



UNITED STATES

PROTECTION GAPS IN SEXUAL VIOLENCE LAWS AND PRACTICES

A Country Factsheet

INTRODUCTION

Prevalence of sexual violence is extremely high in the United States of America, where almost 1 in 5 women have reported being raped at least once in their lifetime. The vast majority (78.7%) of rape survivors reported that their first rape occurred before they were aged 25 years. More than 40% were raped before the age of 18, indicating that a significant proportion of sexual violence in the United States is towards young women and adolescent girls.¹ Despite the high prevalence, protection gaps in the laws themselves deny access to justice for many survivors of sexual violence as they provide a number of opportunities for perpetrators to escape justice.

The United States has ratified very few international and regional human rights conventions. It has however ratified the International Covenant on Civil and Political Rights (ICCPR), which requires all States to repeal discriminatory laws as well as ensure effective access to justice for victims whose rights have been violated (including victims of sexual violence).

Since the U.S. follows a federal legal structure, in addition to the federal laws (which are applicable only in limited circumstances), states are able to enact and implement their own laws on sexual violence. Despite the limited applicability of the federal laws, they do sometimes play an important role in setting a model legislation for states to follow. Since the federal United States Code does include certain outdated and discriminatory provisions, it is important that the federal law also be amended to comply with international standards. In addition to the federal law, we analyse the applicable laws on rape from the states and territories of California, Maryland, New York, Puerto Rico and Virginia. These states/territories have been selected as examples to demonstrate protection gaps and shortcomings in the law, though there may be similar issues in numerous other states which need to be addressed.

Note: The information in this factsheet is largely derived from the report titled ***Failure to Protect: How Discriminatory Sexual Violence Laws and Practices are Hurting Women, Girls and Adolescents in the Americas***, published by Equality Now in September 2021. Please refer to the report for further information on these laws as well as a full list of recommendations.

¹ Waechter, R., & Ma, V, Sexual Violence in America: Public Funding and Social Priority, *Am J Public Health*, 105(12), 2430–2437, 2015, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4638240/>.

PROTECTION GAPS IN THE LAW

Force-Based Definition of Rape

What is the issue? Definitions of rape which are based on force or the threat of force, as opposed to lack of consent to the sexual intercourse, fail to meet international human rights standards² and are problematic for a number of reasons. Force-based definitions of rape risk leaving certain types of rape unpunished, contribute to rape myths and the perception that it is the responsibility of victims to protect themselves, significantly limit the extent to which crimes of rape can successfully be prosecuted, and leave room for significant impunity.

The Model Rape Law drafted by the UN Special Rapporteur on Violence against Women states that:

“Rape is an act of sexual nature committed without consent. Definitions of rape should explicitly include lack of consent and place it at its centre, stipulating that rape is any act of sexual penetration of a sexual nature by whatever means committed against a person who has not given consent.”³

What does U.S. Law say?

- The definition of sexual abuse and aggravated sexual abuse in the United States Code is based on force, requiring force, fear or threat unless the victim is incapable of appraising the nature of the conduct, or is physically unable to decline participation in the sexual act.⁴
- The laws of four out of the five U.S. states and territories studied (Maryland, New York, Puerto Rico, and Virginia) contain similar definitions of rape which require some form of force or incapacity to resist on part of the victim, though the exact requirements of the rape definition varies across jurisdictions. Sexual intercourse/contact without consent is usually punishable only as a lesser offense with lower penalties. Such an approach suggests that lawmakers believe that a victim is less harmed if no physical force is used or that the victim to some extent permitted the crime by not fighting back or that the victim to some extent welcomed the act. None of these beliefs reflects the reality of rape and the reaction of a victim cannot be captured in a single, stereotypical response.
- For instance, the law in New York requires that in order to prove rape of the first or second degree, there must be forcible compulsion (i.e. use of physical force or threat which causes fear of death, physical injury or kidnapping), or the victim should be incapable of consenting due to being physically helpless (i.e. unconscious or for any other reason physically unable to communicate unwillingness).⁵ Sexual intercourse without consent is considered as rape of the third degree, with a much lower penalty (maximum of 4 years in prison) as compared to first-degree rape (punishable by a maximum of 25 years in prison).
- Many jurisdictions in the U.S. have some element of force within the rape definition, or expressly require both lack of consent and force as elements of rape by statute.⁶

What needs to change?

The federal government and governments of concerned U.S. states and territories should:

- Ensure that the definition of rape is amended so that it is not based on a requirement to prove force, but rather covers all forms of sexual penetration with a body part or object committed without the victim's voluntary, genuine, and willing consent, and in a wide range of coercive circumstances.
- Ensure that the law recognizes there are circumstances where it is not possible to give voluntary, genuine, and willing consent and that it must look more broadly at the issue of exploitation, including sexual violence in the context of family or other relationship where there is particular dependency and inequality of power relationships.

² See Inter-American Court of Human Rights, *Sentence in the Caso J. vs. Peru*, 27 November 2013, https://www.corteidh.or.cr/docs/casos/articulos/seriec_275_esp.pdf at para. 358; Committee on the Elimination of Discrimination against Women, CEDAW/C/GC/35, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, §5.

³ Report of the Special Rapporteur on violence against women, its causes and consequences, *A framework for legislation on rape (model rape law)*, A/HRC/47/26/Add.1, 15 June 2021, p. 6.

⁴ 18 United States Code §§ 2242, 2243; <https://www.law.cornell.edu/uscode/text/18/2242>.

⁵ New York Penal Law, Article 130 - Sex Offenses, §§130.35, 130.30; <https://www.nysenate.gov/legislation/laws/PEN/P3THA130>

⁶ See Catharine A MacKinnon, *Rape Redefined*, 10 Harvard Law and Policy Review 431, 437 (2016)

Roadblocks to Accessing Justice for Adolescent Victims

What is the issue? Certain jurisdictions have specific provisions that provide for a lower penalty in cases of what could be sexual abuse of adolescents/minors, which would then result in gaps in protection. Such provisions create a hierarchy of punishment for rape/sexual abuse that particularly discriminate against adolescent girls and afford considerable impunity to offenders.

What does U.S. Law say?

- In Virginia, the offense of carnal knowledge of a child between the ages of 13-15 without the use of force is classified as a separate offense, with penalties of imprisonment of 2-10 years. This is lower than rape (5 years to life imprisonment), but higher than the offense of statutory rape⁷ of a child of the same age (which is punishable by 1-5 years in prison).
- In California and Maryland, lower penalties are applicable for sexual intercourse with adolescents of a certain age. It is unclear as to whether these provisions operate only to set an age below which the law considers a minor unable to give consent, even in the context of apparent consensual intercourse with their peers, or whether they are also intended to address non-consensual sexual intercourse with adolescents/minors. Due to the lack of clarity and considering that the penalties applicable to these provisions are significantly lower than the penalty for rape, the ambiguity in the law leaves open the possibility that perpetrators who commit rape against adolescent girls will be charged under these lesser offenses.

What needs to change? The respective state governments should:

- Repeal provisions that treat rape of adolescents as a lesser offense.⁸ Where the law is unclear, the situations in which such provisions apply (particularly regarding their application to non-consensual sexual intercourse) should be clarified in such a way that protects adolescents from exploitation.
- Ensure that adolescent girls are protected from sexual violence in all circumstances, including by:
 - Reviewing and amending as necessary the whole ecosystem of laws affecting women and girls to ensure they are non-discriminatory and complementary to each other, including laws on child marriage, rape in marriage/intimate partnerships, and access to sexual and reproductive healthcare.
 - Ensuring that programs preventing and addressing sexual violence take a survivor-centered, holistic approach with a special focus on the needs of girls and adolescents, that such programs are implemented effectively throughout the country (including in rural areas), and that survivors are provided with support services irrespective of whether they file a criminal complaint.
 - Implementing age-appropriate sex and relationship education programs in schools, and public information and awareness campaigns aimed at promoting equality, addressing negative stereotypes, and ending violence against women and girls.

⁷ Statutory rape refers to what would be considered consensual sex, except for the fact that it involved a minor whose age means the law deems her or him incapable of being able to consent (in this case between the ages of 13-15).

⁸ Provided that rape itself is prosecutable for all victims, including adolescent girls, i.e. based on a definition of consent assessed in the context of any coercive circumstances

Marital Rape

Failure to adequately address Marital Rape

The law in Maryland explicitly prohibits prosecution for certain sex crimes, including first and second-degree rape, if the accused was the spouse of the victim at the time of the incident. A bill to remove the marital exception is currently pending before Maryland lawmakers.⁹ In other states, there are disproportionately low penalties applicable for marital rape. In Virginia, the law allows judges to only mandate counseling or therapy (without a prison sentence) for marital rape if the judge “finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.”¹⁰ Similarly in California, there is currently no mandatory prison sentence for spousal rape.¹¹ However, a Bill which removes all applicable exemptions for spousal rape was passed by California’s legislature in September 2021 and at the time of writing, is awaiting the signature of the Governor.¹²

What needs to change? State governments should:

- Criminalize marital rape in all cases.
- Set the penalties for marital rape at least as high as for rape generally and list rape in the context of marriage or intimate partner relationship as an aggravating factor in crimes of rape.

Marital Exceptions to Statutory Rape

Section 2243(a) of the federal United States Code (Title 18), on the Sexual Abuse of a Minor, applies when a person “knowingly engages in a sexual act with another person” who is between the ages of 12 and 16 and who is at least four years younger than the perpetrator. 18 U.S.C. Section 2243(c)(2) allows a defense to this crime when “the persons engaging in the sexual act were at that time married to each other.”¹³ This means that, at the federal level, child marriage is viewed as a valid defense to statutory rape, thereby both condoning and enabling child marriage, and enabling impunity for rape of children. Most states across the country have a similar marital exception to statutory rape¹⁴, including California¹⁵, Maryland¹⁶, and New York¹⁷ of the states/territories analysed for the purpose of this factsheet.

What needs to change? The federal and state governments should:

- Remove all provisions that exempt a charge of rape or statutory rape in the context of marriage.
- Set the minimum age of marriage at 18, without exceptions.

Furthermore, the federal Immigration and Nationality Act does not set a minimum age to petition for a foreign spouse or fiancé(e) visa or to be the beneficiary of a spousal or fiancé(e) visa.¹⁸ This protection gap allows for American girls to be exploited for their citizenship and girls around the world to be coerced to the U.S. and raped all under the pretense of marriage.

9 See Kimberly Seif, *Bill to repeal spousal defense for sexual crimes moves to Maryland House of Delegates*, 30 March 2021

<https://www.baltimoresun.com/politics/bs-md-pol-spousal-defense-sex-crimes-bill-20210330-pwkopqejfbgprizgob4naojvem-story.html>

10 Va. Code Ann. §§18.2-6 (C) .

11 California Penal Code, § 262; <https://leginfo.ca.gov/faces/codesTOCSelected.xhtml?tocCode=PEN>

12 AB-1171 Rape of a Spouse, https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1171

13 18 United States Code Section 2243.

14 Unchained at Last, United States’ Child Marriage Problem, April 2021, https://www.unchainedatlast.org/united-states-child-marriage-problem-study-findings-april-2021/#_ftnref16

15 California Penal Code § 261.5

16 MD Code, Criminal Law, § 3-318(a).

17 N.Y. Penal Code § 130.10. In New York, the minimum age of marriage has been increased to 18 without any exceptions as at July 2021, so this provision on the marital exception to statutory rape will have only limited applicability to incidents which took place before the change in the law.

18 8 United States Code Section 1101.

Statute of Limitations

A number of states in the U.S. have eliminated the statute of limitations for felony sex crimes entirely, including Maryland and Virginia. This is a welcome move. In California and New York, a few felony sex offenses still have a statute of limitations. For instance in New York, the statute of limitations for rape in the second degree and rape in the third degree are 10 years (though in the case of minor victims, this period only begins to run when the victim reaches the age of 23).¹⁹ In Puerto Rico, the statute of limitations for the crime of sexual aggression (rape) is currently 20 years in the case of adult victims, though it has been eliminated entirely if the victim was a minor at the time of commission of the offense.²⁰

To ensure perpetrators are held accountable and victims have access to justice, the government of all U.S. states and territories should ensure that the prosecution of rape is not subject to any period of limitation in any circumstances, whether carried out in times of peace or conflict.

¹⁹ See RAINN, State-by-State Guide on Statutes of Limitation, <https://www.rainn.org/state-state-guide-statutes-limitations>

²⁰ 33 L.P.R.A. § 5132, 5133

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