

TIME FOR CHANGE: NEW YORK FAILS TO PROTECT INDIVIDUAL AUTONOMY

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Out of respect for survivors of sexual violence, please beware as this Note contains triggering content. You are seen, heard, and understood; this Note seeks to initiate positive change for you.

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ABSTRACT

Rape, in some form, has been recognized as a crime since the earliest official legal codes were written. Nonetheless, the specific harm being targeted and the conduct that qualified as criminal has shifted significantly over time. From the Code of Hammurabi through European criminal law of the 11th century, rape was treated almost exclusively as a property crime against the father or husband. Indeed, the word itself derives from the Latin word “rapere” or “to seize.” It was not until the middle ages that rape was viewed as a crime against the victim and the state. Even then, the definition of rape focused not on the presence or absence of consent, but on the presence or absence of force. Given the law’s obsessional focus on physical force as the demarcating line between “sex” and “rape,” most coerced or non-consensual sex is treated not as the serious crime of rape but as a lesser, perhaps even trivial, form of criminal conduct.

This Note explores the failures of the criminal justice system in defining and capturing the crime of rape. This Note focuses more specifically on longstanding systemic failures in New York that perpetuate the continued refusal to treat coerced and non-consensual sex as seriously as forced sexual intercourse. This state of affairs has been perpetuated and maintained because of misconceptions about rape, stereotypes fostered by law enforcement, and serious legislative flaws. This Note argues that a root cause of injustice is the failure to recognize rape for what it is: sex without consent rather than sex involving forcible submission. It is beyond question that urgent reforms are needed within the criminal justice system to address the devastating impact of rape in all of its forms for both survivors and society as a whole. By highlighting systemic failures and offering proposals for reform, this Note contributes to an existing body of scholarship focused on the need for a major overhaul in the criminal codes for so-called “sex crimes.” Sex without consent is not some lesser crime to the real crime of “rape.” Sex without consent should be the definition of rape and it is time for the law of New York to treat it as such.

INTRODUCTION

Society has grappled with the concept of rape for centuries, causing vehement disputes within the legal arena about how the law defines it as a crime. “To know what is wrong with rape, know what is right about sex.”¹ A fundamental “right” of sex is an individual’s freedom to decide and control the circumstances under which they will engage in intercourse.² The fundamental “wrong” of rape is an absence of this choice—forcing a sexual act upon someone who did not freely consent. Notice how a lack of control implicitly materializes in the absence of choice. Here lies one common debate over how the law should define rape: some do not recognize that a lack of control follows from an absence of choice. Some believe that rape requires something more, the “something more” often being physical force.

Many systemic barriers to justice are perpetuated by this failure to recognize that the traditional rape elements, force and non-consent, are present regardless of whether a perpetrator uses physical force to compel submission. Coercion and fear can be highly effective in compelling submission to unwanted sex, and penetrating someone without their freely given consent is a forcible bodily assault. While physical force beyond that which is inherent in the act may warrant higher punishment, its absence should not diminish the fact that a rape occurred. Sex without freely given consent should be the definition of rape, and any additional force should be a matter of degree. Yet the criminal justice system often arbitrarily determines that sex without consent is less harmful and thus not a serious crime, sometimes not a crime at all.

All too often, rape is not treated as a serious violent crime absent additional physical force. One of the major issues in New York, for example, is its failure to classify rape without physical force as a serious crime. Under New York law, rape with physical force is a class B felony, while coerced and non-consensual rape are largely subverted by way of codification in the lowest felony class E.³ As a result of these classifications, larceny is an equal or more serious crime than rape without physical force—a thief could receive a higher punishment for property theft than a rapist could for coerced or non-

1. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 174 (1989).

2. *See generally* WORLD ASS’N FOR SEXUAL HEALTH, DECLARATION OF SEXUAL RIGHTS (2014) (explaining human rights in the context of sexuality based on universally recognized rights and scientific knowledge).

3. *See* N.Y. PENAL LAW §§ 130.25, 130.35, 135.61 (McKinney 2023).

consensual intercourse.⁴ This framework undermines the gravity of rape and the necessary legal consequences for the crime, imperiling public safety and hindering justice for survivors.

This Note explores the pervasive failures of New York's criminal justice system surrounding the crime of rape and proposes that the legislature needs to amend its statutory scheme to extinguish any doubt that sex without consent is rape. Part I discusses rape as a crime more generally, including its origin, effects, legal reform over the years, and a survey of the current status of laws across the fifty states. The survey provides a broad overview of each state's approach to defining the conduct that qualifies as rape in the modern age armed with evolving understandings of the crime. To further analyze the progress of meaningful reform, the survey compares sentencing guidelines for rape and theft, revealing which states recognize rape as a serious crime from a macroscopic view of statutory frameworks. Part II takes its way to New York specifically, expounding on the inadequacies of its statutory scheme and illustrating the consequences of failing to comprehensively reform rape law. Part III calls upon the New York legislature to initiate urgently needed reform and addresses the opposition.

I. PEOPLE ARE NOT PROPERTY

A. Rape Rooted in Property Law

The crime of rape is rooted in historical times when women were considered possessions: “[a] virgin daughter was a valuable commodity owned by her father; a wife was a chattel of her husband. As a consequence, rape was treated as a property offense.”⁵ Contemporary societal norms unequivocally reject such an antiquated notion, however, as the times in which it was acceptable to treat fundamental human rights like property are long gone. People are not property; a

4. See *infra* Section II.A. Coerced and non-consensual rape are codified in the same class as grand larceny in the fourth degree, which includes stealing property valued at \$1,000–\$3,000, stealing property from the person of another regardless of its value, and stealing other specified items; the theft of property valued over \$3,000 is a higher, class D or C felony. See N.Y. PENAL LAW §§ 130.35, 135.61, 155.30, 155.35, 155.40 (McKinney 2023). Class E felonies are punishable by a maximum sentence of four years; class D felonies are punishable by a maximum sentence of seven years. N.Y. PENAL LAW § 70.00 (McKinney 2023).

5. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 546, 545 (8th ed. 2018); see also Elizabeth Hanus, *Rape by Nonphysical Coercion: State v. Brooks*, 64 U. KAN. L. REV. 1141, 1143 (2016) (“[U]ntil the mid-twentieth century, the crime of rape was largely focused on protecting men’s property rights—their property being women.”).

human soul is not property. While much progress has been made in recognizing rape as far more perilous than once thought, the ensuing harm is still commonly misunderstood, and numerous states fail to criminalize it adequately. These shortcomings are detrimental and often stem from ancient roots—a bygone impression that rape is but a species of property theft. The theft of property and the theft of individual autonomy are not equally serious crimes; it is time we uproot any lingering paradigms that equate humans to possessions.

B. Victimization: Effects, Statistics, and Stereotypes

Rape is often described as the robbery of individual autonomy.⁶ But how can we expect society to understand, much less properly confront, such an obscure and amorphous concept as the dispossession of individual autonomy? Merriam-Webster defines autonomy as “self-directing freedom and especially moral independence.”⁷ Similarly, Black’s Law defines autonomy as “an individual’s capacity for self-determination.”⁸ Rape thus deprives a person of their ability to determine or control who will penetrate them and when, perhaps the most sacred cornerstone of human dignity. The crime is considered second to murder—one step before death.⁹

Although society has made significant progress in recognizing rape as a heinous crime, the historically misplaced focus on rape as a crime against a woman’s father or husband left the harm to the survivor long ignored. Over time, however, it became clear that a rapist leaves a trail of destruction in their wake, starting with the victim while ripples immerse family and friends, ultimately reaching society as a whole.¹⁰ Modern understandings of the crime indicate that rape frequently leads to physical, mental, emotional, social, and financial

6. See DRESSLER, *supra* note 5, at 546.

7. *Autonomy*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/autonomy> (last visited Jan. 16, 2023).

8. *Autonomy*, BLACK’S LAW DICTIONARY (10th ed. 2015).

9. See DRESSLER, *supra* note 5, at 543.

10. For an overview of how sexual assault may impact survivors and, by extension or through isolation and withdrawal, their loved ones, see generally *The Effects of Sexual Assault*, WASH. COAL. OF SEXUAL ASSAULT PROGRAMS, <https://www.wcsap.org/help/about-sexual-assault/effects-sexual-assault> (last visited Jan. 16, 2023) [hereinafter *Effects of Sexual Assault*]. For further discussions of the effects on survivors and society, see Stephanie Lyng, “Real Rape”: Bias That Allows Violent Offenders to Escape Real Accountability, 52 CUMB. L. REV. 259, 262–68 (2022) (discussing rape as a public health issue); Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. PREVENTATIVE MED. 691, 691 (2017) <https://doi.org/10.1016/j.amepre.2016.11.014> (estimating a “population economic burden of nearly \$3.1 trillion . . . over victims’ lifetimes.”).

anguish—the extent and duration of which differs among survivors.¹¹ Its effects are widespread and often devastating yet somewhat enigmatic because rape is unlike any other crime.

The intangible harm of rape is a somewhat abstruse concept deserving of attention. Depriving an individual of autonomy often causes a loss of self and spirit, and albeit invisible, existential doubt is a wound that requires healing.¹² Survivors who bravely share their stories provide material insight into the psychological effects. One survivor explained what it was like to shower for the first time after being told she was penetrated by a stranger while unconscious,

I stood there examining my body beneath the stream of water and decided, I don't want my body anymore. I was terrified of it, I didn't know what had been in it, if it had been contaminated, who had touched it. I wanted to take off my body like a jacket and leave it at the hospital with everything else.¹³

Another survivor wrote about how her daily life was still tainted with fear seven years after she was raped, “[t]he fear was always there, in warrens just below the surface of my skin, waiting.”¹⁴ And in an evocative description of what it felt like to lose her autonomy, she explained,

11. See *Effects of Sexual Assault*, *supra* note 10; Peterson et al., *supra* note 10, at 691.

12. The Diagnostic and Statistical Manual of Mental Disorders (DSM-5-TR) identifies a causal connection between sexual violence and post-traumatic stress disorder (PTSD). See AM. PSYCHIATRIC ASS'N, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5-TR 302 (5th ed. rev. 2022). Humanistic-existential psychology suggests that symptoms of PTSD should be viewed through an idiographic lens—on an individualized basis—rather than the general patterns found in nomothetic research. For an enlightening discussion of PTSD through this lens, see Mélanie Vachon et al., “*Growing from an Invisible Wound*” *A Humanistic-Existential Approach to PTSD*, in A MULTIDIMENSIONAL APPROACH TO POST-TRAUMATIC STRESS DISORDER – FROM THEORY TO PRACTICE 179, 183–84 (2016) (“Trauma reveals something about existence that cannot be integrated in a coherent and meaningful understanding of the self and the world. Symptoms are often seen as the biological, the psychological, and the existential self who is trying to adjust and integrate the meaning of what happened and, most importantly, the meaning of one's existence given a new existential reality.”). See also, e.g., NANCY VENABLE RAINE, *AFTER SILENCE: RAPE AND MY JOURNEY BACK* 206–07 (1998) (explaining how she lost “faith that there is order and continuity in life[.] . . . [t]o lose faith in life was, for me, the loss of a connection with the intangible world—with soul, spirit, anima, essence, vital force, or whatever one chooses to call it” after she was raped).

13. Katie J.M. Baker, *Here's the Powerful Letter the Stanford Victim Read to her Attacker*, BUZZFEED NEWS (June 3, 2016, 4:17 PM), <https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra>.

14. See RAINE, *supra* note 12, at 1–2.

By destroying my ability to control my own body, he had made my body an object. I lost a sense of it as the boundary of self, the fundamental and most sacred of all borders. A self without boundaries is like a weak country that has been overrun by a stronger one. Once the borders are violated and the invader is entrenched, inhabitants can do little more than go into hiding and hope for outside aid.¹⁵

Rape is a harrowing reality that quietly surrounds us, transpiring every sixty-eight seconds with seemingly no end in sight.¹⁶ The statistics are staggering. In 2022, the Justice Department reported 531,810 completed or attempted rape and sexual assault incidents, but roughly 79% of incidents were unreported.¹⁷ Factoring unreported incidents brings the estimate to 2,485,093 completed or attempted rape and sexual assault incidents in one year. 6,808 per day. Meanwhile, approximately 975 of every 1,000 perpetrators are not convicted; 98% of the time, a rapist goes unscathed, quite possibly living more freely than the victim.¹⁸

Notwithstanding progressive knowledge and ample research invalidating outdated misconceptions, historical stereotypes about the nature of rape are still widely pervasive.¹⁹ One of the more common, misinformed stereotypes is that rape primarily occurs by a stranger and must include violence.²⁰ This archetype does not reflect modern realities—almost 90% of incidents involve a perpetrator that the victim

15. *Id.* at 163.

16. See *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited Jan. 16, 2023).

17. The estimate of reported incidents rose approximately 39% from 2021 to 2022. See ALEXANDRA THOMPSON & SUSANNAH N. TAPP, U.S. DEP'T OF JUST., CRIMINAL VICTIMIZATION, 2022, at 3, 6 (2023), <https://bjs.ojp.gov/document/cv22.pdf>; ALEXANDRA THOMPSON & SUSANNAH N. TAPP, U.S. DEP'T OF JUST., CRIMINAL VICTIMIZATION, 2021, at 2, 5 (2022), <https://bjs.ojp.gov/content/pub/pdf/cv21.pdf> (estimating 324,500 completed or attempted rape and sexual assault incidents in 2021 and a 79% non-report rate).

18. See *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Jan. 16, 2023).

19. See generally MARK G. PETERS, N.Y. CITY DEP'T OF INVESTIGATION, OFF. OF THE INSPECTOR GEN. FOR THE NYPD, AN INVESTIGATION OF NYPD'S SPECIAL VICTIMS DIVISION—ADULT SEX CRIMES (2018); NAT'L JUD. EDUC. PROGRAM, JUDGES TELL: WHAT I WISH I HAD KNOWN BEFORE I PRESIDED IN AN ADULT VICTIM SEXUAL ASSAULT CASE 1 (2017) (discussing historical stereotypes about rape).

20. Compare CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 35 (2005) (“The law’s rape is by a stranger, in a strange location, with a weapon, which the woman resisted within an inch of her life.”) with David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14 SEXUAL ASSAULT REP. 49, 56 (2011) (finding rapists more commonly use “psychological weapons – power, control, manipulation, and threats . . .”).

knows, and most do not use physical force.²¹ The New York City Department of Investigation (DOI) further concluded that “acquaintance rapists” share similar behavioral profiles with “stranger rapists” and “pose similar safety threats to the public at large.”²² Just like stranger rapists, most acquaintance rapists are serial offenders.²³

C. Reporting Rape: “Do They Care?”

1. Social Toxicity

The ancient roots of rape often seethe palpably in much-outdated ignorance, generating discouraging narratives about social perspectives and the difficulties of seeking justice. Enduring stereotypes tend to silence survivors whom we should be listening to rather than quieting, but beyond silence often lies discreditation and shame.²⁴ When trying to explain rape “in terms of a violent assault and the residual trauma,” many people seem to see only a “shameful sexual encounter.”²⁵ This social toxicity exacerbates a myriad of challenges for survivors in the aftermath of rape, particularly when it seeps through the criminal justice system.

2. Confronting Systemic Prejudices

The criminal justice system plays an unfortunate and undeniable role in silencing survivors as its response to rape, or lack thereof, is often retraumatizing. Three decades ago, a renowned scholar said, “[r]ather than deterring or avenging rape, the state, in many victims’ experiences, perpetuates it.”²⁶ And three decades later, a renowned

21. See PETERS, *supra* note 19, at 5 (“Sexual assault perpetrators rarely use weapons and may not use physical force, relying instead on verbal threats, intimidation, and a victim’s vulnerability.”).

22. *Id.* at 29.

23. See Lisak, *supra* note 20, at 55 (describing two studies, where one attributed an average of seven victims to each rapist, and the other attributed an average of eleven victims to each rapist).

24. See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3, 11 (2017) (discussing the prevalence of “credibility discounting” for sexual violence, defined as “an unwarranted failure to credit an assertion where this failure stems from prejudice” and how “most survivors opt to keep their credibility from ever being judged.”); see also RAINE, *supra* note 12, at 207 (“I resented the fact that talking about rape . . . produces a cringe in the people around me. This cringe feels silencing, although that is not always its intent. It confuses me when I feel it.”).

25. See, e.g., RAINE, *supra* note 12, at 207.

26. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. OF WOMEN IN CULTURE & SOC’Y 635, 651 (1983).

advocate insists there is “a long disgraceful legacy in our criminal justice system of not taking rape seriously.”²⁷

Police and prosecutors who foster outdated stereotypes about the crime repeatedly interfere with justice for survivors. Long ago, detectives openly spoke of rape as “assault with a friendly weapon,” and survivors continually attest to similar insensitive and dismissive treatment during investigations.²⁸ Possibly worse, reports of rape are often unfounded, “an active verb in police lexicon for a decision not to believe that a rape happened as reported.”²⁹ Disbelieving rape reports is a longstanding custom with widespread consequences, from impacting statistical data to undermining deterrence and harming survivors.³⁰ One survivor asked, “[d]o they care? The way I was treated by police was worse than the rape itself.”³¹ Prosecutors rarely pursue criminal charges, usually attributing the unwillingness to insufficient evidence, but sometimes avoiding cases that lack physical force and differ from the stereotypical rape.³² These procedural injustices perpetuate a status

27. Jan Ransom, *‘Nobody Believed Me’: How Rape Cases Get Dropped*, N.Y. TIMES, <https://www.nytimes.com/2021/07/18/nyregion/manhattan-da-rape-cases-dropped.html> (Sept. 28, 2021) (quoting Jane Manning, the Director of the Women’s Equal Justice Project and a former sex crimes prosecutor); *see also* Jane Manning, *It’s not Just the Larry Nassar Case. We Are Failing Sexual Assault Victims Across the Country*, N.Y. TIMES (Sept. 27, 2021), <https://www.nytimes.com/2021/09/27/opinion/sexual-assault-victims.html>.

28. RAINE, *supra* note 12, at 135; Manning, *supra* note 27; PETERS, *supra* note 19, at 19; *see also, e.g.*, Gabrielle Fonrouge, *NYC Sex-Assault Survivors Ask Feds to Probe NYPD Over Alleged Gender Bias*, N.Y. POST (Aug. 3, 2021, 5:00 AM), <https://nypost.com/2021/08/03/sex-assault-survivors-ask-feds-to-probe-nypd-over-gender-bias/> (describing a letter to the Department of Justice from seventeen survivors, one of whom a detective asked whether she was “sure” she wanted to pursue charges because “who knows, you could end up dating [the rapist].”).

29. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS*, *supra* note 20, at 130–31 (“Only in sexual assault cases is it believed, against the victim’s statement to the contrary, that she may have consented to forced acts against her.”); *see also* Tuerkheimer, *supra* note 24, at 11. For a concerning study of police practices that can alter “society’s understanding of the magnitude of sexual violence in this country,” *see generally* Corey Rayburn Yung, *How to Lie with Rape Statistics: America’s Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1201–06 (2014) (discussing how police departments falsified rape statistics in part by “label[ing] a large percentage of cases as ‘unfounded’ while performing little to no investigation.”).

30. *See generally* Yung, *supra* note 29 (exposing police practices of “failing to report the true number of rape complaints made,” the consequences thereof, and advocating for a secondary review of unfounded reports).

31. Manning, *supra* note 27.

32. *See id.* (“Even when the police do investigate, prosecutors too often decline cases that may seem challenging because the facts don’t comport with stereotypes about rape, sometimes despite solid evidence or multiple victims.”).

quo that retraumatizes and silences survivors while jeopardizing public safety by leaving rapists free to inflict more harm.³³

D. Legal Reform Over the Years

At English common law, the crime of rape included only male-to-female penetration “forcibly and against her will,” which swam its way to the states and was adopted by most jurisdictions.³⁴ After much success eradicating sexist and draconian procedural obstacles, rape law reform moved its focus to substantive issues regarding the elements of force and non-consent.³⁵ Scholars adamantly critiqued the common law definition for its limited application as the realization grew that physical force is not the only means by which rape can occur.³⁶ Perpetrators need not use physical force to manipulate a person’s decision of whether they will engage in unwanted sex; coercion and fear may compel submission as effectively as violence.³⁷ The “absence of force does not ensure the presence of . . . control.”³⁸ And without the presence of control—freely given consent—the act is rape.

Reformers were initially met with fierce reluctance to change how the law defines rape, particularly in trying to eliminate the requirement of physical force.³⁹ The force requirement was traditionally defined “in terms of the female’s resistance,” giving rise to an

33. See *id.*; see also PETERS, *supra* note 19, at 28 (explaining how procedural injustice is a “primary reason victims disengage from the investigative process” and directly impacts public safety); Tuerkheimer, *supra* note 24, at 29 (advocating that survivors are “mostly foregoing the criminal justice system in anticipation of how their case will be (mis)handled.”); Yung, *supra* note 29, at 1249 (“If [systemic underreporting] continues unabated, ever-increasing numbers of rape victims will not get justice and more rapists will be free to prey on new targets.”).

34. 2 WILLIAM BLACKSTONE, COMMENTARIES *210.

35. See Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 MINN. J. OF L. & INEQ. 335, 337–40 (2017); but see GA. CODE ANN. § 16-6-1 (2023) (requiring male-to-female penetration for rape in Georgia).

36. See Schulhofer, *supra* note 35, at 337–40.

37. See, e.g., *id.* at 339–40; see also *Brown v. State*, 576 S.W.2d 820, 823 (Tex. Crim. App. 1978) (“Inherent in the concept of force, whether it be physical force, threats, or some other type of coercion, is that when involuntarily confronted with distasteful options, it is very human to select that which is the least distasteful.”). For a discussion delineating the nuances of coercion and consent, see generally Kimberly Kessler Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L.J. 951 (2018) (identifying two normative functions of coercion, “[s]ometimes coercion is about the blameworthiness of the coercer, and sometimes coercion is about the involuntariness of the consenter’s choice.”).

38. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 1, at 199.

39. See Schulhofer, *supra* note 35, at 337 (describing states’ reluctance to adopt a broader concept of force to include nonviolent duress or coercion).

inference that rape must require physical force beyond that which is inherent in the sexual act.⁴⁰ Through time and zealous advocacy, however, some courts and legislatures began to realize that “force runs on a continuum,” and sex without freely given consent entails a forcible bodily assault otherwise known as rape.⁴¹ When the Supreme Court limited the federal prosecution of sex trafficking cases to those compelled by “physical” or “legal” coercion, Congress broadened the statutory definition to include coercion by “psychological, financial, or reputational harm.”⁴² That rape can occur without violence started to gain traction, partly due to public outrage after courts dismissed cases where no physical force was used but the act was non-consensual.⁴³ Many states accordingly started to redefine the conduct that qualifies as a crime of rape.⁴⁴

40. DRESSLER, *supra* note 5, at 556 (discussing the need to reform the definition of force as understandings of rape evolve and historical requirements are abandoned); *see also, e.g.*, State v. Jones, 299 P.3d 219, 228 (Idaho 2013) (“[I]f a forcible rape statute by definition requires penetration, then for an additional requirement of force to be meaningful, it necessarily must mean some force beyond that inherent in penetration.”). Idaho has since expanded its definition of force. *See* IDAHO CODE § 18-6101(6), (10) (2023).

41. Schulhofer, *supra* note 35, at 339 (illustrating the force continuum as starting from a knife to the throat, a threat of imprisonment, to a threat of losing one’s job). Black’s Law defines force as “[p]ower, violence, or pressure directed against a person or thing;” and assault is defined as “[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact.” *Force, Assault* BLACK’S LAW DICTIONARY (10th ed. 2015); *see also, e.g.*, Commonwealth v. Bower, 563 S.E.2d 736, 738 (Va. 2002) (“Sexual assaults are assaults against the body of the victim; they are violent acts which common knowledge tells us inflict bodily hurt on the victim. It defies human experience to conclude that fear of the possibility of bodily injury caused by sexual assault is insufficient ‘fear of bodily harm’ for purposes of establishing sexual assault by intimidation.”).

42. United States v. Kozminski, 487 U.S. 931, 948 (1988) (interpreting federal involuntary servitude statute); 18 U.S.C. § 1591(e)(5) (2023); *see also* Paguirigan v. Prompt Nursing Empl. Agency LLC, 286 F. Supp. 3d 430, 437 (E.D.N.Y. 2017) (explaining Congress’ intent to expand the scope of prosecution to cases involving nonviolent coercion).

43. *See* Schulhofer, *supra* note 35, at 339; *see also* Rosemary J. Scalo, *What Does “No” Mean in Pennsylvania? — The Pennsylvania Supreme Court’s Interpretation of Rape and the Effectiveness of the Legislature’s Response*, 40 VILL. L. REV. 193, 216 (1995) (discussing the Pennsylvania legislature’s swift reaction to public outcry after its supreme court dismissed a rape case where the victim repeatedly said “no.”).

44. *See generally* Schulhofer, *supra* note, 35 (discussing state reform of rape statutes).

E. The Current Status of Rape Law: A Fifty-State Survey

A comprehensive survey of the fifty states reveals those open to reform generally divide into two categorical approaches for defining the crime of rape: some states criminalize intercourse upon the absence of consent, while others have broadened the definition of force.⁴⁵ Twenty-three states adopted the first approach, recognizing that physical force is inherent in the act of rape and allowing for the prosecution of the crime when intercourse occurs without consent or against another's will—when an individual says “no.”⁴⁶ Twenty states vary within the confines of the second approach, expanding the definition of force to include nonphysical compulsion such as coercion, fear, or deceit.⁴⁷ Notably, four states fall into one of these two categories as a result of judicial precedent and courts' interpretations of statutory language and legislative intent.⁴⁸ On the other end, however, six states still require non-consensual intercourse compelled by physical force for the crime of rape.⁴⁹

To further analyze the progress of meaningful reform, the survey compares sentencing guidelines for rape and theft, evaluating which states systematically classify rape as a serious crime. Here, forty-five states agree upon one point—the crime of rape has outgrown its roots and involves fundamental human rights that supersede property rights on the moral hierarchy. An overwhelming majority of states classify rape without physical force as a serious crime, assigning sentencing guidelines that reflect the stark contrast between rape and property

45. See *infra* App. A; see also, e.g., ALASKA STAT. § 11.41.420(a)(5) (2023) (criminalizing “sexual penetration with another person without consent of that person.”); 18 PA. CONS. STAT. § 3101 (2023) (defining forcible compulsion as “[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied.”). This survey includes only statutes and cases that govern sexual *intercourse*. Some states have separate provisions for other sexual acts, an issue beyond the scope of this Note.

46. See *infra* App. A.

47. See *id.*

48. The courts in Arkansas and Virginia have interpreted statutory language to include intercourse without consent, while the courts in Massachusetts and North Carolina have held that “force” within the statutory language does not need to be physical. See *infra* App. A.

49. See *id.* (Connecticut, Georgia, Illinois, Kentucky, Maryland, and West Virginia). Most of these states have crimes for sexual *contact* without consent but define sexual contact as distinct from intercourse. For example, Kentucky criminalizes sexual contact without consent as a Class B misdemeanor with a maximum sentence of ninety days and statutorily defines “sexual contact” as distinct from “sexual intercourse.” See KY. REV. STAT. ANN. §§ 510.010(5), (7), 510.130, 532.090 (West 2023).

theft.⁵⁰ And in all six states that require physical force, the sentencing guidelines for rape are significantly higher than forcible robbery.⁵¹ New York is one of five states that criminalize coerced and non-consensual rape but still classify those offenses like property crimes.⁵²

II. NEW YORK'S FAILURE TO ADEQUATELY PROTECT INDIVIDUAL AUTONOMY

A. The Roots of Injustice: Current Statutory Scheme

New York maintains one of the most complex statutory schemes for sex crimes, easily susceptible to misinterpretation by an untrained eye and inept at providing meaningful justice for most survivors.⁵³ The scheme contains twenty-two distinct sex crimes within Article 130, "Sex Offenses," and one in Article 135, "Kidnapping, Coercion and Related Offenses."⁵⁴ As this Note is forthcoming, the Assembly

50. See *infra* App. A; see also, e.g., *Commonwealth v. Caracciola*, 569 N.E.2d 774, 777 (Mass. 1991) (rejecting that physical force is required in rape cases because it "asks us to assume the Legislature intended to give greater protection to property than to bodily integrity," and the court would not "make such an unwarranted assumption.").

51. See *infra* App. A.

52. See *id.* (Alabama, New York, Maine, Missouri, and Oregon). Maine sentences non-consensual rape equal to larceny but coerced rape as a higher crime. *Id.*

53. See PETERS, *supra* note 19, at 5 (finding perpetrators generally rely on verbal threats and intimidation rather than physical force). The report also includes a finding from 2010 that sex crimes are sometimes misclassified, attributing such errors in part to the "Penal Law classifications [being] . . . particularly complex," which may result in misinterpretation by authorities lacking sex crimes expertise. *Id.* at app. A at x. An oversight committee thus established the Sex Crime Analytical Group (SCAG) to review all Article 130 complaints every twenty-four hours after realizing inexperienced officers were mistakenly downgrading reported rape incidents. See *id.* at app. G at xlv. Although the statutory scheme remains largely unchanged, a 2019 lawsuit against the City and three high-ranking officials in the NYPD asserts, among other issues, that SCAG has since been shut down. See Amended Complaint & Demand for Jury Trial at 20, *Demski v. City of New York*, No. 150089/2019 (N.Y. Sup. Ct. filed Jan. 31, 2019).

54. N.Y. PENAL LAW § 130.20 (McKinney 2023) (sexual misconduct); N.Y. PENAL LAW § 130.25 (rape in third degree); N.Y. PENAL LAW § 130.30 (McKinney 2023) (rape in second degree); N.Y. PENAL LAW § 130.35 (McKinney 2023) (rape in first degree); N.Y. PENAL LAW § 130.40 (McKinney 2023) (criminal sexual act in third degree); N.Y. PENAL LAW § 130.45 (McKinney 2023) (criminal sexual act in second degree); N.Y. PENAL LAW § 130.50 (McKinney 2023) (criminal sexual act in first degree); N.Y. PENAL LAW § 130.52 (McKinney 2023) (forcible touching); N.Y. PENAL LAW § 130.53 (McKinney 2023) (persistent sexual abuse); N.Y. PENAL LAW § 130.55 (McKinney 2023) (sexual abuse in third degree); N.Y. PENAL LAW § 130.60 (McKinney 2023) (sexual abuse in second degree); N.Y. PENAL LAW § 130.65 (McKinney 2023) (sexual abuse in first degree); N.Y. PENAL LAW § 130.65-a (McKinney 2023) (aggravated sexual abuse in fourth degree); N.Y. PENAL LAW §

passed a bill that awaits the Governor's signature, proposing to consolidate the provisions for oral and anal sexual conduct into the definition of rape.⁵⁵ But this bill does not address the felony classifications of coerced and non-consensual rape, which harbor a significant flaw that compromises public safety and inhibits justice for survivors.⁵⁶

New York requires "forcible compulsion" as an element of all first-degree sex crimes unless the victim was physically helpless or underage.⁵⁷ Forcible compulsion requires either *physical* force or a threat that the victim or someone else is at risk of imminent *death, physical injury, or kidnapping*.⁵⁸ Rape in the second degree prohibits intercourse with a person who cannot consent due to a mental disability or incapacitation, and an age-related offense.⁵⁹ Rape in the third degree prohibits intercourse without consent "where such lack of consent is by reason of some factor other than" age or incapacity, as well as another age-related offense.⁶⁰ Separate from "sex offenses," coercion in the second degree prohibits compelling intercourse, oral sexual

130.66 (McKinney 2023) (aggravated sexual abuse in third degree); N.Y. PENAL LAW § 130.67 (McKinney 2023) (aggravated sexual abuse in second degree); N.Y. PENAL LAW § 130.70 (McKinney 2023) (aggravated sexual abuse in first degree); N.Y. PENAL LAW § 130.75 (McKinney 2023) (course of sexual conduct against a child in first degree); N.Y. PENAL LAW § 130.80 (McKinney 2023) (course of sexual conduct against a child in second degree); N.Y. PENAL LAW § 130.90 (McKinney 2023) (facilitating a sex offense with controlled substance); N.Y. PENAL LAW § 130.91 (McKinney 2023) (sexually motivated felony); N.Y. PENAL LAW § 130.95 (McKinney 2023) (predatory sexual assault); N.Y. PENAL LAW § 130.96 (McKinney 2023) (predatory sexual assault against a child); N.Y. PENAL LAW § 135.61 (McKinney 2023) (coercion in second degree).

55. See Assemb. B. 3340, 246th Ann. Legis. Sess. (N.Y. 2023) [hereinafter B. 3340].

56. See *id.*

57. See, e.g., PENAL § 130.35 (rape in the first degree); PENAL § 130.50 (criminal sexual act in the first degree); PENAL § 130.65 (sexual abuse in the first degree); PENAL § 130.70 (aggravated sexual abuse in the first degree). Rape in the first degree prohibits intercourse under these circumstances. See PENAL § 130.35.

58. See PENAL § 130.00 (McKinney 2023) (emphasis added); see also MACKINNON, WOMEN'S LIVES, MEN'S LAWS, *supra* note 20, at 245 ("Only extreme physical force, preferably including weapons other than the penis, is usually credible enough to meet the criminal law's standard for enough force for sex to look like rape.").

59. See PENAL § 130.30 (prohibiting intercourse with a person under fifteen years old when the actor is eighteen years old or older).

60. See PENAL § 130.25 (prohibiting intercourse with a person under seventeen years old when the actor is twenty-one years old or older). A lack of consent for rape in the third degree includes circumstances under which the victim "clearly expressed that he or she did not consent to engage in such an act," where a reasonable person in the actor's situation would have understood the victim's words or acts to mean non-consent. See N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2023).

conduct, or anal sexual conduct through ten enumerated coercive threats.⁶¹

The felony classifications of coerced and non-consensual rape suggest that New York does not consider rape without physical force as a serious crime.⁶² Not all crimes are created equally; when the legislature creates a crime, it also decides the seriousness of the offense, which is conveyed through a classification that partly determines the severity of punishment.⁶³ The classification of a crime may thus undermine distinctions between substantive offenses to the extent that it allows equal punishment for varying degrees of crimes.⁶⁴ Assuming society deems crimes against property less culpable than crimes against people, “property crimes stand out as the ‘least culpable’ reference points for judging a variety of crimes.”⁶⁵

Against this backdrop, New York law assigns the same classification to coerced rape, non-consensual rape, stealing property worth \$1,000 to \$3,000, and stealing property from the person of another regardless of its worth.⁶⁶ By theoretical comparison, then, the crime of rape—desecrating fundamental decisions about sex such as who, when, where, why, and how to engage—is no more serious than the lowest-tiered felony of property theft. Echoing its roots, the disposal of rape at this level turns a blind eye to the forcible bodily assault

61. See PENAL § 135.61; N.Y. PENAL LAW § 135.60 (McKinney 2023) (enumerating the coercive acts for coercion in the second degree); *but see generally* People v. Cannata, 177 N.Y.S.3d 411 (City Ct. 2021) (holding § 135.60(5) unconstitutional as applied, since the law was an infringement of defendant’s First Amendment rights to “engage in core political speech.”).

62. See PENAL § 130.25 (classifying rape in the third degree as class E); PENAL § 135.61 (classifying coercion in the second degree as class E); N.Y. PENAL LAW § 70.00 (McKinney 2023) (ranking felony classes); *see also* Lisak, *supra* note 20, at 49 (asserting that the Alaska legislature’s explanation of intentionally high sentencing guidelines for sex offenses conveys a message that the community considers rape “an extremely serious crime.”).

63. See Janine Ferraro, *New York’s Criminal Justice System*, in STATE-SPECIFIC CRIMINAL JUSTICE SERIES 59–60 (Robert Costello ed. 2019); *see also* N.Y. PENAL LAW § 1.05 (McKinney 2023) (enumerating general purposes of the penal code, which includes “[t]o differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor . . .”).

64. See RICHARD G. SINGER ET AL., *EXAMPLES & EXPLANATIONS FOR CRIMINAL LAW* 33–34 (8th ed. 2022) (discussing how classifications and sentencing schemes can “undo the doctrines of substantive criminal law.”).

65. See Connor Sunderman, *Violence Against Property: The Breaking Point of Federal Crime of Violence Classifications*, 122 COLUM. L. REV. 755, 778 (2022) (proposing that “[a] property-based definition of violence makes property crimes disproportionately significant in the categorical classification of crimes of violence.”).

66. See PENAL §§ 130.25, 135.61; N.Y. PENAL LAW § 155.30 (McKinney 2023).

inherent in the act and flies in the face of universally recognized human rights.⁶⁷ New York cannot ensure public safety or provide adequate justice for survivors with its current system—a system that deviates from a nearly national consensus that rape, whether by force, coercion, or non-consent, is a more serious crime than property theft.⁶⁸

B. Lack of Substantive Justice: Courts and Cases

New York's statutory scheme time and again leaves prosecutors and courts unable to provide justice for survivors. Most cases that make it to the courts involve extreme violence—a crime separate from rape—and are thus properly adjudicated.⁶⁹ But some appellate courts have overruled jury convictions of first-degree sex crimes, holding the evidence insufficient to prove forcible compulsion and often stating it would have upheld a lesser charge.⁷⁰ When applying the strict letter of New York law, these courts delivered harsh opinions on rape, revealing a pattern of divergence from juries. Two decisions from 2021 are illustrative.

First, an appellate court overruled a jury's verdict after finding insufficient evidence of forcible compulsion in a disturbing case involving four defendants and the forcible rape of a fifteen-year-old sex trafficking victim.⁷¹ The District Attorney (DA) reported that the teenager had been trafficked for about a month before the trafficker and her sister incessantly "ordered" the victim to have sex with their boy-friends.⁷² Despite her attempts to refuse, the two men "forcibly raped" and "forcibly orally sodomized" the teenager while she cried, and the women sat back on a couch watching, filming, and laughing.⁷³ Two

67. See *supra* notes 2, 41 and accompanying text.

68. See *infra* App. A; PETERS, *supra* note 19, at 2 ("The failure to treat acquaintance and domestic rape as crimes on par with stranger rape is unacceptable in modern law enforcement.").

69. See MACKINNON, WOMEN'S LIVES, MEN'S LAWS, *supra* note 20, at 245; see also, e.g., *People v Walker*, 140 N.Y.S.3d 307, 309–10 (App. Div. 2021) (holding sufficient for forcible compulsion the victim's testimony "that defendant shoved her, knocked her to the ground in the hallway, choked her to the point that she lost consciousness, dragged her to the trash room and engaged in sexual intercourse without her consent.").

70. See, e.g., *People v. Graham*, 159 N.Y.S.3d 87, 92 (App. Div. 2021); *People v. Warren*, 156 N.Y.S.3d 346 (App. Div. 2021) (reducing a jury conviction of sexual abuse in the first degree to sexual abuse in the third degree).

71. See *Graham*, 159 N.Y.S.3d at 89–90, 92.

72. *State Prison Sentences for Rape of Sex Trafficking Victim*, CRIME & PUNISHMENT (Apr. 30, 2019), <https://www.davidmhoovler.com/state-prison-sentences-for-rape-of-sex-trafficking-victim/>.

73. *Id.*

defendants pled guilty to crimes related to the rape, and a jury convicted the two other defendants on various charges.⁷⁴ One defendant appealed his eighteen-year sentence, but the court found it was not excessive and “no exceptional circumstances” that would warrant modification.⁷⁵

On an appeal concerning the merits, however, the same court reversed and held that any physical contact with the victim was “incidental” to the sexual acts.⁷⁶ The appellate division vacated two defendants’ convictions—one of the men and later the trafficker’s sister—ruling the evidence insufficient to establish forcible compulsion.⁷⁷ Soon after discussing the fifteen-year-old victim’s reluctance to obey the defendants’ demands and her attempts to resist, the court held that the men did not use “actual physical force,” declaring all physical contact incidental to the sexual acts.⁷⁸ Because the perpetrators did not expressly threaten physical force, and the men did not play an apparent role in “verbal cajoling,” the case hinged on whether there was an implied threat of physical force.⁷⁹

In its implied threat analysis, the court acknowledged that the victim did not believe she could control the situation or stop the defendants, but it nevertheless dismissed her case.⁸⁰

The complainant said repeatedly during her testimony that she was uncomfortable throughout the incident, that she ‘fe[lt] like [she] had no control’ over what was happening, and that there was ‘nothing [she] could do’ to stop it.⁸¹

This testimony was insufficient to establish forcible compulsion by an implied threat because it did not assert the requisite fear of physical harm.⁸² The court determined that “even from her subjective point of

74. *See id.*

75. *People v. Graham*, 127 N.Y.S.3d 871 (App. Div. 2020).

76. *Graham*, 159 N.Y.S.3d at 90.

77. *See id.* at 92; *see also* *People v. Patterson*, 184 N.Y.S.3d 390, 393–94 (App. Div. 2023). The trafficker’s sister, Patterson, appealed separately and the court issued another opinion while this Note was forthcoming, vacating all charges against her, including filming the act. The court granted an affirmative defense based on Patterson’s “good-faith reasonable belief” that the victim was seventeen years old. *See Patterson*, 184 N.Y.S.3d at 394.

78. *Graham*, 159 N.Y.S.3d at 89–90.

79. *Id.* at 90.

80. *See id.* at 91–92.

81. *Id.* at 91 (alteration in original).

82. *Compare id.* at 91–92 (holding the testimony insufficient for first-degree rape) with *People v. Evans*, 913 N.Y.S.2d 41, 42–43 (App. Div. 2010) (holding similar testimony sufficient for third-degree rape).

view,” the victim had “no reason” to fear the defendant would physically harm her because she had never spoken to him before.⁸³ The Appellate Division, Second Department thereby reversed the jury’s verdict and its own opinion affirming the sentence, vacated convictions of rape in the first degree and criminal sexual act in the first degree, and New York’s highest Court denied appeal.⁸⁴

Next, in *People v. O’Donnell*, the Appellate Division, Fourth Department dismissed another jury verdict after finding insufficient evidence of forcible compulsion.⁸⁵ News outlets reported that the victim was missing for a month until seen getting out of the defendant’s car and walking into a hospital “bruised, malnourished, disheveled and intoxicated.”⁸⁶ Investigators found blood-stained sheets at the defendant’s apartment and ultimately concluded that he held the victim captive while continuously feeding her alcohol, beating, and raping her.⁸⁷ A jury convicted the defendant on eight charges: four counts of rape in the first degree, two counts of attempted criminal sexual act in the first degree, and two counts of coercion in the first degree.⁸⁸

In cases involving ongoing abuse, the appellate division ruled that a specific abusive incident must be linked to a particular sex act to substantiate first-degree rape charges.⁸⁹ The court again characterized this case quite differently on appeal, opining that the defendant physically abused the victim just twice and “had repeated sexual contact” with her during the one-month period.⁹⁰ After determining that the defendant did not compel or coerce any *particular* sex act by physical force or a threat, the court dismissed all charges predicated on forcible compulsion and coercion.⁹¹ The court sustained only three charges

83. *Graham*, 159 N.Y.S.3d at 91.

84. *See id.* at 92; *People v. Graham*, 185 N.E.3d 989 (N.Y. 2022).

85. *People v. O’Donnell*, 148 N.Y.S.3d 589, 591–92 (App. Div. 2021).

86. Tom Dinki, *O’Donnell Kidnapping and Rape Trial Begins with Opening Statements, First Round of Witnesses*, OLEAN TIMES HERALD (Jan. 11, 2018), https://www.oleantimesherald.com/news/o-donnell-kidnapping-and-rape-trial-begins-with-opening-statements-first-round-of-witnesses/article_3b7fd4b4-f695-11e7-bca1-d7ce904d7b0e.html#tncms-source=signup.

87. *See id.* (reporting DA Lori Rieman’s opening remarks, including how the victim would awaken to the defendant sexually assaulting her).

88. *O’Donnell*, 148 N.Y.S.3d at 590.

89. *See id.* at 591 (citing *People v. Aponte*, 932 N.Y.S.2d 627, 627–28 (App. Div. 2011)).

90. *Id.*

91. *See id.* at 591–92.

based on physical helplessness and significantly reduced the defendant's sentence as "unduly harsh."⁹²

Recognize the precedents these cases establish for our future. Both victims lacked control over a forced sexual assault and attained justice through a jury, only to have that justice abrogated by the letter of the law. Insufficient evidence of forcible compulsion—the absence of additional physical force—should not be reason to have convicted rapists back in our neighborhoods. But now that an appellate division has held physical force incidental to the act of rape, the doors are open for courts to dismiss cases lacking severe violence or involving ongoing abuse when a sexual act cannot be linked to specific abusive conduct.⁹³ Overruling jury determinations of credibility paves this path concretely and significantly undermines the fundamental principle of deferring to the "fact-finder's opportunity to view the witnesses, hear the testimony, and observe demeanor."⁹⁴ These issues fall squarely within the legislature's purview, bearing the ability to reform the forcible compulsion requirement under New York law.

C. Consequences of Deficient Criminalization

1. Lack of Procedural Justice: Investigations, Pleas, and Sentencing

Recent events in New York illustrate some of the more far-reaching consequences that arise from requiring forcible compulsion for

92. *Id.* at 592 (dismissing two counts of rape in the first degree, one count of attempted criminal sexual act in the first degree, and two counts of coercion in the first degree).

93. See *People v. Graham*, 159 N.Y.S.3d 87, 90 (App. Div. 2021); *O'Donnell*, 148 N.Y.S.3d at 591. Recent miscarriages of justice have also occurred on procedural grounds. See generally *People v. Regan*, 39 N.Y.3d 459 (N.Y. 2023) (reversing a jury's first-degree rape conviction due to an inexplicable preindictment delay by the People, despite DNA evidence, deeming the delay a due process violation and recognizing a "still-pervasive problem of law enforcement's inability to recognize the seriousness of sexual assault . . ."); *People v. Garcia*, 145 N.Y.S.3d 213 (App. Div. 2021) (reversing a jury's first-degree rape conviction based on the lower court's failure to give a missing witness charge for the first person the victim told about the assault, despite DNA evidence and corroborating testimony by another witness with whom she confided the same details to just hours later). For a discussion by a former Associate Judge of the Court of Appeals advocating for change in New York's prompt outcry rule, see generally Robert S. Smith, *How the Prompt Outcry Rule Protects the Guilty*, 76 ALB. L. REV. 1445 (2012/2013).

94. *People v. Romero*, 859 N.E.2d 902, 909 (N.Y. 2006) (citing *People v. Bleakley*, 508 N.E.2d 672, 675 (N.Y. 1987)). This path is particularly concerning in the context of rape cases, which often hinge on survivors' already systematically tainted credibility. See generally Tuerkheimer, *supra* note 24 (analyzing systemic disbelief of rape allegations and "situating prejudiced disbelief as a separate failure of justice, one itself deserving of consideration.").

first-degree rape and downgrading the more common forms of rape in the lowest felony class.⁹⁵ This legislative flaw inadvertently fosters a culture where police, prosecutors, and judges may overlook or dismiss legitimate cases due to the low likelihood of a conviction or preconceived notions that coerced and non-consensual rape are not serious crimes in New York's justice system.⁹⁶

First, police may “unfound” rape reports and drop investigations, allowing the perpetrator to re-offend, as occurred with Tyler Lockett. A New York University student reported that she awakened to a masked man who told her not to scream then held her down and raped her.⁹⁷ The investigation matched a fingerprint to Lockett, which should have “triggered several investigative steps” that were not taken.⁹⁸ Instead, a detective discouraged the victim from pursuing charges, closed the case, and marked it with a code indicating all leads had been exhausted.⁹⁹ The police chief was uncertain why the investigation was dropped but said it was likely due to insufficient evidence—the condom wrapper on which they found Lockett's fingerprint was not opened.¹⁰⁰ Because the rape investigation was removed from Lockett's record, prosecutors struck a no-jail bargain for an unrelated conviction and released him from custody.¹⁰¹ Lockett proceeded to attack three more women over two weeks.¹⁰²

Second, prosecutors unable to pursue higher offenses will reduce the charges in many cases, lowering bail and making it easier for rapists to walk amongst the public, as occurred with Justin Washington. Washington was facing twenty-five years in prison for first-degree

95. See *supra* notes 20–21 and accompanying text.

96. See, e.g., Ransom *supra* note 27 (discussing a study on New York's sex crimes bureau, revealing that “decisions about which cases to pursue were based on the likelihood of a conviction . . .”); Regan, 39 N.Y.3d at 492 (Singas, J., dissenting) (“[Deeply entrenched prejudices] have infected both our culture and law enforcement's handling of these cases, resulting in the premature ending of rape investigations, closing cases as based on ‘unfounded’ allegations, and devoting less time and resources to investigating such cases.”).

97. See Ashley Southall, *A Rape Suspect was Released. 3 More Women Were Attacked.*, N.Y. TIMES (Feb. 17, 2020) <https://www.nytimes.com/2020/02/17/nyregion/nypd-rape-victims-division.html>.

98. *Id.*

99. See *id.* The victim's mother stated that a detective treated her daughter like she was guilty and falsely told her she would “have the news all over [her]” if she did not close the case. The victim decided not to pursue charges; her mother stated, “[w]e just wanted to get out of this precinct.” *Id.*

100. See *id.*

101. See *id.*

102. See Southall, *supra* note 97.

rape, first-degree sexual abuse, and forcible touching after his teenage relative informed police that he raped her.¹⁰³ By no surprise, however, the DA's office stated that it could not establish forcible compulsion upon the evidence from its investigation.¹⁰⁴ Prosecutors thus reduced the charges and, adding insult to injury, negotiated a thirty-day sentence in exchange for a guilty plea.¹⁰⁵ Washington's bail was lowered by more than half, he was released from custody until sentencing, and proceeded to sexually assault five more victims in one day.¹⁰⁶

Third, judges may not sentence the more common forms of rape as serious crimes, deterring survivors rather than perpetrators, as occurred in Christopher Belter's case. Belter was facing eight years in prison after assaulting four teenage girls and pleading guilty to third-degree rape, attempted first-degree sexual abuse, and two charges of second-degree sexual abuse.¹⁰⁷ One victim testified that she focused on the leaves of a plant while crying as Belter told her to "stop being such a baby" and that "if she stopped resisting, it wouldn't hurt as much."¹⁰⁸ Nonetheless, a judge stunned the nation when he "prayed over" the decision, found "a sentence that involves incarceration or partial incarceration [wasn't] appropriate," and let Belter off with probation.¹⁰⁹

2. Resorting to Self-Help Measures

A perpetual lack of justice and support has caused many survivors to lose faith in the system.¹¹⁰ After watching the judge give Belter mere probation, one survivor said,

103. See Larry Celona & Gabrielle Fonrouge, *Sex Fiend Gets 'Sweet' Deal From Manhattan DA Bragg on Teen Rape Charge – Then Attacks 5 Others*, N.Y. POST, https://nypost.com/2022/09/22/Sex-Fiend-Gets-Sweet-Deal-From-Manhattan-DA-Bragg-on-Teen-Rape-Charge-Then-Attacks-5-Others-sources/?utm_source=url_sitebuttons&utm_medium=site%20buttons&utm_campaign=site%20buttons (Sept. 23, 2022, 10:57 AM).

104. See Minyvonne Burke, *N.Y. Man Accused of Sexually Assaulting 5 People a Week Before he was Scheduled to be Sentenced in Prior Rape*, NBC NEWS (Sept. 23, 2022, 1:30 PM), <https://www.nbcnews.com/news/us-news/ny-Man-Accused-Sexually-Assaulting-5-People-Week-was-Scheduled-Sentenc-rcna49147>.

105. See Celona & Fonrouge, *supra* note 103.

106. See *id.*

107. See Timothy Bella, *Man who Sexually Assaulted 4 Teenagers Gets no Prison Time. 'Incarceration Isn't Appropriate,' Judge Says.*, WASH. POST (Nov. 17, 2021, 10:20 AM), <https://www.washingtonpost.com/nation/2021/11/17/newyork-christopher-belter-rape-probation/>.

108. *Id.*

109. *Id.*

110. See Fonrouge, *supra* note 28; see also Tuerkheimer, *supra* note 24, at 29.

If I were to be someone viewing this right now, looking at this case as a victim of rape or sexual assault—I mean, I would think what’s the point in coming forward? Why put yourself through the painful experience of testifying when there’s not going to be a good outcome?¹¹¹

And in a letter to the Department of Justice (DOJ) signed by seventeen survivors, they said,

We worry—more than our case detectives ever did—about the perpetrators who attacked us. We wonder how many other people they have gone on to harm, because the NYPD failed to take action to stop them.¹¹²

Concerned analysts have proposed that survivors should turn to restorative justice due to these systemic failures, but advocates emphasize this cannot be the solution.¹¹³ “There are some crimes too serious and some offenders too dangerous for alternative justice.”¹¹⁴

Lost faith in the criminal justice system has left many individuals resorting to self-help measures like “whisper networks” to offset a diminished sense of security in our communities.¹¹⁵ Whisper networks trace back decades to Brown University when survivors wrote perpetrators’ names on the bathroom walls, seeking to warn others and draw attention to neglected cases.¹¹⁶ From written messages to the digital age, individuals are now using social media for the same purpose and employing a trait that the criminal justice system has seemingly abandoned in sex crimes—tenacity.¹¹⁷ This tenacity has also been shown in the form of requesting support from oversight agencies.¹¹⁸

111. Mola Lenghi, *A Judge Sentenced a Rapist to Probation. One of his Victims Warns “He Will Offend Again,”* CBS NEWS (Nov. 19, 2021, 7:45 AM), <https://www.cbsnews.com/news/christopher-belter-rape-probation-victim-mm/>.

112. Fonrouge, *supra* note 28.

113. *See* Manning, *supra* note 27.

114. *Id.*

115. Carrie Ann Johnson, *‘Whisper Networks’ About Sexual Harassment Thrive Because Formal Methods of Reporting are Traumatizing—and Often Don’t Work*, FORTUNE (Jan. 4, 2023, 1:59 PM), <https://fortune.com/2023/01/04/whisper-networks-sexual-harassment-women/>.

116. *See* Karen Schwartz, *Wall of Shame. Names of Alleged Rapists Written on Walls*, WIS. STATE J., Nov. 29, 1990, at 4A.

117. *See, e.g.,* Carter Sherman, *Women in Ohio are Using TikTok to Warn Each Other About Brock Turner*, VICE NEWS (Aug. 22, 2022, 11:52 AM), <https://www.vice.com/en/article/3adany/brock-turner-tiktok-ohio-rape>. In 2016, a judge sentenced Brock Turner to only six months in prison for raping an unconscious woman. Six years later, individuals continue to warn of his whereabouts through whisper networks. *Id.*

118. *See* Fonrouge, *supra* note 28.

3. Oversight Investigations

Persistent advocacy regarding the NYPD's mishandling of sex crimes has triggered numerous oversight investigations, eventually leading the DOJ to open its own investigation in 2022.¹¹⁹ In 2010, the former Police Commissioner developed an internal task force to evaluate the department's handling of sex crimes in response to complaints about its methods and procedures.¹²⁰ The task force identified significant concerns, including misclassifying crimes, mistreating victims, and recurring failures to investigate rape cases thoroughly.¹²¹

In 2018, the DOI released a troubling report from its year-long investigation into the NYPD and Special Victims Division (SVD), which found the same issues unresolved and some worsened.¹²² The DOI attributed deficiencies primarily to understaffing and inadequate training, both of which the task force addressed in its recommendations seven years earlier.¹²³ But instead of increased staffing and resources, the DOI found that NYPD leadership instructed officers to "simply not investigate" misdemeanor sex crimes and "make all resources available for stranger rapes and cases with high media profiles."¹²⁴ The DOI also confirmed the routine mistreatment of victims, found that insensitivity by detectives likely produces a silencing effect, and concluded that such mistakes directly impact public safety.¹²⁵

119. See *Justice Department Announces Investigation of New York City Police Department's Special Victims Division*, U.S. DEP'T OF JUST., OFF. OF PUB. AFFS. (June 30, 2022), <https://www.justice.gov/opa/pr/justice-department-announces-investigation-new-york-city-police-department-s-special-victims> [hereinafter DOJ REPORT].

120. See John Eligon, *Panel Seeks More Police Training on Sex Crimes*, N.Y. TIMES (June 2, 2010), <https://www.nytimes.com/2010/06/03/nyregion/03rape.html>; see also PETERS, *supra* note 19, at 6–7.

121. See PETERS, *supra* note 19, at 6–7.

122. See *generally id.* While NYPD expanded the SVD caseload per the task force recommendations, it did not follow the recommendation to increase the number of investigators. Thus, the SVD's caseload increased by 65.3%, but only two investigators were added to the unit. *Id.* at 8.

123. See *id.* at 1.

124. *Id.* at 1, 28. The report also noted a "longstanding, but problematic, Detective Bureau policy" that local precincts, rather than the SVD, are to investigate "acquaintance" and "domestic" rape cases if patrol officers summarily arrest the suspect. *Id.* at 28.

125. See *id.* at 28. ("Without a successful investigation, sexual predators remain unidentified and at large.").

In 2019, the NYPD's Internal Affairs Bureau (IAB) opened an investigation into allegations of misconduct within the SVD.¹²⁶ The IAB raided three of the sex crime unit's offices, collected years of log-books, and searched for rape kits that detectives retrieved from hospitals but were not submitted for testing.¹²⁷

Finally, in June 2022, the DOJ announced that it opened an investigation into the NYPD after receiving "concerning information" about how the SVD conducts its sex crime investigations.¹²⁸ The DOJ is looking into alleged deficiencies such as "failing to conduct basic investigative steps and instead shaming and abusing survivors and re-traumatizing them during investigations."¹²⁹ Thirteen years after the initial task force was established, the DOJ's investigation highlights the unbridled laxity with which sex crimes are handled in New York.

III. CALL TO ACTION

A. Resolutions For Positive Change

While oversight agencies resolve understaffing and training deficiencies, the legislature must remove the obstacles to justice for which it is responsible. When the legislature eliminated a statute of limitations for first-degree rape, it claimed, "[s]ex crimes are one of the most heinous and deeply disturbing in our society."¹³⁰ But suppose Jane calls the NYPD to report that her ex-husband, John, threatened to sue her for custody of their children unless she had sex with him, so she aversely complied, and then John reports that Jane stole a watch off his wrist. Jane's report of coerced rape is systematically the same as John's stolen watch because the legislature classifies those offenses as equal crimes.¹³¹ If, by chance, John's watch is valued over \$3,000, Jane would face a higher sentence than John.¹³² New York law needs meaningful reform without delay.

126. See Meg O'Connor, *Internal Affairs Investigators Raid NYPD's Special Victims Division for Third Time*, THE APPEAL (Jan. 9, 2020), <https://theappeal.org/nypd-special-victims-raid/>.

127. See *id.*; see also *People v. Regan*, 39 N.Y.3d 459, 493 (N.Y. 2023) (Singas, J., dissenting) ("[I]f law enforcement negligently delays rape investigations, [victim's] voices will continue to be stifled, rapists held unaccountable, and jury verdicts discarded.").

128. DOJ REPORT, *supra* note 119.

129. *Id.*

130. S.B. 8441, 229th Sess. (N.Y. 2006) (enacted).

131. N.Y. PENAL LAW §§ 135.60, 135.61, 155.30(5) (McKinney 2023).

132. N.Y. PENAL LAW §§ 155.35, 70.00(2)(d)–(e) (McKinney 2023).

It is time for the legislature to recognize that rape, in any form, is a serious crime. This Note does not purport to know the “right” solution but rather to raise awareness of disparities, explore options for reform, and spark discussion. As Bill 3340 remains uncertain, and in the spirit of consolidation, amending the definition of forcible compulsion would apply to all first-degree sex crimes, allowing the state to repeal numerous provisions in its crowded statutory scheme.¹³³ The question would then become whether to broaden the definition of force or define rape as sex without consent. Eliminating the need for force and defining rape as sex without consent sets forth an uncontroversial principle that “people do not want to be sexually penetrated unless and until they indicate . . . that they do.”¹³⁴

At a minimum, the legislature should reclassify its coercion and non-consent provisions as serious crimes, in which case it could vary the classifications of each. The deterrent influence of criminalization is most effective when a system increases the likelihood of catching offenders.¹³⁵ But a twenty-one-year sentencing discrepancy between rape with physical force and rape without physical force belies the seriousness of the latter crime, facilitating hesitancy by law enforcement in an already prejudiced area of the system.¹³⁶ Lawmakers thus need to realize that police, prosecutors, and judges are more likely to continue disregarding coerced and non-consensual rape so long as the crimes sit in class E next to relatively innocuous property theft.

133. See B. 3340, *supra* note 55 (proposing to merge oral and anal sexual conduct into the definition of rape); see also N.Y. PENAL LAW §§ 130.20, 130.25, 130.40, 130.55, 130.65-a, 135.61 (McKinney 2023). Bill 3340 would repeal two other provisions; together, these proposals would eliminate 36% of New York’s sex crime provisions.

134. Schulhofer, *supra* note 35, at 345. If the primary harm of rape is a loss of autonomy, then the only issue should be whether a person freely chooses to participate in the act. See *People v. De Stefano*, 467 N.Y.S.2d 506, 512 (Cnty. Ct. 1983) (“Rape is an abomination . . . because it is an assault on freedom. The gravity of rape is not in the injury to the [body], it is in the injury to autonomy.”).

135. See, e.g., NAT’L INST. JUST., FIVE THINGS ABOUT DETERRENCE 2 (2016); Yung, *supra* note 29, at 1205 (asserting that police mishandling of rape reports “substantially undermines the deterrence of rape by diminishing the probability that rapists will be arrested, prosecuted, and convicted.”); Lynge, *supra* note 10, at 267–70 (discussing attrition rates of sexual violence and how the statistics reflect failures in both deterrence and encouraging victims to report the crime).

136. See N.Y. PENAL LAW §§ 130.35, 130.25, 135.61, 70.00 (McKinney 2023). Coerced and non-consensual rape have a maximum sentence of four years but are often punished well below the ceiling when punished at all. See PENAL §§ 130.25, 135.61, 70.00; see also, e.g., *People v. Cariello*, 127 N.Y.S.3d 335, 335 (App. Div. 2020) (requiring a defendant to “abide by certain terms and conditions” for one-year of interim probation).

By comparison, Vermont—New York’s sister circuit state—authorizes a life sentence for non-consensual rape and increases its mandatory minimum sentencing for other violence and aggravating circumstances.¹³⁷ In essence, Vermont law does not allow the absence of additional physical force to negate the seriousness of rape. Meaningful reform should (1) send a message to both the community and law enforcement that all forms of rape are serious crimes; (2) remove the obstacles to a fair chance at trial; and (3) prevent egregious miscarriages of justice like those in *Graham* and *O’Donnell*.¹³⁸

B. Acknowledging the Opposition

Much resistance to rape law reform arises from common misconceptions about the nature of rape and its distinct harm as discussed in Section I.B.¹³⁹ Another lingering misconception derives from a “legacy of suspicion” surrounding the veracity of rape allegations.¹⁴⁰ As with most stereotypes, research indicates this suspicion is mistaken; the prevalence of false reports is trivial, and the presumed motives behind false accusations are fallacious.¹⁴¹ Perhaps the best reply to stereotypical opposition is modern-age statutory reform by the majority of states based on evolving understandings of the crime.¹⁴²

In some ways, reform has become a double-edged sword, giving rise to legitimate concerns regarding the potential for overcriminalization, a lack of due process for the accused, abuses of discretionary

137. See VT. STAT. ANN. tit. 13, § 3252(a)(1), (f)(1) (2023) (including both non-consent and coercion and imposing three-year minimum sentence with maximum term of life); VT. STAT. ANN. tit. 13, § 3253 (2023) (imposing a ten-year minimum sentence for added injury or threats, multiple actors involved, serial offenders, kidnapping the victim, and victims who are minors).

138. See *supra* Part II.

139. See Schulhofer, *supra* note 35, at 348–49.

140. *People v. Regan*, 39 N.Y.3d 459, 477 (N.Y. 2023) (Singas, J., dissenting) (“Hale famously wrote that ‘rape is an accusation easy to be made, hard to be proved and harder to be defended by the party accused though ever so innocent,’ setting off centuries of policies and legal theories designed to shield men from accusations, and accountability, and leave their victims without recourse.”); see also, e.g., Tuerkheimer, *supra* note 24, at 20.

141. See Tuerkheimer, *supra* note 24, at 20. (describing three studies where false report rates ranged from 4.5% to 6.8%, “significantly lower” than estimates by law enforcement officers; and debunking assumptions about motivations for false accusations, “even in false reports, revenge, regret and guilt are not usually factors.”).

142. See *supra* Section I.E.

authority, racial inequities, and the like.¹⁴³ For the most part, these concerns exist across all crimes; such opposition is thus a broader issue addressed through a wider scope of much-needed reform in the justice system. Antithetical to most crimes, however, deeply rooted prejudices unique to rape often lead authorities in “the *opposite* direction” of overcriminalization, disadvantaging survivors through no fault of their own and fueling an exigency to balance the scales.¹⁴⁴ Moreover, piecemeal legislation in New York and elsewhere has left property over person on the moral hierarchy. This Note seeks precedent reform to align the law with contemporary moral codes that value person over property.

CONCLUSION

The law’s obsessional focus on physical force as the demarcating line between sex and rape has narrowed the scope of the crime for far too long. If sex proceeds without freely given consent, it necessarily entails a forcible bodily assault of the worst kind and an obscene violation of human rights. But all too often, survivors of rape are told no visible harm, no foul.

Although New York statutorily accounts for rape without physical force, the provisions are flawed and the framework is detrimental. Evidenced by failures to achieve procedural justice during investigations and substantive justice in adjudication, the state needs to classify coerced and non-consensual rape as serious violent crimes against the person. New York cannot ignore the distinct harm of rape, the miscarriages of justice, or the hazard to public safety any longer. Ignoring such issues leaves survivors deprived of not only their autonomy but

143. See Schulhofer, *supra* note 35, at 350; Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 206, 239 (2017) (asserting that beliefs about the potential broad application of rape law contribute to opposition).

144. Schulhofer, *supra* note 35, at 350–51 (emphasis added). Justice Singas of the New York Court of Appeals dissented in a recent case, outlining the history of legal barriers to justice for survivors and criticizing the majority for reversing a jury conviction of first-degree rape based on an inexplicable investigatory delay. See *Regan*, 39 N.Y.3d at 474–94 (Singas, J., dissenting). Justice Singas cautioned, “[i]n creating a rule that will systemically bar countless victims from obtaining justice in the event law enforcement fails ‘to recognize the seriousness of sexual assault,’ (majority op at 17), the majority has only reaffirmed rape culture’s pernicious grasp on our criminal justice system. Its opinion will not deter this type of behavior by law enforcement, but instead be weaponized against victims and used in hindsight to rationalize closing long-running rape investigations and dismissing prosecutions.” *Id.* at 493. Justice Singas continued, “[d]espite much progress, and a cultural reckoning surrounding sexual violence and power dynamics, it is clear from today’s decision that there is much work to be done.” *Id.* at 494.

also of justice and leaves the public vulnerable to attack at the mercy of rapists. Defining rape as sex without consent reflects the value of individual autonomy and public safety.

APPENDIX A

Alabama	Includes the absence of consent for sexual misconduct, which has a maximum sentence of one year; first-degree theft of property valued over \$2,500 has a maximum sentence of ten years. ALA. CODE §§ 13A-6-65, 13A-8-3, 13A-5-7(1), 13A-5-6 (2023).
Alaska	Includes the absence of consent for sexual assault in the second degree, which has a maximum sentence of ninety-nine years; theft in the second degree of property valued at \$750–\$24,999.99 has a maximum sentence of five years. ALASKA STAT. §§ 11.41.420(a)(5), 11.41.470(10), 11.46.130, 12.55.125(d), (e), (i)(3) (2023).
Arizona	Expands its force requirement for sexual assault, which has a maximum sentence of fourteen years; the theft of property valued at \$3,000–\$3,999.99 has a maximum sentence of three years. ARIZ. REV. STAT. ANN. §§ 13-1401(7), 13-1406, 13-1802(G), 13-702(D) (2023).
Arkansas	Courts have held that the absence of consent satisfies the element of forcible compulsion for rape. <i>See, e.g.,</i> Holland v. State, 2020 Ark. App. 434, 13 (Ark. Ct. App. 2020), <i>review denied</i> , 2020 Ark. LEXIS 428 (Ark. 2020). Rape has a maximum sentence of forty years or life; the theft of property valued at \$1,000.01–\$5,000 has a maximum sentence of six years. ARK. CODE ANN. §§ 5-14-101(3), 5-14-103, 5-36-103(3), 5-4-401 (2023).
California	Expands its force requirement for rape, which has a maximum sentence of eight years; grand theft of property valued over \$950 has a maximum sentence of one year. CAL. PENAL CODE §§ 261(a)(2), (a)(7), (b)(1), 264, 487(a), 489 (West 2023).
Colorado	Includes the absence of consent for sexual assault, which has a maximum sentence of six years; the theft of property valued at \$2,000–\$4,999.99 has a maximum sentence of one year and six months. COLO. REV. STAT. §§ 18-3-401(1.5), 18-3-402(1)(a), 18-4-401, 18-1.3-401(1)(a)(V.5)(A) (2023).
Connecticut	Requires physical force for sexual assault in the first degree, which has a maximum sentence of twenty years; robbery in the third degree has a maximum sentence of five years. CONN.

	GEN. STAT. §§ 53a-70(a), 53a-136, 53a-35a (2023).
Delaware	Expands its force requirement for rape in the second degree, which has a maximum sentence of twenty-five years; the theft of property valued over \$1,500 has a maximum sentence of two years. DEL. CODE ANN. tit. 11, §§ 761(k), 772(a)(1), 791, 841(c)(1), 4205(b)(2), (b)(7) (2023).
Florida	Includes the absence of consent for sexual battery, which has a maximum sentence of fifteen years; grand theft in the third degree of property valued at \$750–\$19,999.99 has a maximum sentence of five years. FLA. STAT. §§ 794.011(1)(a), (5)(b), 812.014(2)(c), 775.082(3)(d)–(e) (2023).
Georgia	Requires physical force for rape, which is punishable by death or life imprisonment; robbery has a maximum sentence of twenty years. GA. CODE ANN. §§ 16-6-1(a)(1), (b), 16-8-40 (2023).
Hawaii	Includes the absence of consent for sexual assault in the second degree, which has a maximum sentence of ten years; theft in the second degree of property valued at \$750.01–\$20,000 has a maximum sentence of five years. HAW. REV. STAT. §§ 707-700, 707-731(1)(a), 708-831(1)(b), (2), 708-830.5(1)(a), 706-660(1) (2023).
Idaho	Expands its force requirement for rape, which has a maximum sentence of life imprisonment; grand theft of property valued over \$1,000 has a maximum sentence of fourteen years. IDAHO CODE §§ 18-6101(6), (10), 18-6104, 18-2407(1)(b), 18-2408(2)(a) (2023).
Illinois	Requires physical force for criminal sexual assault, which has a maximum sentence of fifteen years; robbery has a maximum sentence of seven years. 720 ILL. COMP. STAT. 5/11-1.20(a)(1), 5/18-1 (2023); 730 ILL. COMP. STAT. 5/5-4.5-30(a), 5/5-4.5-35(a) (2023).
Indiana	Includes the absence of consent for rape, which has a maximum sentence of sixteen years; the theft of property valued at \$750–\$49,999.99 has a maximum sentence of two years and six months. IND. CODE §§ 35-42-4-1(a)(4), 35-43-4-2(a)(1)(A), 35-50-2-5(b), 35-50-2-7(b) (2023).
Iowa	Courts have held that the absence of consent is sufficient for sexual abuse in the third degree. <i>See, e.g., State v. Kelso-Christy</i> , 911 N.W.2d 663, 667 (Iowa 2018) (explaining the legislative intent behind “against the will” is to protect against nonconsensual acts). Sexual abuse in the third degree has a

	maximum sentence of ten years; theft in the second degree of property valued at \$1,500.01–\$10,000 has a maximum sentence of five years. IOWA CODE §§ 709.1(1), 709.4(1)(a), 714.2(2), 902.9(d), (e) (2023).
Kansas	Expands its force requirement for rape, which has a maximum sentence of forty-nine years and four months; the theft of property valued at \$1,500–\$24,999.99 has a maximum sentence of nine months. KAN. STAT. ANN. §§ 21-5503(a)(1)(A), (b)(1)(A), 21-5801(b)(3), 21-6804 (2023).
Kentucky	Requires physical force for rape in the first degree, which has a maximum sentence of twenty years; robbery in the second degree has a maximum sentence of ten years. KY. REV. STAT. ANN. §§ 510.010, 510.040, 515.030, 532.060 (West 2023).
Louisiana	Includes the absence of consent for third degree rape, which has a maximum sentence of twenty-five years; the theft of property valued at \$1,000–\$4,999.99 has a maximum sentence of five years. LA. STAT. ANN. §§ 14:43(A)(4), (B), 14:67(B)(3) (2023).
Maine	Expands its force requirement for gross sexual assault, which has a maximum sentence of ten years, but non-consent under gross sexual assault has a maximum sentence of five years; the theft of property valued at \$1,000.01–\$10,000 has a maximum sentence of five years. ME. STAT. tit. 17-A, §§ 253(2)(B), (M), 1604 (2023) (amended 2023); ME. STAT. tit. 17-A, § 353(B)(4) (2023).
Maryland	Requires physical force for rape in the first degree, which has a maximum sentence of life imprisonment; robbery has a maximum sentence of fifteen years. MD. CODE ANN., CRIM. LAW §§ 3-303(a), (d)(1), 3-304, 3-402 (LexisNexis 2023).
Massachusetts	Courts have held that the definition of force for rape is not limited to physical force. <i>See, e.g., Commonwealth v. Caracciola</i> , 569 N.E.2d 774, 776 (Mass. 1991). Rape has a maximum sentence of twenty years; larceny of property valued over \$1,200 has a maximum sentence of five years. MASS. GEN. LAWS ch. 265 § 22(b), ch. 266 § 30(1) (2023).
Michigan	Expands its force requirement for criminal sexual conduct in the first degree, which has a maximum sentence of life imprisonment; larceny of property valued at \$1,000.01–\$20,000 has a maximum sentence of five years. MICH. COMP. LAWS §§ 750.520a(n), 750.520b(f), 750.356(3) (2023).
Minnesota	Expands its force requirement for criminal sexual conduct in the third degree, which has a maximum sentence of fifteen years; the theft of property valued at \$1,000.01–\$5,000 has a

	maximum sentence of five years. MINN. STAT. §§ 609.344(1a), (2), 609.52(3)(3) (2023).
Mississippi	Includes the absence of consent for sexual battery, which has a maximum sentence of thirty years; grand larceny of property valued at \$1,000–\$4,999.99 has a maximum sentence of five years. MISS. CODE. ANN. §§ 97-3-95(1)(a), 97-3-101, 97-17-41(1) (2023).
Missouri	Includes the absence of consent for rape in the second degree, which has a maximum sentence of seven years; stealing property valued at \$750–\$24,999.99 has a maximum sentence of seven years. MO. REV. STAT. §§ 566.031, 570.030(4), (5), 558.011 (2023).
Montana	Includes the absence of consent for sexual intercourse without consent, which has a maximum sentence of twenty years or life imprisonment; the theft of property valued at \$1,500.01–\$5,000 has a maximum sentence of three years. MONT. CODE ANN. §§ 45-5-503, 45-6-301(7)(b) (2023).
Nebraska	Includes the absence of consent for sexual assault in the first degree, which has a maximum sentence of fifty years; the theft of property valued at \$1,500–\$4,999.99 has a maximum sentence of two years. NEB. REV. STAT. §§ 28-319, 28-518(2), 28-105 (2023).
Nevada	Courts have held that the absence of consent is sufficient for sexual assault. <i>See, e.g., Dinkens v. State</i> , 546 P.2d 228, 230 (Nev. 1976) (explaining that physical force is not required; instead, the question is whether the act was committed without consent). Sexual assault has a maximum sentence of life imprisonment; the theft of property valued at \$1,200–\$4,999.99 has a maximum sentence of four years. NEV. REV. STAT. §§ 200.366(1)(a), 205.0835(2)(b), 193.130 (2023).
New Hampshire	Includes the absence of consent for aggravated felonious sexual assault, which has a maximum sentence of twenty years; the theft of property valued over \$1,500 has a maximum sentence of fifteen years. N.H. REV. STAT. ANN. §§ 632-A:2(I)(m), 632-A:10-a, 637:11(I)(a), 651:2 (2023).
New Jersey	Includes the absence of consent for sexual assault, which has a maximum sentence of ten years; theft in the third degree of property valued at \$500.01–\$74,999.99 has a maximum sentence of five years. N.J. STAT. ANN. §§ 2C:14-2(c)(1), 2C:20-2(b)(2), 2C:43-6 (West 2023).
New Mexico	Expands its force requirement for criminal sexual penetration in the second degree, which has a basic sentence of nine years;

	larceny of property valued at \$2,500.01–\$20,000 has a basic sentence of three years. N.M. STAT. ANN. §§ 30-9-11(E)(3), 30-9-10(D); 30-16-1(E), 31-18-15 (2023).
New York	Includes the absence of consent for rape in the third degree, which has a maximum sentence of four years; grand larceny in the third degree of property valued at \$1,000.01–\$3,000 has a maximum sentence of four years. N.Y. PENAL LAW §§ 130.25, 155.30, 70.00 (McKinney 2023).
North Carolina	Courts have held force does not need to be physical, and “against the will” is defined as the absence of consent. <i>See, e.g.</i> , <i>State v. Stanley</i> , 327 S.E.2d 902, 905 (N.C. Ct. App. 1985); N.C. GEN. STAT. § 14-27.20(1a) (2023). Second-degree forcible rape has a maximum sentence of thirteen years and nine months; larceny of property valued over \$1,000 has a maximum sentence of two years and one month. N.C. GEN. STAT. §§ 14-27.22, 14-72(a), 15A-1340.17 (2023).
North Dakota	Expands its force requirement for sexual imposition, which has a maximum sentence of ten years; the theft of property valued at \$1,000.01–\$10,000 has a maximum sentence of five years. N.D. CENT. CODE §§ 12.1-20-04(1), 12-23-05(2), (3)(a), 12-32-01 (2023).
Ohio	Expands its force requirement for sexual battery, which has a maximum sentence of five years; the theft of property valued at \$1,000–\$7,499.99 has a maximum sentence of one year. OHIO REV. CODE ANN. §§ 2907.03(A)(1), 2913.02(B), 2929.14 (LexisNexis 2023).
Oklahoma	Expands its force requirement for rape in the first degree, which is punishable by death or life imprisonment; grand larceny of property valued over \$1,000 has a maximum sentence of five years. OKLA. STAT. tit. 21, §§ 111(A), 1114, 1115, 1704, 1705 (2023).
Oregon	Includes the absence of consent for sexual abuse in the second degree, which has a maximum sentence of five years; theft in the first degree of property valued over \$1,000 has a maximum sentence of five years. OR. REV. STAT. §§ 163.425, 164.055, 161.605 (2023).
Pennsylvania	Expands its force requirement for rape, which has a maximum sentence of twenty years for rape; the theft of property valued at \$2,000.01–\$99,999.99 has a maximum sentence of seven years. 18 PA. CONS. STAT. §§ 3121, 3101, 3903(a.1), (a)(5), 1103 (2023).

Rhode Island	Expands its force requirement for second-degree sexual assault, which has a maximum sentence of fifteen years; larceny of property valued at \$1,500.01–\$4,999.99 has a maximum sentence of three years. 11 R.I. GEN. LAWS §§ 11-37-4(2), 11-37-5, 11-41-5(a)(1) (2023).
South Carolina	Expands its force requirement for criminal sexual conduct in the third degree, which has a maximum sentence of ten years; larceny of property valued at \$2,000.01–\$9,999.99 has a maximum sentence of five years. S.C. CODE ANN. §§ 16-3-654, 16-3-651, 16-13-30 (2023).
South Dakota	Expands its force requirement for rape in the second degree, which has a maximum sentence of fifty years; grand theft of property valued at \$2,500.01–\$5,000 has a maximum sentence of five years. S.D. CODIFIED LAWS §§ 22-22-1(2), 22-30A-17, 22-6-1 (2023).
Tennessee	Includes the absence of consent for rape, which has a maximum sentence of twenty years; the theft of property valued at \$2,500–\$9,999.99 has a maximum sentence of four years. TENN. CODE ANN. §§ 39-13-503(a)(2), (b), 39-14-105(a)(3), 40-35-112 (2023).
Texas	Expands its force requirement for sexual assault, which has a maximum sentence of twenty years; the theft of property valued between \$2,500–\$29,999.99 has a maximum sentence of two years. TEX. PENAL CODE ANN. §§ 22.011(b)(1), 31.03(e)(4)(A), 12.33, 12.35 (West 2023).
Utah	Includes the absence of consent for rape, which has a maximum sentence of life imprisonment; the theft of property valued at \$1,500.01–\$4,999.99 has a maximum sentence of five years. UTAH CODE ANN. §§ 76-5-402, 76-6-404, 76-3-203 (LexisNexis 2023).
Vermont	Includes the absence of consent for sexual assault, which has a maximum sentence of life imprisonment; grand larceny of property valued over \$900 has a maximum sentence of ten years. VT. STAT. ANN. tit. 13, §§ 3252(a)(1), (f)(1), 2501 (2023).
Virginia	Courts have held that the absence of consent satisfies the element of force for rape. <i>See, e.g., Jones v. Commonwealth</i> , 252 S.E.2d 370, 372 (Va. 1979). Rape has a maximum sentence of life imprisonment; grand larceny of property valued over \$1,000 has a maximum sentence of twenty years. VA. CODE ANN. §§ 18.2-61, 18.2-95 (2023).

Washington	Includes the absence of consent for rape in the third degree, which has a maximum sentence of eight years; theft in the second degree of property valued at \$750.01–\$5,000 has a maximum sentence of two years and five months. WASH. REV. CODE §§ 9A.44.060(1)(a), 9A.44.010, 9A.56.040, 9.94A.510, 9.94A.515 (2023).
West Virginia	Requires physical force for sexual assault in the first degree, which has a maximum sentence of thirty-five years; robbery has a maximum sentence of eighteen years. W. VA. CODE §§ 61-8B-3(a)(1), (b), 61-8B-1(1), 61-2-12 (2023).
Wisconsin	Includes the absence of consent for third-degree sexual assault, which has a maximum sentence of ten years; the theft of property valued at \$2,500.01–\$5,000 has a maximum sentence of 3.5 years. WIS. STAT. §§ 940.225(3)(a), 943.20(3)(bf), 939.50 (2023).
Wyoming	Expands its force requirement for sexual assault in the second degree, which has a maximum sentence of twenty years; the theft of property valued over \$1,000 has a maximum sentence of ten years. WYO. STAT. ANN. §§ 6-2-303(a)(ii), 6-3-402(c)(i), 6-2-306 (2023). ¹⁴⁵

145. This survey is intended to provide a broad overview of each state's approach to defining rape and a proximate comparison between the sentencing of rape crimes and property crimes. As such, it oversimplifies many states' statutory schemes. For example, some states that expand the force requirement differ on what constitutes nonphysical force. Further, many states employ incremental sentencing and authorize moderately higher sentences for aggravating circumstances, such as additional violence, the use of weapons, etcetera. As Kansas, North Carolina, and Washington use sentencing charts, the calculations here are based on the maximum offender score to maintain consistency in designating the maximum sentence for all states. Regarding theft, provisions were selected by the closest monetary range to the valuation that New York classifies as equivalent to rape without physical force.