist and a victim's advocate who spoke during the hearing in Montana,

(51) At 9, OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., DEPT. OF JUST., REPEAT VIOLENT VICTIMIZATION REPORT, (2017); Patrick Langan, Erica Schmitt, & Matthew Durose, *supra* note 48.

explained the concept of tonic immobility that victims often experience during the assault. She quotes Rebecca Campbell's neurotrauma research to illustrate that some victims experience a biological reaction, during which they cannot move or speak. The 1976 research by Suarez and Gallup that has defined tonic immobility as an "unlearned state of profound motor inhibition produced by motor restraint" began to examine tonic immobility as a response to rape in humans.⁽⁵²⁾ Since then, there has been extensive research into tonic immobility in the context of sexual assault. TeBockhorst, Halloran, and Nyline⁽⁵³⁾ who studied the phenomenology of tonic immobility has found that, consistent with prior literature, victims who have experienced tonic immobility during the sexual assault experienced symptoms such as eye closure, tremors, and endogenous analgesia, often described as feeling physically 'numb' during the assault.⁽⁵⁴⁾

According to Rebecca Campbell,⁽⁵⁵⁾ when a person experiences a fearful event, the HPA axis (the path for communication between the hypothalamus, the pituitary gland and the adrenals) causes four main chemicals, adrenaline, catecholamines, cortisol, and oxytocin, to be released. When cortisol is released at a very high level, it reduces the energy level of the body, causing the "freezing" response, otherwise called "rape-induced paralysis."⁽⁵⁶⁾ Because these responses are biological and autonomic, the victims cannot control it.⁽⁵⁷⁾ During the state, the victim can experience increased breathing and eye closure.⁽⁵⁸⁾ They also experience muscular paralysis and is unable to move.⁽⁵⁹⁾ Research suggests that between twelve and fifty percent of rape victims experience tonic immobility during sexual assaults, and most data suggests that the rate is closer to fifty percent than twelve percent.⁽⁶⁰⁾ When a victim reports that she was experiencing these symptoms during the rape, a law enforcement personnel who is uninformed about this information may conclude that the victim's case is weak or cause secondary harm by forming prejudice against the victim.

Two other hormones, oxytocin and catecholamines, can also cause the victim to act in a way that may seem

(52) At 315, Susan Suarez & Gordon Gallup Jr., *Tonic Immobility as a Response to Rape in Humans a Theoretical Note*, 29 THE PSYCH. RECORD, 3, 315, 320 (1979).

(53) Sunda TeBockhorst, Mary O'Halloran & Blair Nyline, *Tonic Immobility Among Survivors of Sexual Assault*, Psych. Trauma: Theory, RES., PRAC. & POL'Y (2014), <http://dx.doi.org/10.1037/a0037953>.

(54) *Id.* at 4.

(55) Rebecca Campbell, *The Neurobiology of Sexual Assault: Implications for Law Enforcement, Prosecution, and Victim Advocacy*, NAT'L INST. OF JUST. (2012). See also Sarah Banks et al., *Amygdala-Frontal Connectivity During Emotion Regulation*, 2 SOC. COGN. AFFECT NEUROSCI. 4, 303, 312 (2007); Steven Southwick, Meena Vythilingam, Dennis Charney, *The Psychobiology of Depression and Resilience to Stress: Implications for Prevention and Treatment*, 1 ANNU. REV. CLIN. PSYCHOL. 1, 225, 291, (2005).

(56) *Id.*

(57) *Id.*

(58) *Id.*

(59) *Id.*

(60) *Id.*

unnatural to others. The victims often experience a high level of opiates caused by oxytocin. It can block pain for the victim but also can make the victim seem very emotionally flat. An improperly trained law enforcement personnel may conclude that the victim is not behaving “like a victim.”

Moreover, the high level of catecholamines can hinder the hippocampus, the part of the brain that processes information into memory and also impacts a person’s ability to think and act rationally. Catecholamine is one of the main neurotransmitters that mediate a variety of central nervous system functions, such as motor control, cognition, emotion, memory processing, and endocrine regulation. A high level of this neurotransmitter may cause the victim to act in a way that a layperson may view as irrational or unnatural in the situation.⁽⁶¹⁾ The victim may have a hard time recalling the details of the event precisely, as the high level of catecholamines makes it difficult to retrieve and consolidate memory or even encode the memory, especially when the victim is under the influence of alcohol.⁽⁶²⁾ Again, law enforcement personnel who is uneducated about this neurobiological phenomenon may conclude that the victim is not trustworthy when the victim experiences difficulties accurately recalling the details of the assault.

During the hearings, advocates emphasized these trauma research outcomes to underline why the force requirement is not feasible with the current understanding of victims’ behavior during or after the sex crimes.

3. The Amendment to the Laws of Sex Crimes

After the 2017 revision, the sexual intercourse without consent provision (“a person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent...”⁽⁶³⁾) applies the ordinary definition of “lack of consent”:

- (i) the victim is compelled to submit by force against the victim or another; or an expression of lack of consent through words or conduct means there is no consent or that consent has been withdrawn;
- (ii) a current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent; and
- (iii) lack of consent may be inferred based on all of the surrounding circumstances and must be considered in determining whether a person gave consent.

Mont. Code Ann. § 45-5-501 (West).

(61) Kazyto Kobayashi, *Role of Catecholamine Signaling in Brain and Nervous System Functions: New Insights from Mouse Molecular Genetic Study*, 6 J. INVESTIG. DERMATOL SYMP. PROC., 1, 115, 121 (2001).

(62) Andrew Harris & R. Karl Hanson, *supra* note 49.

(63) Mont. Code Ann. § 45-5-503 (1) (West).

III. JAPAN

1. Japan's Sex Crime Laws Before the 2017 Amendments

Japan's laws pertaining to sex crimes remained largely unchanged since 1907, the year the law was first enacted. In 1958, the requirement for the victim to make a complaint was abolished for rape by multiple perpetrators.⁽⁶⁴⁾ In 2004, the penalty for rape and fatal rape (rape resulting in injury/death; 強姦致死傷罪) was increased, and the multiple-perpetrator rape law ("gang rape"⁽⁶⁵⁾) was enacted. However, the elements or the basic format of the laws have been unchanged.⁽⁶⁶⁾ Article 177, the country's rape law, had stated, "[a] person who, through assault or intimidation, forcibly commits sexual intercourse with a female of not less than thirteen years of age commits the crime of rape and shall be punished..."⁽⁶⁷⁾ "Assault" corresponds to "force", and "intimidation" to "threat" in the Anglo-American legal language.

The Supreme Court of Japan has held that "even when the observation of [the alleged act] on its own falls short of satisfying the force or threat requirement, the requirement should be deemed satisfied if the act, under the conditions at the specific time and place, is considered to have made it impossible or conspicuously difficult for a person of the age, sex, background and behavior to [resist]."⁽⁶⁸⁾ Therefore, courts have evaluated the force requirement using the standard of whether the force or threat is of the nature that would make it conspicuously difficult for a victim to resist.

As shown in the above legal text, the law before the amendment failed to recognize male victims of sexual violence (Rape against male victims had been prosecuted as sexual assault, which carries a lighter penalty than rape). With the improved understanding of the reality of sexual assault, as well as the realization that their laws had failed to protect many victims of sexual assault in Japan, it became an important assignment for the legislature of Japan to amend its law related to sex crimes. The amendment could bring different kinds of sexual violence victims within its purview.

(64) 田野尻猛 [Tanojiri] 「性犯罪の罰則整備に関する刑法改正の概要」論究ジュリスト23号 (2017年) 112頁.

(65) 集団強姦 [Crime of Multi-perpetrator Rape], KEIHO [KEIHO] [Pen. C.] 第七十八條之二, added by平成十九年法律第五十四号改正 [Article 178-2, Act No. 45 of 1907, Amendment of Act No. 54 of 1997] (Japan) (When two or more persons jointly commit the crimes prescribed under Article 177 or paragraph (2) of Article 178, they shall be punished by imprisonment with work for a definite term of not less than 4 years.) <http://www.japaneselawtranslation.go.jp/law/detail/?id=1960&vm=04&re=02&new=1> (Japan).

(66) Tanojiri, *supra* note 64.

(67) 強姦 [Crime of Rape], KEIHO [KEIHO] [Pen. C.] 第七十七條, [Art. 177], 1907, Ch. 12, <http://www.japaneselawtranslation.go.jp/law/detail/?id=1960&vm=04&re=02&new=1>, (Japan).

(68) 最判昭和33年6月6日集刑126号171頁 (最高裁判所 [Sup. Ct] Jun. 6, Showa 33 [1958], Japan).

2. The Review Committee for Sex Crime Punishments

The Review Committee for Sex Crime Punishments (hereinafter “the committee”), under the direction of the Ministry of Justice, has reviewed Japan’s sex crime laws and discussed the directions for the 2017 amendments. The committee considered many aspects related to the sex crime laws, including the elimination of the requirement for a complaint by a victim for sex crime prosecutions and the force requirement in the rape statute, Article 177.

a. Protected interest for rape

The fundamental discussion of the amendment should begin with the understanding of the protected interest for the sex crime laws in Japan. A brief discussion about the protected interest will aid in the understanding of the purpose of the sex crime laws in Japan, and further, the decision of whether force or consent element is more suitable in serving that purpose.

In Japan, the prevailing opinion has been that the protective interest for sex crimes is sexual autonomy.⁽⁶⁹⁾ Throughout their meetings, the committee briefly discussed the protective interest for sex crimes. The second and third committee meeting was held with the purpose of hearing from the individuals who have “knowledge about the nature of sex crimes.”⁽⁷⁰⁾ During this meeting, Kazuko Hirakawa, the chief director of the Sexual Assault Relief Center, Tokyo (“SARC Tokyo”), explained that bodily integrity and the right to sexual self-determination are the integral protective interests.⁽⁷¹⁾ She explained that her experience of assisting sex crime victims in the organization supported that sexual violence causes long-term damage to the body and mind of the victim.⁽⁷²⁾ She further suggested that sexual violence reaches beyond the mere violation of sexual autonomy, as it involves violence to the body and threatens the life of the victim.⁽⁷³⁾ During the third committee meeting, guest experts such as Hiroko Goto, among others, also suggested that protected interests for sex crimes are understood to be the protection of sexual autonomy and the right to sexual self-determination.⁽⁷⁴⁾ Yukiko Tsunoda, an attorney member of the committee, elaborated that the protected interest for sex crimes should be interpreted as a violation of human dignity, since the damage to the victim lasts for a long time.⁽⁷⁵⁾ While discussing increasing

(69) *See generally* 井田良 [Ida], 講義刑法学・各論, (2d ed. 2018) 348頁; 山口厚 [Yamaguchi], 刑法各論, (3d ed. 2016) 102頁 (“The liberty of sexual self-determination”); 松原芳博 [Matsubara], 刑法各論, (2016) 85頁.

(70) 法務省 [MINISTRY OF JUST.] 性犯罪の罰則に関する検討会第2回会議 (平成26年11月21日) 議事録1頁 (THE REV. COMM. FOR SEX CRIM. PUNISHMENTS).

(71) 法務省 [MINISTRY OF JUST.] 性犯罪の罰則に関する検討会第3回会議 (平成26年11月28日) 議事録20頁 (THE REV. COMM. FOR SEX CRIM. PUNISHMENTS).

(72) *Id.*

(73) *Id.*

(74) *Id.* at 2.

(75) 法務省 [MINISTRY OF JUST.] 性犯罪の罰則に関する検討会第7回 (平成27年2月27日) 議事録5頁 (THE REV. COMM. FOR SEX CRIM. PUNISHMENTS).

the penalty for sex crimes, Mana Shimaoka pointed out that punishment for sex crimes is a matter of human rights and the protection of rights of all in the context of sexual inequality, arguing that the understanding of protective interest should not be limited to the violation of sexual autonomy.⁽⁷⁶⁾

In regards to this point, Kayoko Kitagawa, a member of the committee, explained that “the proper way to define the protected interest for sex crimes...”⁽⁷⁷⁾ is the “freedom not to have your body exploited sexually.”⁽⁷⁸⁾ She further explained that the recognition of the severity of damage resulting from the invasion to this protected interest, as evidenced by the gravity of psychological damage from the sexual activity against one’s will, has prompted the review of elements of the sex crimes as well as the revision of sex crime laws.⁽⁷⁹⁾

b . The force and threat element

During the committee meetings, some of the members, such as Tsunoda, recognized the past shortcomings of not being able to properly consider the victims’ perspective in the evaluation of the force or the threat element.⁽⁸⁰⁾ Azusa Saito pointed out that the force or threat requirement is at odds with the actual experience of sex crimes by the victims, during which they often experience fear of death and are unable to speak or move without force or threat.⁽⁸¹⁾ In order to demonstrate that force requirement cannot operate as a proper tool to punish rape, Tsunoda offered the examples of spousal rape, during which sexual activity without consent is often achieved without force or threat, especially in the households with the history of domestic violence.⁽⁸²⁾ Tsunoda, giving an example case of obscenity and kidnapping (わいせつ誘拐) against a thirteen-year-old with a mental disability where the defendant did not have to use force or threat, suggested that the law needs to provide a broader scope of protection.⁽⁸³⁾ Tsunoda also added that victims’ rights would have been better protected if the law enforcement and the legal professionals were more properly trained about the issues related to sex crimes.⁽⁸⁴⁾

Nevertheless, as shown in the committee summary report, many members suggested that the elimination of the force requirement is not feasible.⁽⁸⁵⁾ During the sixth committee meeting, Mihoko Tanabe, a Tokyo

(76) THE REV. COMM. FOR SEX CRIM. PUNISHMENTS, *supra* note 71 at 11.

(77) 北川佳世子「強制性交等の罪・準強制性交等の罪」法律時報90巻4号（2018年）56頁， quoting 佐伯仁志「刑法における自由の保護」曹時67巻9号（2015年）37頁。

(78) *Id.*

(79) *Id.*

(80) *See, e.g.*, 法務省 [MINISTRY OF JUST.] 性犯罪の罰則に関する検討会第6回（平成27年2月12日）議事録10頁 (THE REV. COMM. FOR SEX CRIM. PUNISHMENTS) (statements made by Yukiko Tsunoda).

(81) *Id.* at 4.

(82) *Id.* at 3.

(83) *Id.* at 4.

(84) *Id.* at 10 (statements made by Yukiko Tsunoda).

(85) 『性犯罪の罰則に関する検討会』取りまとめ報告書』（2015年）18-20頁 (THE REV. COMM. FOR SEX CRIM.

district court judge, explained that the force or threat element is evaluated by properly considering the specific circumstances around whether resistance was possible, including evaluations of factors such as the relationship between the victim and the perpetrator, the age and capabilities of the victim, and the situational factors leading to the event.⁽⁸⁶⁾ Judge Tanabe also suggested that proving a lack of consent beyond a reasonable doubt can be challenging because the court may find that a perpetrator believed that there was consent when there was not.⁽⁸⁷⁾ Ryo Ogiso also expressed a concern that if the consent element is applied instead of the force element, the difficulty in proving a victim's allegations beyond a reasonable doubt when there is no physical evidence can rather become an impediment to proper punishment for sex crimes.⁽⁸⁸⁾ Additionally, Keiko Miyata, an attorney member of the committee, suggested that the force requirement should be maintained for a proper defense.⁽⁸⁹⁾

Focusing on the judicial application of the force element, Mitsue Kimura suggested that the standard of "making the victim's resistance conspicuously difficult" may have been improperly applied. Kimura pointed out the possibility that the 1949 Supreme Court case applied the standard only to highlight the sufficiency of resistance in the case at hand: That is, since the Court applied the standard in order to refute the defense lawyer's argument that a fifteen-year-old who was beaten and raped could have resisted, the Court may not have meant to apply the standard as a necessary condition for the force element.⁽⁹⁰⁾ On balance, the members of the committee suggested different opinions about the abolishment or relaxation of the force requirement. Many expressed concerns about the feasibility of the lack of consent element as a replacement for the force or threat element that properly protects a defendant's rights.⁽⁹¹⁾ Ultimately, the force requirement in Article 177 was maintained after the amendment process.

c. Criticism for the force element

On the other hand, some legal scholars who have contrasting opinions to the "mainstream" or the majority of the committee argue that the force requirement in Japan needs to be relaxed or removed. Shimaoka suggests that the required degree of force or threat that makes a victim's resistance conspicuously difficult may be based on the male-dominated ideology that "since a certain degree of violence is permitted during sex with consent, to be a crime, the [higher] degree of force should be required."⁽⁹²⁾ She additionally warns that the evaluation of force

PUNISHMENTS).

(86) THE REV. COMM. FOR SEX CRIM. PUNISHMENTS, *supra* note 79 at 8.

(87) *Id.*

(88) *Id.* at 6.

(89) *Id.* at 2.

(90) *Id.* at 7.

(91) *Id.* at 8.

(92) THE REV. COMM. FOR SEX CRIM. PUNISHMENTS, *supra* note 71 at 9.

or threat may open up a greater possibility for the prejudice and gender bias of the law enforcement officials and judges to cloud the investigation and judgment of the case.⁽⁹³⁾ Shimaoka has argued that "...[the analysis of] the conduct and history of victims in sex crime trials promotes prejudice against the victims and causes secondary victimization ('second rape'), resulting in human rights violations and causing impediments to a fair trial. To that effect, the United States and Canada expressly prohibit the same practice (the practice of questioning a sex crime victim's past sexual history)(explanation added) by 'Rape Shield Law.'⁽⁹⁴⁾ Shimaoka maintains that the sexual act against a victim should be sufficient to find rape.⁽⁹⁵⁾ The criminal act can be proved by "objective evidence of sexual activity (generally accompanying usually some inherently forceful physical activity), along with the victim's statement that the sexual act was against her will."⁽⁹⁶⁾ Similarly, Hiroko Goto explains that a lack of consent can be evaluated by looking at the relevant objective evidence related to consent.⁽⁹⁷⁾

3. The Amendment to the Laws of Sex Crimes

The 2017 amendment⁽⁹⁸⁾ was brought about with two aims. First, the amendment sought to broaden the scope of protection and expand the target activities.⁽⁹⁹⁾ Second, the amendment sought to raise the minimum legal penalty.⁽¹⁰⁰⁾ The amendment that came to fruition was faithful to its aims, as it has successfully (1) broadened its scope of protection by modifying the subject of the protection as "female" to "person," (2) included sexual activities other than vaginal intercourse, including oral and anal sexual acts, (3) abolished the requirement for a victim to make a formal complaint for prosecution, and (4) increased the minimum penalty for sex crimes.⁽¹⁰¹⁾ Article 177 has consequently been amended as the following:

A person who, through assault or intimidation, commits sexual intercourse, anal sexual intercourse, or oral sexual intercourse (hereinafter referred to as "sexual intercourse") with a person not less than thirteen years of age commits forced intercourse and shall be punished by imprisonment with work for a definite term of five years or more. The same shall apply to persons who have had sexual intercourse with persons under the age of 13.

強制性交等 [Crime of Forced Sexual Intercourse], KEIHO [KEIHO] [Pen. C.] 第七十七条, [Art. 177], 1907, Ch. 12, (Japan).

(93) Shimaoka, *supra* note 12 at 30.

(94) *Id.*

(95) *Id.*

(96) *Id.*

(97) *See* THE REV. COMM. FOR SEX CRIM. PUNISHMENTS, *supra* note 71 at 7.

(98) 刑法の一部を改正する法律 [Revisional Law to a Part of Criminal Law], Law no. 72 of 2017 (Japan).

(99) *See generally* Tanojiri, *supra* note 64.

(100) *Id.*

(101) *Id.*

While the 2017 amendment touched on and made improvements on various aspects of sex crime laws in Japan, the force or threat element was maintained for Article 177.

IV. EVALUATION

During the committee discussion in Japan, many factors that had been attended to during the Montana hearing have been addressed in like manner. This section will evaluate how these factors were addressed and evaluated in Japan and offer opinions about why Japan and Montana nonetheless reached different conclusions.

1. Common Points of Concern in Japan and Montana

The testimonials of professionals and the social science evidence that were introduced during the hearing in Montana have been similarly addressed in Japan.

a. Opinions of the professionals

It is important to note some practitioners in Japan have voiced the same kind of concerns that were raised during the Montana hearing. During the third committee meeting, Kaoru Matsu-ura, a member of a non-profit organization called “Tears of Happiness,” explained that 76 percent of female victims of sexual intercourse without consent knew perpetrators.⁽¹⁰²⁾ She argued that the force requirement should be abolished because when a victim and the perpetrator are acquainted, it is possible to commit sexual violence without using force or threat.⁽¹⁰³⁾ Sakura Kamitani, a lawyer who specializes in sex crimes, suggested that most sexual violence cases do not get prosecuted, and she has to spend much of her time trying to tell the victims that it is not their fault.⁽¹⁰⁴⁾ She testified that many victims feel that the legal process is unreasonable, and even when the perpetrators get sentenced, the victims get frustrated by the lightness of the punishments.⁽¹⁰⁵⁾

Yumiko Suto, a co-representative of a national organization “Let’s Make Sexual Violence (Prohibition) Laws,” criticized the high hurdle of force or threat sufficient to make the resistance of a victim conspicuously difficult, as she pointed out that many cases go unprosecuted or, even when prosecuted, found not guilty,⁽¹⁰⁶⁾ She pointed out that sexual violence can be considered “murder of a soul,” based on her experience of counseling sex crime victims.⁽¹⁰⁷⁾ She suggested that sex crime law should be reformed to render proper punishment for the

(102) THE REV. COMM. FOR SEX CRIM. PUNISHMENTS, *supra* note 71 at 16-17.

(103) *Id.*

(104) *Id.* at 24.

(105) *Id.*

(106) THE REV. COMM. FOR SEX CRIM. PUNISHMENTS, *supra* note 70 at 20.

(107) *Id.*

perpetrators.⁽¹⁰⁸⁾ Suto also explained that the reality of rape is such that a victim cannot clearly predict the attack and resist. According to her, trauma research supports that many victims freeze during the assault.⁽¹⁰⁹⁾ However, in many instances, the police would not investigate the case, or the cases are not prosecuted because the law enforcement believes the victims did not properly resist.⁽¹¹⁰⁾ This is equivalent to a proclamation that victims are not to be believed, affecting the recovery of victims from the trauma of the event.⁽¹¹¹⁾

Suto also argues that these consequences result in the perpetrators who commit repeat offenses escaping punishment, increasing the risk of future sex crimes.⁽¹¹²⁾ This point corresponds with the opinions raised during Montana hearing about the repeat offenders. Moreover, during the survey interview for the understanding of realities of sex crimes that was held after the amendment in 2017, Sakura Kamitani⁽¹¹³⁾ explains that the conviction of a sex crime “for the first time” does not usually mean that it is the perpetrator’s first crime. In fact, at the point of arrest, there is a high chance that the perpetrator’s propensity for sexual deviance has already been developed, and there is already a great number of victims.⁽¹¹⁴⁾

Similar to the classic stranger rape narrative in the United States that was introduced earlier in this paper,⁽¹¹⁵⁾ during the committee meeting, Hiroko Goto talks about the rape myth that causes people to think that rape is only committed by a stranger on a dark street in the middle of the night.⁽¹¹⁶⁾ She suggests that this myth may cause people to believe that a victim would attempt to resist or escape, leading to the false assumption that threat and force requirement is necessary.⁽¹¹⁷⁾ This is supported by statistical research. Yuko Otake, a clinical psychology researcher at Oxford University and the joint head of the qualitative study of the impact of sexual assault on victims, explained that approximately one out of ten women in Japan has been raped, and more than seventy percent of them were committed by an acquaintance,⁽¹¹⁸⁾ suggesting that there are numerous acquaintance rape cases in Japan.

(108) *Id.*

(109) *Id.* at 21.

(110) *Id.* at 20.

(111) *Id.* at 20-21.

(112) *Id.* at 21.

(113) 性犯罪に関する施策検討に向けた実態調査ワーキンググループ第2回（平成30年7月30日）議事録3頁 (WORKING GRP. FOR UNDERSTANDING THE REALITIES OF SEX CRIM.) (statement made by Sakura Kamitani).

(114) *Id.*

(115) See Anderson, *supra* note 38.

(116) THE REV. COMM. FOR SEX CRIM. PUNISHMENTS, *supra* note 71 at 3.

(117) *Id.*

(118) 性犯罪に関する施策検討に向けた実態調査ワーキンググループ第7回（平成30年5月24日）議事録2頁 (WORKING GRP. FOR UNDERSTANDING THE REALITIES OF SEX CRIM.) (statement made by Yuko Otake), citing 内閣府男女共同参画局『男女間における暴力に関する調査報告書』平成26年度調査. http://www.gender.go.jp/policy/no_violence/e-vaw/chousa/h26_boryoku_cyouusa.html (last visited May 7, 2020).

Qualitative research that Yuko Otake has conducted with Kaori Okamoto and Azusa Saito further illustrates the “entrapment” type of sexual assault, during which a victim would often find it difficult to escape from the sexual violence even without the use of force. The “entrapment” type of assault occurs when the perpetrator holds superiority in the relationship with the victim. The researchers explain that this is done much easier in a case where the perpetrator already holds a higher societal position, but a perpetrator can elevate his position by frequently using words that promote his position and demoting the victim until he holds the higher ground in the relationship. Using the relationship, a perpetrator would commit a sexual act against the victim’s will. The researchers also explain that the social custom in Japan emphasizing that a person should not cause trouble in a relationship, and women should be obedient also contribute to the difficulties of resisting.⁽¹¹⁹⁾ Saito reported out of forty-one rape cases, only thirteen cases involved force or threat. Moreover, there were only three cases where the victim has physically resisted, compared to twenty-four cases where the victim did not resist.⁽¹²⁰⁾

The research supports that in reality, sex crime perpetrators often commit multiple offenses, know how to select their victims, and commits sexual acts against victims’ will without using force, as argued during the Montana hearing. Overall, the opinions of these practitioners show that the current reality of sex crimes in Japan is not much different from what was discussed in the legislative meeting in Montana.

b. The social science evidence

The committee for sex crime punishments, in its consideration for amendment for sex crime laws, has already considered freezing response by victims.⁽¹²¹⁾ During the discussion about force or threat requirement, the members of the committee recognized the cases during which victims feel the fear that amounts to the fear of losing their lives, freezing to the extent they are unable to speak or move. Therefore, Azusa Saito, a member of the committee, suggested taking these sorts of psychological state of paralysis into consideration.⁽¹²²⁾ Shimaoka also emphasizes this need to consider scientific evidence, mainly, the scientific evidence behind the victim’s immobility in the “freezing” state.⁽¹²³⁾ These discussions support that experts in Japan are already aware or becoming aware of the recent trauma research about sex crime victims.

(119) Saito & Otake, *supra* note 10.

(120) 齋藤梓・大竹裕子 [Saito & Otake] 「性暴力被害経験に関する質的研究」性犯罪に関する施策検討に向けた実態調査ワーキンググループ第7回（令和元年5月24日）配付資料2, <http://www.moj.go.jp/content/001299303.pdf> (last visited June 8, 2020).

(121) THE REV. COMM. FOR SEX CRIM. PUNISHMENTS, *supra* note 71 at 8.

(122) *Id.* at 5-6.

(123) “フリーズ反応”, *supra* note 12 at 32.

2. Differences

If all these similar concerns were shared by the legal professionals and experts in Japan and Montana, why did Montana choose to replace the force element with the lack of consent element when Japan chose not to? There were some meaningful differences between Japan and Montana that could explain why they decided to take on different paths.

a. Comparability with other states

First, Montana has many sister states to learn and compare its sex crime laws with. During the legislative hearing for Senate Bill 29, many proponents emphasized that the proposed definition for “lack of consent” in the amendment is consistent with the language used in other states’ laws. Montana could model its laws after the states and the military that have already amended their sex crime laws from requiring force/threat to lack of consent. States with different elements for sex crimes could also have served as a comparison point as Montana’s interim committee evaluated which element is the most effective one. Moreover, it could have prompted the legislature of Montana to question why they have not yet made amendments to sex crime laws that other states had already made years ago.

Most importantly, states that had already adopted the lack of consent element may have also given the Montana legislature assurance that the change is nothing radical. The observation that the lack of consent element has been tested and proven in the other states and the U.S. military could have alleviated practical concerns by showing that the lack of consent standard can be implemented without infringing on defendants’ rights.

On the other hand, the concerns for practical implications may have been more substantial in Japan because Japan did not have similar benchmarks. It should be first acknowledged that there has been continuous discussion and studious examination about the sex crime laws of other countries in Japan. The committee also referred to the laws of countries in different continents, including several states of the United States, in its discussions for the amendment.⁽¹²⁴⁾ However, it is probable that the nature of comparability between true lack of consent states and Montana may be quite different from that of Japan and other jurisdictions, because of the differences in the legal systems, gender equality and culture. In fact, one of the main arguments for maintaining the force element during the committee meeting was its necessity for proper enforcement of the law and concerns about practical implications of adopting the lack-of-consent standard, the same concerns that Montana could alleviate by examining other states.⁽¹²⁵⁾ The lack of equivalent reference points may have discouraged the committee and the legislature of Japan from making what can be considered a radical change to the element of sex crimes.

(124) See 法務省 [MINISTRY OF JUST.] 性犯罪の罰則に関する検討会第4回（平成26年12月24日）議事録4 - 6頁 (THE REV. COMM. FOR SEX CRIM. PUNISHMENTS) (referring to the laws of Michigan, New York and California of the United States, as well as England, France, Germany and Korea).

(125) See THE REV. COMM. FOR SEX CRIM. PUNISHMENTS, *supra* note 79.

b. Differences in the legal systems

A trial by jury guaranteed by a defendant's constitutional right could have also contributed to Montana's motivation to make changes to definitions of its sex crime laws so that it is easier for the laypersons to understand. To this effect, during the hearing, Prosecutor Suzy Boylan suggests that one of the reasons that they should adopt the definition of lack of consent instead of force is that it gives the judge and the jury more deliberation.⁽¹²⁶⁾ She argued that the lack of consent standard would provide the jury with the clarity they deserve and perpetrators the accountability that follows from that.⁽¹²⁷⁾ On the other hand, because it is generally the professional judges who decide the sex crime cases in Japan, Japan could have been able to afford a less straightforward definition of rape. That is, as Makoto Ida clarifies, courts in Japan interpret the force or threat requirement in its narrowest sense as deemed sufficient for the cases where force or threat was not used but was nevertheless clearly committed against a victim's will⁽¹²⁸⁾ ("if such cases show that the act was against a victim's will beyond a burden of proof and can refute the perpetrators' argument about the mistaken belief that there was consent"⁽¹²⁹⁾).

c. The influence of feminist movements on sex crime law reforms

Finally, Tsunoda explains that the discussions about sex crime law in Japan could have been delayed because many have viewed the problems surrounding sex crimes as "something obscene or of a deviant interest."⁽¹³⁰⁾ She also explains that the real picture of sex crimes has been distorted by the myth created by people who did not experience sex crimes, making it difficult for people to clearly recognize the shortcomings of sex crime laws of Japan.⁽¹³¹⁾ In the United States, many states had required "utmost resistance" by the victim to prove rape, which could have contributed to the early development of feminist groups' active involvement in defining sexual violence and reforming sexual assault laws.⁽¹³²⁾ Feminist groups across the United States actively challenged rape laws of the states throughout the 1960s and 1970s, achieving legal reforms in how the crimes are tried and defined through "grass-roots campaigns and lobbying."⁽¹³³⁾

There have been numerous reforms to sex crime laws in the states throughout the 20th century to make

(126) *Hearing on S.B. 29, supra* note 23 (statement of Prosecutor Suzy Boylan).

(127) *Id.*

(128) 井田良 [Ida], 「性犯罪処罰規定における暴行・脅迫要件をめぐって」法曹時報72巻2号(2020年)276-277頁.

(129) *Id.* at 277.

(130) 角田由紀子 [Tsunoda], 「性犯罪法の改正——改正の意義と課題」論究ジュリスト23号(2017年)120-121頁.

(131) *Id.*

(132) At 37, Morrison Torrey, *Feminist legal scholarship on rape: A maturing look at one form of violence against women*, 2 WM. & MARY J. WOMEN & L. 35 (1995).

(133) At 72, Stacy Futter & Walter Mebane, *The Effects of Rape Law Reform on Rape Case Processing*, BERKELEY WOMEN'S L.J. 16, 72, 111 (2001).

the laws more consistent with the growing understanding of sexual violence and gender equality. While there also have been active feminist groups in Japan, because of the more developed history of interaction between the feminist groups, academic research on sexual violence and the reform movements of sex crime laws in the United States, Montana may have had more resources to determine which direction it needs to head to better address sex crimes in the state.

V. RECOMMENDATION

The 2017 amendment of Japan contains a conditional clause that requires a review of the law in three years.⁽¹³⁴⁾ In company with the review, it is crucial to evaluate if the current law serves as an effective tool for ensuring proper punishment for the perpetrators of sexual violence. As illustrated by the decisions of many countries and states⁽¹³⁵⁾ that opted to use the lack of consent requirement rather than the force/threat requirement, the lack of consent requirement can serve as a better tool for proper punishment of sex crimes. Therefore, this following requirement is proposed as a model for amendment for rape law in Japan: a person is guilty of rape if he recklessly commits sexual intercourse with a person not less than thirteen years of age without “freely given consent.” This section will discuss the reasons for this recommendation and address potential concerns related to the element.

During the committee meeting, Kiyo Kudo expressed her reservation for abolishing the force requirement because she believes that the difficulty of objective evaluation of a victim’s awareness causes practical hardship in deciding sex crimes.⁽¹³⁶⁾ While the careful attitude towards a change in criminal element should be appreciated, consent rather than force can serve as a more comprehensible and inclusive legal element. Why does the lack of consent element serve as a better requirement than does the force element?

First, the lack of consent requirement serves as a clearer guideline. It should be first established that the force requirement in Japan, in an effort to be more inclusive of the cases where force was not used but nonetheless should be regarded as rape, has become especially convoluted. Courts in Japan have broadened the boundaries of the force requirement beyond the textual meaning of force and threat. This may have allowed Japanese courts to deem the force requirement to be satisfied for the cases where there is no proof of actual

(134) Supp. Prov. Art. 9. 刑法の一部を改正する法律 [Revisional Law to a Part of Criminal Law], Law no. 72 of 2017 : 第二十二章わいせつ、姦淫及び重婚の罪 [Crimes of Obscenity, Rape and Bigamy], KEIHO [KEIHO] [Pen. C.], 1907, Ch. 12, (Japan).

(135) *e.g.*, Germany, Luxembourg, United Kingdom, Sweden, Singapore, as well as states within the United States, such as Nebraska, New Mexico, Oregon and Washington, include the concept of consent in their sex crime laws.

(136) THE REV. COMM. FOR SEX CRIM. PUNISHMENTS, *supra* note 79 at 6.

force or threat used to the degree that made a victim's resistance conspicuously difficult,⁽¹³⁷⁾ as long as it can be demonstrated that a victim's consent has been severely compromised. Makoto Ida compares the force element with the consent-related elements of blackmail and robbery statutes of Japan, to illustrate that the force requirement is liberal enough to encompass sex crimes committed against the victim's consent but not with the actual use of force.⁽¹³⁸⁾ According to Ida, the robbery statute of Japan includes an interim requirement of suppressing the resistance of the victim and thus requires external pressure enough to nullify consent.⁽¹³⁹⁾ Therefore, the force requirement in the rape law is more similar in its degree to the defective consent in the blackmail statute, which is deemed to be satisfied if there was no meaningful consent.⁽¹⁴⁰⁾ While this analogy serves as a tool to better understand the boundaries of the force requirement, it also illustrates how nuanced the degree of the force element is, making it difficult for laypersons to understand.

The obfuscated boundaries of force or threat in Japan's force requirement may yield negative consequences for deliberation of proper justice in sex crime cases. First, an unclear boundary of the rule may allow more room for personal bias and prejudice to play a role in the adjudication of cases.⁽¹⁴¹⁾ Moreover, it may fail to serve as a clear guideline for the law enforcement, resulting in inconsistent prosecution of sex crime cases. Finally, a rule that lacks clarity can also confuse the public, making it unclear which act is criminal and which act is not. These points will be further substantiated in the following subsections.

Proponents of the force element may suggest that the consent as a legal element is just as complicated. However, there is no reason to unnecessarily complicate the legal concept of consent or make an assumption that it must be intricate, as many examples that were discussed during the Montana hearing illustrate that consent as a legal concept, too, can be straightforward. Some may point out that there are contentions about the existence of consent in actual cases, just as when the standard is force. However, the clarity of a concept as a legal element should not be muddled with various opinions that can be formed as the result of the application of the element to facts. As a matter of course, the factual application of any requirement would yield different opinions, giving courts a reason for existence. However, as opposed to force requirement of which complicatedness is double-fold in its definition and the application, consent requirement is clear by its concept, thereby making it less confusing to all parties involved.

Second, the lack of consent element is inherently better at ensuring perpetrators of all types of sexual violence to be properly punished. The force or threat requirement, even when it is liberally interpreted, may let a large group of cases escape prosecution, especially the "entrapment type" perpetrators who are skillful at using

(137) See Ida, *supra* note 127.

(138) *Id.* at 257.

(139) *Id.*

(140) *Id.*

(141) See Shimaoka, *supra* note 12 at 30.

their social positions to pressure a victim and performing sexual acts against the victim's will without using force or threat.⁽¹⁴²⁾ As demonstrated by the aforementioned comments of Prosecutor Boylan and the literature on how perpetrators target vulnerable victims, some perpetrators are highly manipulative and skillful in masking their exertion of pressure on the victim as they commit unwanted sexual acts against a victim, and they may escape punishment if the focus is on external pressure asserted by the perpetrator rather than the existence of consent. Specifying the element as "a freely given consent" will further ensure that the consent needs to be made without undue external pressure, such as fraud or pressure using the perpetrator's superior social position. The protection of all rape victims will be better served with the adoption of "the freely given consent" element.

Third, in handling sex crimes, the lack of consent element allows the focus to be centered on what is vital – that is, whether the sexual act was committed without the victim's consent. On the other hand, if force or threat needs to be proven, no matter how liberally the requirement is interpreted, the evaluation of a case will be centered on an imprecise measuring of external pressure, which can be often clouded by a perpetrator's manipulation, beyond the absence of consent.

This difference in the focus can be clearly demonstrated by an example of theft statutes. For the purpose of illustration, the first definition for theft will state, "taking of another person's property without the person's consent," which is analogous to a sex crime provision with the consent requirement. This will be compared to the second definition, "taking of a person's property using force or threat," which is analogous to the provision with the force requirement. Imagine a scenario where a man was invited to a woman's house. Without telling her, the man takes her watch as he leaves her house. Under the first definition, the focus will be centered on whether she agreed to his taking of her watch. However, under the second definition, the analysis will be focused on whether there was any use of force or threat when he took her watch. Since there is no obvious use of force or threat, we may expand the definition of force or threat to include any untoward actions that could have allowed him to take the woman's property without her consent. Even in this case, the focus would still be inherently on whether the actions of the man were enough to satisfy the force requirement, no matter how clear and straightforward it is that the man did not have the woman's consent to take the watch.

Consequences of having the focus on the degree of external pressure or force is an increased possibility that a perpetrator will go unpunished even when it is clear that the victim did not give her consent. Therefore, the lack of consent requirement serves as a more explicit and inclusive requirement for sex crimes.

1. Concerns regarding the lack of consent requirement

The proponents of the force requirement voice a concern that without the force requirement, the law enforcement would be left without a clear guideline to prosecute sex crimes, and the lack of consent requirement

(142) Saito & Otake, *supra* note 10 at 185.

will be too ambiguous to ensure that a defendant's rights are protected.⁽¹⁴³⁾ However, consent, as addressed earlier in the section, is not misleading or vague. Moreover, in many cases where the perpetrator and the victim are acquainted, and the perpetrator do not employ physical violence or obvious threats, unlike force that can be exerted in ways that are too varied to be reliable, consent, which operates under the ordinary meaning of the word, can provide a more concrete guideline.

Consider the following case⁽¹⁴⁴⁾: A, along with her friend B, goes to a bar and meets B's male friend, C. Later at night, C asks her to give him a ride when A told him that she was going home. A, after warning C that she is just giving him a ride home and nothing else, drives C to C's apartment. In the parking lot of C's apartment C asks A to come in, but A repeatedly refuses. C then takes her car keys and comes over to her side and again asks if she will come up. A, feeling scared, follows C to the apartment. Later, A testifies that she went to C's apartment because the way C looked at her scared her. At the house, C talks to A for a few minutes. When C goes into his room for a couple of minutes, A does not attempt to leave. When C comes back, A asks if she could go. C says that he wants her to stay. C asks A to get on the bed with him and pulls A by the arms to the bed. C begins to undress her. A repeatedly asks C to let her go, and C says no. A testified that C made her perform oral sex and engaged in vaginal intercourse with her. After the intercourse, C finally returns A's car keys. C asks her if he could see her again. A said yes, asks C for the directions out of his neighborhood, and leaves C's apartment.

In this case, it is clear that A did not consent to the sexual acts. On the other hand, there can be differing opinions when it comes to the existence of force or threat and their degrees. If the force requirement is liberally interpreted, courts in Japan may find that C's taking of A's car keys and C telling A that he does not want her to leave are enough to satisfy the force requirement. However, there is no certainty in saying that the courts in Japan would indeed find the force requirement satisfied here. In fact, in a number of cases, Japanese courts have set the required degree of force or threat too strict and thus found perpetrators of sexual acts without consent not guilty.⁽¹⁴⁵⁾ Others will argue that the force requirement is not satisfied here. In fact, under the Maryland law that required force⁽¹⁴⁶⁾, while the jury convicted the defendant in the trial of this case, the Court of Special Appeals of Maryland overturned the conviction because the court did not find enough evidence to find that the force the defendant used was sufficient. This ruling was again reversed by the Court of Appeals of Maryland.⁽¹⁴⁷⁾

This flexible, and in other words, unclear boundary of the force/threat requirement may be what allowed courts of Japan to broadly interpret the requirement to include acts that do not clearly constitute force or threat.

(143) See Section III-2-b.

(144) See at 232-235, *State v. Rusk*, 289 Md. 230, 424 A2d. 720 (1981).

(145) *Ida*, *supra* note 127 at 269.

(146) MD. CODE ANN. Art. 27, § 463(a)(1) (repealed 2012 and replaced by § 3-304).

(147) *State v. Rusk*, 424 A2d. 720 (1981).

However, when it comes to clarity, the force requirement does not serve law enforcement as a clearer and more practical tool than does the lack of consent requirement. Furthermore, the degree of force/threat of which would make a victim's resistance conspicuously difficult (“反抗を著しく困難にする程度”) required in Japan not only weaken the argument that the force requirement in its narrowest sense actually encompasses all lack-of-consent situations but also make it even more challenging for people to grasp the boundary of the force requirement.

In addition, as sex crimes are prosecuted, the ambiguity of force requirement invites personal bias or prejudice regarding sex crimes and gender roles to fill the gaps created by statutory ambiguity.⁽¹⁴⁸⁾ It may allow a judge to put undue weight on peripheral factors, such as whether a victim has made complaints about specific aspects of the assault. For example, a judge may place undue emphasis on that the victim failed to complain about the perpetrator not wearing a condom or the possibility of pregnancy,⁽¹⁴⁹⁾ even though the victim's failure to complain may signify nothing other than the fact that the victim did not feel comfortable enough to talk about all her concerns and feelings about the assault. The lack of clarity in the force element of the crime may also fail to deter courts from reaching unwarranted conclusions, such as considering the victim's unfavorable description of the defendant's physical characteristics as her potential motivation to falsely testify against the defendant.⁽¹⁵⁰⁾ As Goto already emphasized⁽¹⁵¹⁾ during the committee meeting, the principle of *nulle poena sine lege* (no penalty without law) signifies the importance of having a clear rule of law in preventing judges' arbitrary application of the law.⁽¹⁵²⁾ The lack of consent element, rather than the force element, will better guide courts in putting the judges' bias aside and making decisions by focusing on what is important—whether the sexual act was committed against a victim's will.

As the committee emphasizes, the training and education of legal enforcement would be crucial in preventing personal bias from playing a role in prosecuting sex crime cases. The parliamentary resolution for the 2017 amendment has thus suggested that they would educate the law enforcement and the legal professionals so that their prejudice does not get in the way of the investigation and the prosecution of sex crimes.⁽¹⁵³⁾ However, if the unclarity of an element of a crime allows for an unnecessarily large room for allowing personal prejudice to affect decisions of the police and the court, amending the law would be a more fundamental solution for fixing the problem. Goto, pointing out cases in which judges made improper gender-biased decisions, suggested that

(148) See Section III-2-c.

(149) 前橋地方裁判所 [Maebashi Dist. Ct.] May 23, 2018, Heisei 29 (wa 7), no. 589, available at LEX/DB25560674 (Japan) (holding that a defendant who allegedly threatened and raped a woman whom he made acquaintance through a mobile chatting application in his car at a parking lot of a grocery store not guilty).

(150) *Id.* at 5.

(151) THE REV. COMM. FOR SEX CRIM. PUNISHMENTS, *supra* note 71 at 3.

(152) *Id.*

(153) 第193回国会衆議院会議録第32号（官報号外平成29年6月8日）47頁.

the ongoing legal education will take some time to yield changes in the behavior of those involved in sex crime prosecution. She thus recommended that the amendment that provides a clear direction for judges would be more effective in producing uniform application of the law.⁽¹⁵⁴⁾

Finally, some experts express concern that the lack of consent element would increase the possibility of wrongful convictions for sex crimes. A similar concern has been raised during the Montana hearing about whether the removal of the force requirement increases the possibility that a person may be convicted in a so-called “he said, she said” situations without other evidence.⁽¹⁵⁵⁾ To this question, a prosecutor replied that it would not increase the likelihood because, as it has been the case with the law with the force requirement, the prosecution still needs to prove a lack of consent beyond a reasonable doubt.⁽¹⁵⁶⁾ Moreover, a court will go through a similar process of reviewing the evidence regarding the communication and the action between the perpetrator and the victim, as well as the overall circumstances and their relationship, as would a court do under the law with the force requirement. The difference is that instead of focusing on whether there was enough external pressure to subdue the victim, the court will be focused on evaluating whether the external evidence shows that the victim has not consented to the sexual act.

2. Constitutionality of the lack of consent requirement

Article 31 of the Constitution of Japan states, “No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to the procedure established by law.”⁽¹⁵⁷⁾ Building on the article, the Supreme Court of Japan has held that when the text of a criminal legal provision is ambiguous and unclear, the law should be deemed to violate the Article 31 of the Constitution and is thus void.⁽¹⁵⁸⁾ The determination of whether a criminal legal provision should be deemed void for its vagueness needs to be made by asking if a layperson of ordinary prudence (“通常の判断能力を有する一般人”⁽¹⁵⁹⁾) would be able to determine if a specific act is governed by the criminal provision.⁽¹⁶⁰⁾ There has been some concern that the lack of consent element is difficult to implement because it is ambiguous, even to the degree of being unconstitutional. Accordingly, this section will review why the replacement of force or threat requirement with the lack of consent element will not render the law unconstitutional under the void-for-vagueness doctrine.

(154) THE REV. COMM. FOR SEX CRIM. PUNISHMENTS, *supra* note 71 at 2-3.

(155) *Hearing on S.B. 29, supra* note 23.

(156) *Id.*

(157) The translation depends 日本国憲法[NIHONKOKU KENPO][CONSTITUTION], art. 31, <https://www.ndl.go.jp/constitution/etc/c01.html> (Japan).

(158) 最判昭和50年9月10日刑集29巻8号489頁（最高裁判所 [Sup. Ct] Sep. 10, Showa 50 [1975], Japan).

(159) *Id.*

(160) *Id.*

By and large, a law with a force requirement, rather than a lack of consent requirement, may be at more risk of being deemed unconstitutional for its vagueness. Some members of the committee argued that the force requirement is feasible because of the courts' liberal interpretation of the term force or threat.⁽¹⁶¹⁾ A defendant could argue that the liberal interpretation itself is what renders the law ambiguous, thus making it virtually impossible for a layperson to determine if a specific act would satisfy force or threat under the article. On the other hand, as per the committee's own argument, if the courts do not liberally construe the force requirement, there is a greater possibility that victims' rights will not be protected.

Consider the aforementioned case⁽¹⁶²⁾ where C has neither directly threatened A nor used force to make A come up to his apartment and commit sexual acts against her. Again, a court in Japan may find that the force requirement has been satisfied. However, for the purpose of determining constitutionality, if we ask laypersons of ordinary prudence whether the specific acts by C should be regarded as the force as applied in Article 177, would such persons be able to give a clear and uniform answer? Evidently, the void-for-vagueness doctrine does not refer to the varied opinions about the application of the law in real cases. However, the ambiguity in the above situation does not stem from various interpretation of facts under a clear text of the law but from the ambiguity inherent in the word "force" as used in Article 177. A layperson reading the text of Article 177 would not be able to understand that the force or threat requirement in the legal text means something beyond their meaning in the ordinary sense.⁽¹⁶³⁾ This liberal interpretation of force/threat requirement not only makes it challenging for a layperson to understand the sex crime law provisions but also obscures the true purpose of sex crime laws, which is to punish those who commit sexual acts against victims' will.

The straightforward application of the lack of consent requirement, rather than the force requirement that needs to be expanded beyond its textual meaning, provides a comprehensible guideline for a layperson as he reads the law. In fact, the proponents of Montana hearing have also argued that the lack of consent requirement would serve as a better yardstick for law enforcement, the members of the jury and the judges. Therefore, the lack of consent requirement will not cause the law to become unconstitutional due to its vagueness.

VI. CONCLUSION

Defining sexual offenses is challenging⁽¹⁶⁴⁾ because of its direct relationship with the social perceptions

(161) See Section III-2-b.

(162) *Supra* note 143.

(163) This is especially true if the force requirement is to be liberally construed as to encompass all lack-of-consent cases. See Ida, *supra* note 127, commenting on how the requirement should be understood.

(164) At 383, Jacquelyn White & Lori Post, *Understanding Rape: A Metatheoretical Framework*, 16 *EVOLUTION, GENDER & RAPE*, 4, 383, 411 (2003).

of sexual violence and gender equality, as well as the unique nature of sex crimes where external evidence is limited, and the resulting act is often the same as non-criminal sexual intercourse. In 2017, both Japan and Montana amended sex crime laws, yet their paths significantly diverged. The most critical point of diversion was that while Montana has amended its law to rid of the force requirement and instead adopt “without consent” requirement, Japan has retained its force requirement. In Japan, there is a continued discussion regarding the direction for the further amendment to its sex crime laws. For this discussion, Japan can take advantage of the knowledge and opinions shared during the hearing in Montana to evaluate whether there is any room for improvement for its current law.

Notably, the path that was first walked by many states of the United States and finally, by Montana, can be the inspiration for Japan to consider why so many jurisdictions have finally decided to remove the force requirement from their sex crime laws. Some members of the committee in Japan reasoned that the force requirement should be maintained because the force is broadly interpreted by considering the totality of the circumstances and because it helps reduce the possibility that the innocent may be convicted.⁽¹⁶⁵⁾ However, during the legislative hearing, the members of the interim committee in Montana demonstrated inherent shortcomings of the force requirement in punishing cases where there was a clear lack of consent but little use of force, while the consent requirement is able to bring justice a whole class of cases where force was not used. They also showed that, as illustrated by the examples of other states and the military, the lack of consent requirement would not increase the likelihood of false conviction. These different conclusions in the evaluation of the two requirements may provide additional points for rumination for the legislature of Japan.

Japan has a lot to consider as it decides its future direction for addressing sex crimes. On this journey, the case of Montana, a state that had chosen to implement the lack of consent requirement after careful consideration of testimonies of practitioners and examination of available research, may serve as a lodestar that guides the ship in the right direction.

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(165) See THE REV. COMM. FOR SEX CRIM. PUNISHMENTS, *supra* note 79; *see also Id.* at 9.