

**Submission by the Coalition Against Trafficking in Women (CATW)  
to the UN SRVAW Thematic Report on Rape as a Grave and Systematic Human Rights Violation  
and Gender-Based Violence Against Women**

**Questionnaire on Criminalization and Prosecution of Rape**

28 December 2020

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
<b>Definition and Scope of Criminal Law Provisions</b>			
1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.	1. Rape: sexual intercourse (penal-vaginal penetration) <sup>1</sup> 2. Criminal sexual act: oral or anal sexual conduct <sup>2</sup> 3. Sexual abuse: sexual contact (any touching of sexual/intimate parts of a person for purpose of gratifying sexual desire) <sup>3</sup> 4. Aggravated sexual abuse: insertion of a finger or foreign object <sup>4</sup> 5. Forcible touching <sup>5</sup> 6. Predatory sexual assault: first degree rape, criminal sexual act, aggravated sexual abuse, or course of sexual conduct against a child and (i) causes serious physical injury, (ii) uses/threatens use of a dangerous instrument or (iii) against one or more people; or previously convicted of a felony under § 130, incest (§ 255.25) or	The vast majority of California sexual abuse offenses are found in the California Penal Code. Major provisions are: <ul style="list-style-type: none"> <li>- § 261(rape, consent)</li> <li>- §262 (rape of a spouse)</li> <li>- §263 (sufficiency of penetration).</li> </ul> [Note: transcripts to be attached]	The vast majority of federal sexual abuse offenses are found in Chapters 109A, 110 and 117 of Title 18 of the United States Code.  The major provisions and focus of this questionnaire are: 18 U.S.C. § 2241 Aggravated sexual abuse  18 U.S.C. § 2242 Sexual abuse  18 U.S.C. § 2243 Sexual abuse of a minor or ward  18 U.S.C. § 2244 Abusive sexual contact  Additional provisions related to sex trafficking include:  18 U.S.C. § 1591 Sex trafficking of children or by force, fraud or coercion

<sup>1</sup> N.Y. Penal Law §§ 130.00, 130.35, 130.30, 130.25; 6 New York Criminal Practice § 59.03 (2020).

<sup>2</sup> N.Y. Penal Law §§ 130.50, 130.45, 130.40.

<sup>3</sup> Id. §§ 130.65, 130.60, 130.55.

<sup>4</sup> Id. §§ 130.70, 130.67, 130.66, 130.665-a.

<sup>5</sup> Id. § 130.52.

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
	<p>use of a child in a sexual performance (§ 263.05)<sup>6</sup></p> <p>7. Sex trafficking: intentionally advances/profits from prostitution by way of providing drugs to person who is being patronized, making false statements, impairing freedom of movement, using force, instilling fear<sup>7</sup></p> <p>See Appendix 1 for further detail.</p> <p>[Note: transcripts to be attached]</p>		<p>18 U.S.C. § 2421 Transportation generally</p> <p>18 U.S.C. §2422 Coercion and enticement</p> <p>18 U.S.C. §2423 Transportation of minors</p> <p>18 U.S.C. §2425 Use of interstate facilities to transmit information about a minor</p> <p>[Note: transcripts to be attached]</p>
2. Based on the wording of those provisions, is the provided definition of rape:			
2a. Gender specific, covering women only YES/NO	No	No	No
2b. Gender neutral, covering all persons YES/NO	Yes	Yes	Yes
2c. Based on the lack of consent of victim YES/NO	<p>Yes – lack of consent is an element of every offense defined in Article 130 (sex offenses).</p> <p>Lack of consent results from:</p> <p>(a) forcible compulsion</p> <p>(b) incapacity to consent</p>	<p>Yes – Consent = “positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.”<sup>9</sup></p> <p>Previous relationship does not constitute consent.<sup>10</sup></p>	<p>Yes-</p> <p>Abusive sexual contact requires a person to knowingly engage “in sexual contact with another person without that other person’s permission”.<sup>12</sup></p> <p>However, the more substantial US federal rape laws are not based on lack of consent.</p>

<sup>6</sup> Id. § 130.95.

<sup>7</sup> Id. § 230.34.

<sup>9</sup> Cal. Penal Code § 261.6 (West 2020).

<sup>10</sup> Id.

<sup>12</sup> 18 U.S.C. § 2244

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	<p>(c) when the victim does not acquiesce (expressed or implied) (sexual abuse/forcible touching)</p> <p>(d) victim clearly expressed that they did not consent (third degree rape/criminal sexual act)</p> <p>A person is incapable of consent when they are:</p> <p>(a) less than 17 years old</p> <p>(b) mentally disabled</p> <p>(c) mentally incapacitated</p> <p>(d) physically helpless</p> <p>(e) in the care/custody/supervision of a government facility or office (ex. correctional facility, hospital, office of children and family services, residential facility licensed by office of mental health) and the actor is an employee of, or person providing services to, the facility/office. In some cases, the law specifies that the actor is not married to the victim.</p> <p>(f) a patient and the actor is a health care provider and the act occurred during a session/examination/etc. (third degree rape/criminal sexual act/sexual abuse and fourth degree aggravated sexual abuse)</p>	<p>Can be incapable of giving consent as a result of mental disorder or developmental/physical disability.<sup>11</sup></p>	<p>Aggravated sexual abuse is dependent on “using force”, “by threatening or placing that other person in fear”, rendering “another person unconscious” or administering “to another person by force or threat of force... a drug, intoxicant or other similar substance” that “substantially impairs the ability of that other person to appraise or control conduct”.<sup>13</sup></p> <p>Sexual abuse is dependent on “threatening or placing that other person in fear” or engaging in a sexual act with a person who is “incapable of appraising the nature of the conduct” or “physically incapable of declining participation.”<sup>14</sup></p>

<sup>11</sup> Id. § 261.

<sup>13</sup> 18 U.S.C. § 2241

<sup>14</sup> 18 U.S.C. § 2242

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
	(g) detained/in custody of a law enforcement official and the actor is a law enforcement official <sup>8</sup>		
2d. Based on the use of force or threat YES/NO	Yes – Use of force is not necessary, but “forcible compulsion” falls under first degree rape and criminal sexual act. <sup>15</sup> Forcible compulsion = use or threat of force. <sup>16</sup> Second and third degree rape and criminal sexual act do not involve use or threat of force. <sup>17</sup>	Yes – includes use or threat of force as well as threat of injury to the victim or another person. <sup>18</sup>	Yes- Use of force, or the threatening or placing of the victim in fear of “death, serious bodily injury or kidnapping” is only required for aggravated sexual abuse. <sup>19</sup>  The other sex crimes (sexual abuse, sexual abuse of a minor or ward and abusive sexual contact) are not dependent on actual or threatened force. <sup>20</sup>
2e. Some combination of the above. YES/NO	Yes – use or threat of force falls under first degree rape and criminal sexual act. First, second, and third degree rape and criminal sexual act all involve lack of consent. <sup>21</sup>	Yes	Yes  As discussed above, force or threat of force only applies to aggravated sexual abuse, but not other sex crimes.
2f. Does it cover only vaginal rape? YES/NO	No – sexual intercourse which “has its ordinary meaning and occurs upon any penetration, however slight” falls under first, second, and third degree rape. <sup>22</sup> Ordinary meaning is defined in case law as	No –  Rape is an act of sexual intercourse which is defined as vaginal penetration/intercourse. <sup>25</sup>	No- Aggravated sexual abuse and sexual abuse involves a “sexual act”, while abusive sexual contact involves “sexual contact”  The definition of “sexual act” includes:

<sup>8</sup> N.Y. Penal Law § 130.05.

<sup>15</sup> N.Y. Penal Law § 130.35.

<sup>16</sup> Id. § 130.00.

<sup>17</sup> Id. §§ 130.30, 130.25.

<sup>18</sup> Cal. Penal Code § 261 (West 2020).

<sup>19</sup> 18 U.S.C. § 2241

<sup>20</sup> 18 U.S.C. § 2242, § 2243, § 2244

<sup>21</sup> N.Y. Penal Law §§ 130.35, 130.30, 130.25.

<sup>22</sup> N.Y. Penal Law §§ 130.00, 130.35, 130.30, 130.25.

<sup>25</sup> 18 Cal. Jur. 3d *Criminal Law: Crimes Against the Person* § 575, Westlaw (database updated August 2020).

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
	<p>“heterosexual penal-vaginal sexual intercourse.”<sup>23</sup></p> <p>Oral/anal sexual conduct does not count as rape, but does fall under first, second and third degree criminal sexual act.<sup>24</sup></p>	<p>Other forms of genital/anal penetration are covered under Forcible acts of sexual penetration.<sup>26</sup></p>	<p>a) Contact between the penis and the vulva or the penis and the anus</p> <p>b) Contact between the mouth and the penis, the mouth and the vulva or the mouth and the anus</p> <p>c) The penetration of an the anal or genital opening by a hand of finger or by any other object</p> <p>d) The intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years old</p> <p>The definition of “sexual conduct” is the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh or buttocks.<sup>27</sup></p>
<p>2g. Does it cover all forms of penetration? YES/NO</p> <p>If yes, please specify.</p>	<p>Yes –</p> <ol style="list-style-type: none"> <li>1. Rape = penal-vaginal penetration</li> <li>2. Criminal sexual act = oral/anal conduct</li> <li>3. First, third and fourth degree aggravated sexual abuse = insertion of a foreign object</li> <li>4. Second degree aggravated sexual abuse = insertion of a finger<sup>28</sup></li> </ol>	<p>Yes –</p> <ol style="list-style-type: none"> <li>1. Rape = vaginal penetration<sup>29</sup></li> <li>2. Forcible acts of sexual penetration = genital/anal penetration “by any foreign object, substance, instrument, or device, or by any unknown object” – this includes penetration with any part of the body<sup>30</sup></li> </ol>	<p>Yes – see above.</p>

<sup>23</sup> 6 New York Criminal Practice § 59.03 (2020)

<sup>24</sup> N.Y. Penal Law §§ 130.50, 130.45, 130.40.

<sup>26</sup> Cal. Penal Code § 289 (West 2020).

<sup>27</sup> 18 U.S.C. § 2246

<sup>28</sup> N.Y. Penal Law §§ 130.35, 130.30, 130.25, 130.50, 130.45, 130.40, 130.70, 130.66, 130.65-a, 130.67.

<sup>29</sup> 18 Cal. Jur. 3d *Criminal Law: Crimes Against the Person* § 575, Westlaw (database updated August 2020).

<sup>30</sup> Cal. Penal Code § 289 (West 2020).

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
		3. Sodomy (nonconsensual or with a minor) = penal/anal penetration <sup>31</sup> 4. Oral copulation (nonconsensual or with a minor) <sup>32</sup>	
2h. Is marital rape in this provision explicitly included? YES/NO	No, except for the below. “In any prosecution under this article in which the victim's lack of consent is based solely on his or her incapacity to consent because he or she was less than seventeen years old, mentally disabled, a client or patient and the actor is a health care provider, detained or otherwise in custody of law enforcement under the circumstances described in paragraph (j) of subdivision three of section 130.05 of this article, or committed to the care and custody or supervision of the state department of corrections and community supervision or a hospital and the actor is an employee, <b>it shall be a defense that the defendant was married to the victim</b> as defined in subdivision four of section 130.00 of this article.” <sup>33</sup>	Yes – general definition of rape specifically excludes spousal rape but it has its own provision. Unlike general rape, spousal rape does not include lack of consent based on mental disorder or developmental/physical disability, perpetrators fraudulent representation that the act is for a professional purpose, and the intent of the accused to make the victim believe that the person committing the act is not the accused. <sup>34</sup>	No Marriage is only included in federal law as a defense to the sexual abuse of a minor or ward. It is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other. <sup>35</sup>
2i. Is the law silent on marital rape? YES/NO	Yes, except for the above.	No – see above.	Yes, except for the above.
2j. Is marital rape covered in the general provisions or by legal precedent even if	<i>People v. Liberta</i> (1984) removed the marital exemption from first degree rape and first degree sodomy (now criminal sexual act (N.Y. Penal Law § 130.50), meaning that	Yes. Cal. Penal Code §§ 262	No

<sup>31</sup> Id. § 286.

<sup>32</sup> Id. § 287.

<sup>33</sup> N.Y. Penal Law § 130.10.

<sup>34</sup> Cal. Penal Code §§ 261, 262 (West 2020).

<sup>35</sup> 18 U.S.C. § 2243

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
it is not explicitly included? YES/NO	NY would no longer distinguish between marital rape and non-marital rape. <sup>36</sup>		
2k. Is marital rape excluded in the provisions, or is marital rape not considered as a crime? YES/NO	No – although not explicitly covered, it is not excluded and is still considered a crime.	No	No – The Sexual Abuse Act of 1986 specifically removed spousal immunity from the law. <sup>37</sup> While marital rape is not mentioned specifically, it is a crime.
3. Are there any provisions excluding criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit it.	No	No	No
4. What is the legal age for sexual consent?	17 <sup>38</sup>	18 <sup>39</sup>	16 <sup>40</sup>
5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them.	Yes – Being less than four years older than the victim is an affirmative defense to second degree rape and second degree criminal sexual act. <sup>41</sup>	Yes – 18 Ca Jur Criminal Law: Crimes Against the Person § 628 – “in prosecution for forcible rape, it is proper to show the relationship existing between the victim and the defendant” <sup>42</sup>	Yes – Sexual abuse of a minor requires the minor “has attained the age of 12 years but has not attained the age of 16 years” and “is at least

<sup>36</sup> *People v. Liberta*, 64 N.Y.2d 152, 163-164 (1984); 6 New York Criminal Practice § 59.04 (2020), 6 New York Criminal Practice § 59.01, at 2 (2020)

<sup>37</sup> <https://www.congress.gov/bill/99th-congress/house-bill/4745>

<sup>38</sup> N.Y. Penal Law § 130.05.

<sup>39</sup> Cal. Penal Code § 261.5 (West 2020).

<sup>40</sup> 18 U.S.C. § 2243

<sup>41</sup> N.Y. Penal Law §§ 130.30, 130.45.

<sup>42</sup> 18 Cal. Jur. 3d *Criminal Law: Crimes Against the Person* § 628, Westlaw (database updated August 2020).

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
		Guilty of unlawful sexual intercourse = if victim is a minor who is not more than three years older/younger than perpetrator, or perpetrator is 21 or older and victim is under 16. <sup>43</sup>	four years younger than the person so engaging.” <sup>44</sup>
6. Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.	<p>Felony sex offense terms:</p> <ol style="list-style-type: none"> <li>1. Class A-I: 15-life sentence/life without parole (sexually motivated Class A-I felonies (murder/terrorism))<sup>45</sup></li> <li>2. Class A-II: 3-life, but if predatory sexual assault or predatory sexual assault against a child, then 10-life (sexually motivated Class A-II felonies, predatory sexual assault, predatory sexual assault against a child)<sup>46</sup></li> <li>3. Class B: 5-25 years (first degree rape/criminal sexual act/aggravated sexual abuse, sex trafficking)<sup>47</sup></li> <li>4. Class C: 3.5-15 (second degree aggravated sexual abuse)<sup>48</sup></li> <li>5. Class D: 2-7 (second degree rape/criminal sexual act, third degree</li> </ol>	<p>Rape, generally: 3, 6 or 8 years</p> <ol style="list-style-type: none"> <li>1. If victim is a minor who is 14 or older: 7, 9 or 11 years</li> <li>2. If victim is under 14: 9, 11 or 13 years<sup>52</sup></li> </ol> <p>Forcible acts of sexual penetration: 3, 6, or 8 years</p> <ol style="list-style-type: none"> <li>1. If victim is a minor who is 14 or older: 6, 8, or 10 years</li> <li>2. If victim is under 14: 8, 10, or 12 years<sup>53</sup></li> </ol>	<p>The relevant federal provisions include the following maximums:</p> <p>Aggravated sexual abuse – any term of years or life, or both<sup>54</sup></p> <p>Sexual abuse – any term of years or for life<sup>55</sup></p> <p>Sexual abuse of a minor or ward – a fine or up to 15 years imprisonment, or both<sup>56</sup></p> <p>There are mandatory minimum sentences for various additional sex-related crimes, which are prohibited by the other sections of Title 18. These minimums include:</p> <ul style="list-style-type: none"> <li>• § 1591(b)(1) and (2) (minimum ten- or 15-year term for sex trafficking of a minor depending on the age of the victim and whether offense effectuated by force, fraud, or coercion);</li> <li>• § 2241(c) (minimum 30-year term for traveling across state lines with the intent to have sex with a child under 12 years of age</li> </ul>

<sup>43</sup> Cal. Penal Code § 261.5(b), (d) (West 2020).

<sup>44</sup> 18 U.S.C. § 2243

<sup>45</sup> N.Y. Penal Law §§ 70.80(3), (7), 60.06, 70.00(2)(a), (3)(a)(i).

<sup>46</sup> Id. §§ 70.80(3), (7), 70.00(2)(a), (3)(a)(ii).

<sup>47</sup> Id. §§ 70.80(4)(a)(i), 130.35, 130.50, 130.70, 230.34.

<sup>48</sup> Id. §§ 70.80(4)(a)(ii), 130.67.

<sup>52</sup> Cal. Penal Code § 264 (West 2020).

<sup>53</sup> Id. § 289.

<sup>54</sup> 18 U.S.C. § 2241

<sup>55</sup> 18 U.S.C. § 2242

<sup>56</sup> 18 U.S.C. § 2243

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	<p>aggravated sexual abuse, first degree sexual abuse)<sup>49</sup></p> <p>6. Class E: 1.5-4 (third degree rape/criminal sexual act, fourth degree aggravated sexual abuse)<sup>50</sup></p> <p>There are higher minimum sentences for violent/non-violent predicate felony offenders.</p> <p>Above sentences are determinate, but Class D or Class E offenders may be sentenced to probation or a definite sentence of one year or less.<sup>51</sup></p>		<p>or for crossing state lines and having sex with a child between the ages of 12 and 16 under certain aggravating circumstances);</p> <ul style="list-style-type: none"> <li>• §§ 2251(e) and 2260(c)(1) (minimum 15-year term for production of child pornography and enhanced minimum terms if such a defendant has a prior felony conviction for an enumerated sex offense);</li> <li>• § 2251A(a) and (b) (minimum 30-year term for buying or selling, or otherwise transferring, children for the purpose of participating in the production of child pornography);</li> <li>• § 2422(b) (minimum ten-year term for using mails or facilities or means of commerce to cause a minor to engage in prostitution or other criminal sexual activity);</li> <li>• § 2423(a) (minimum ten-year term for transporting a minor in commerce for the purpose of engaging in prostitution or other criminal sexual activity); and</li> <li>• § 3559(e) (mandatory life imprisonment for second conviction for certain sex offenses against minors).<sup>57</sup></li> </ul>
<p>7. What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence</p>	<p>Victims can apply to the New York State Office of Victim Services to be compensated for an out-of-pocket loss resulting from the crime. They can be compensated for</p>	<p>Nothing explicitly, but California Constitution requires restitution from the defendant to the victim in every case in which a crime victim suffers a loss, regardless of the sentence or disposition,</p>	<p>The Victims of Crime Act of 1984 requires each state to have a crime victim compensation program that allocates funds to survivors of sexual assault and other violent crimes. These programs cover crime-</p>

<sup>49</sup> Id. §§ 70.80(4)(a)(iii), 130.30, 130.45, 130.66, 130.65.

<sup>50</sup> Id. §§ 70.80(4)(a)(iv), 130.25, 130.40, 130.65-a.

<sup>51</sup> Id. § 70.80(4)(b-c) to (6).

<sup>57</sup> [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190102\\_Sex-Offense-Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190102_Sex-Offense-Mand-Min.pdf)

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after conviction of the perpetrator?	expenses including medical services and counseling. <sup>58</sup>	unless compelling and extraordinary reasons exist to the contrary. <sup>59</sup>	related costs of lost wages or loss of support, medical costs and mental health consulting. <sup>60</sup>
<b>Aggravating and Mitigating Circumstances</b>			
8. Does the law foresee aggravating circumstances when sentencing rape cases?  If so, what are they?	<p>Yes – aggravating circumstances include:</p> <ol style="list-style-type: none"> <li>1. Defendant’s history of sex offenses<sup>61</sup></li> <li>2. Defendant’s inability to control behavior and threat to society<sup>62</sup></li> <li>3. Facilitating a sex offense with a controlled substance = Class D felony<sup>63</sup></li> <li>4. Offenses where force is used, the victim is physically helpless, or the victim is particularly young carry higher sentences.</li> <li>5. Insertion of a foreign object that causes physical injury has a higher sentence than insertion of a foreign object that doesn’t cause physical injury.<sup>64</sup></li> <li>6. A court can impose consecutive sentences for multiple “separate and distinct” sexual acts that occur in a single incident.<sup>65</sup></li> </ol>	<p>Yes – aggravating circumstances include:</p> <ol style="list-style-type: none"> <li>1. Perpetrator can be charged with multiple counts of rape if multiple penetrations occurred with a break in time in between or as a result of victim’s struggle.<sup>67</sup></li> <li>2. If there are multiple counts of aggravated sexual assault of a child (separate victims or same victim on separate occasions), sentences for each offense should be consecutive.<sup>68</sup></li> <li>3. If previously convicted of similar crime, sentence enhanced by five years for each prior conviction. If served two or more prison terms for similar crime, sentence enhanced by 10 years for each term.<sup>69</sup> This applies specifically to crimes of/related to rape/sexual assault.</li> <li>4. If kidnapped victim to commit sexual offense, additional term of nine years or</li> </ol>	<p>Yes – under the sentencing guidelines for criminal sexual abuse, aggravating circumstances include:</p> <ol style="list-style-type: none"> <li>(1) If the offense involved force or threat of force.</li> <li>(2) If the victim had not attained the age of twelve years, or the victim had attained the age of twelve years but had not attained the age of sixteen years.</li> <li>(3) If the victim was in the custody, care, or supervisory control of the defendant; or a person held in the custody of a correctional facility.</li> <li>(4) If the victim sustained permanent or life-threatening bodily injury, if the victim sustained serious bodily injury, or if the degree of injury is between those specified above</li> <li>(5) If the victim was abducted</li> </ol>

<sup>58</sup> <https://ovs.ny.gov/sites/default/files/brochure/ovs-crime-victim-brochure-2018-web-final-3-18.pdf>

<sup>59</sup> 22A Cal. Jur. 3d *Criminal Law: Posttrial Proceedings* § 568, Westlaw (database updated August 2020).

<sup>60</sup> <https://www.rainn.org/articles/crime-victim-compensation>

<sup>61</sup> 34A N.Y. Jur. 2D *Criminal Law: Procedure* § 3294, Westlaw (database updated August 2020).

<sup>62</sup> Id.

<sup>63</sup> 6 New York Criminal Practice § 59.06[2][i].

<sup>64</sup> N.Y. Penal Law §§ 130.70, 130.67, 130.66, 130.65-a.

<sup>65</sup> Morris & Black, *Criminal Law in New York* § 6:155 (4th ed. 2019).

<sup>67</sup> 18 Cal. Jur. 3d *Criminal Law: Crimes Against the Person* § 645, Westlaw (database updated August 2020).

<sup>68</sup> Cal. Penal Code § 269(c) (West 2020).

<sup>69</sup> Cal. Penal Code § 667.6 (West 2020).

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	7. If abduction was completed prior to sexual assault and/or restraint continued after the assault, the perpetrator can be given separate convictions for kidnapping and the assault. <sup>66</sup>	<p>15 is the victim is under 14 years of age.<sup>70</sup></p> <p>5. Possession/use of a firearm.<sup>71</sup></p> <p>6. If infliction of great bodily injury, five year enhancement for each violation.<sup>72</sup></p> <p>7. If multiple sex offenses involving same victim on same occasion (or on multiple occasions), can impose full, separate and consecutive terms for each.<sup>73</sup></p> <p>8. Enhanced sentence if offense is associated with criminal street gang activity.<sup>74</sup></p>	(6) If, to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or if, to facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, the offense involved the knowing misrepresentation of a participant's identity; or the use of a computer or an interactive computer service. <sup>75</sup>
8a. Is rape by more than one perpetrator an aggravating circumstance? YES/NO	Not mentioned	Yes – if defendant acted in concert with another person to commit the offense or aid and abet the other person, then sentence will be 5, 7, or 9 years (longer if victim is a minor) <sup>76</sup> as opposed to 3, 6, or 8. <sup>77</sup>	Not mentioned
8b. Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims?	Yes Age: younger victim would lead to first or second degree rape, which carries a higher sentence than third degree rape. <sup>78</sup>	Yes 1. Sentences are higher if the victim is a minor older than 14 and higher if victim is under 14 years old. <sup>80</sup> 2. If victim is 65 years or older, 14 years or younger, blind, deaf,	Yes Sentencing increases under the following circumstances: If the victim had not attained the age of twelve years, or the victim had attained the

<sup>66</sup> 35A N.Y. Jur. 2D *Criminal Law: Principles and Offenses* § 732, Westlaw (database updated August 2020).

<sup>70</sup> Id. § 667.8

<sup>71</sup> 18 Cal. Jur. 3d *Criminal Law: Crimes Against the Person* § 571, Westlaw (database updated August 2020).

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> 22 Cal. Jur. 3d *Criminal Law: Posttrial Proceedings* § 253, Westlaw (database updated August 2020).

<sup>75</sup> <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf>

<sup>76</sup> Cal. Penal Code § 264.1 (West 2020).

<sup>77</sup> Id. § 264.

<sup>78</sup> N.Y. Penal Law §§ 130.35, 130.30, 130.25, 70.80.

<sup>80</sup> Cal. Penal Code § 264 (West 2020).

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
(for example, doctor/patient; teacher/student; age difference) YES/NO	Power imbalance: Inability to consent is based on a power imbalance. <sup>79</sup>	developmentally disabled, paraplegic or quadriplegic and perpetrator knew or reasonably should have known – 1 year enhancement for each violation. <sup>81</sup>	age of twelve years but had not attained the age of sixteen years.  If the victim was in the custody, care, or supervisory control of the defendant; or a person held in the custody of a correctional facility. <sup>82</sup>
8c. Is rape by spouse or intimate partner an aggravating circumstance? YES/NO	Not mentioned	No	Not mentioned
9. Does the law foresee mitigating circumstances for the purposes of punishment? YES/NO  If yes, please specify.	<ol style="list-style-type: none"> <li>1. Second degree rape and criminal sexual act, it is an affirmative defense that victim was less than 4 years younger than actor<sup>83</sup></li> <li>2. If incapacity to consent based on victim being mentally disabled, mentally incapacitated or physically helpless, it is an affirmative defense that defendant did not know victim was incapable of consent. Applies to any offense under § 130.<sup>84</sup></li> <li>3. Defendant’s mental illness/abnormality/inability to control behavior.<sup>85</sup></li> </ol>	Mitigating circumstances are determined in light of whether the defendant: was a passive participant or played a minor role in the crime; participated in the alleged rape under circumstances of either coercion or duress, or his/her criminal activity may be partially excusable for another reason not amounting to a defense; was induced by others, with no evident predisposition otherwise to participate in the crime; mistakenly believed that your conduct was legal; was motivated by a desire to provide necessities for your family or self; suffered repeated/continuous physical, sexual, and/or psychological abuse that was inflicted by the alleged victim of the crime, and the victim of the crime was the spouse (or the intimate cohabitant), or parent of the accused’s child (and this abuse does not constitute a defense); exercised caution	Under 18 U.S.C. § 3553, the court must impose a sentence consistent with the guidelines published by the Sentencing Commission (pursuant to section 994(1)(1) of title 28) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an

<sup>79</sup> N.Y. Penal Law § 130.05.

<sup>81</sup> 22 Cal. Jur. 3d *Criminal Law: Posttrial Proceedings* § 247, Westlaw (database updated August 2020).

<sup>82</sup> <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf>

<sup>83</sup> N.Y. Penal Law §§ 130.30, 130.45.

<sup>84</sup> Id. § 130.10(1); 35A N.Y. Jur. 2D *Criminal Law: Principles and Offenses* § 607, Westlaw (database updated August 2020).

<sup>85</sup> 34A N.Y. Jur. 2D *Criminal Law: Procedure* § 3294, Westlaw (database updated August 2020).

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
		to prevent harm to persons or any damage to property, or no harm was done or threatened against the victim. Mitigating circumstances are also determined considering whether the victim was an initiator of, willing participant in, or aggressor/provoker of the alleged crime, and whether the alleged crime was committed in an unusual circumstance (e.g., great provocation) that is not likely to recur. <sup>86</sup>	appropriate sentence, having due regard for the purposes set forth in subsection.  For child crimes and sexual offenses, offenders may receive relief from mandatory minimums if the prosecution files a motion based on the defendant's "substantial assistance." <sup>87</sup>
10. Is reconciliation between the victim and the perpetrator allowed as part of a legal response? YES/NO  If so, at what stage and what are the consequences?	No	No – CA has community-based corrections programs (including restitution and reconciliation). <sup>88</sup> Such programs are generally unavailable to those convicted of rape/sex offenses, as prison sentences must be imposed for offenses that require the defendant to register as a sex offender under Cal. Penal Code § 290. <sup>89</sup>	No
10a. Regardless of the law, is reconciliation permitted in practice? YES/NO  What is the practice in this regard?	No	No	No
11. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? YES/NO  If yes, please specify.	No	No	No

<sup>86</sup> 22A Cal. Jur. 3d *Criminal Law: Posttrial Proceedings* § 417, Westlaw (database updated August 2020).

<sup>87</sup> 18 U.S.C. § 3553

<sup>88</sup> Cal. Penal Code § 17.5 (West 2020).

<sup>89</sup> Cal. Penal Code § 1170(h)(3) (West 2020); [https://www.courts.ca.gov/partners/documents/cjr\\_faq.pdf](https://www.courts.ca.gov/partners/documents/cjr_faq.pdf).

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
11a. If the perpetrator marries the victim of rape? YES/NO	No	No	No
11b. If the perpetrator loses his “socially dangerous” character or reconciles with the victim? YES/NO	No	No	No
<b>Prosecution</b>			
12. Is rape reported to the police prosecuted ex officio (public prosecution)? YES/NO	All court sittings are public, but in cases of rape and criminal sexual act it is at the court’s discretion to exclude people who are not directly involved. <sup>90</sup>	Open to the public, but if victim is under 16 years old or developmentally disabled, court can hold a hearing to determine whether testimony of/relating to the victim should be closed to the public to protect their reputation. Applies in cases of rape and other sex offenses. <sup>91</sup>	Yes
13. Is rape reported to the police prosecuted ex parte (private prosecution)? YES/NO	No	A court may issue orders related to the protection of witnesses or victims <sup>92</sup> .	No – the federal right of private prosecution was removed by the Supreme Court in <i>Leeke v. Timmerman</i> . <sup>93</sup>
14. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women? YES/NO	Yes  With the consent of the court and the people, a defendant may plead guilty to a lesser included offense, some but not all offenses charged, or a combination of the above. There are provisions specifying the minimum offense that a plea needs to	Right to plea bargain not available for:  1. Forcible rape, sodomy, lewd conduct with a child, and oral copulation  2. Rape by use of drugs  3. Penetration with a foreign object and aiding and abetting rape/penetration with a foreign object	Yes  In November 1989, the Supreme Court approved federal sentencing guidelines. Since that time, the proportion of federal cases (of all federal crimes) has risen sharply, reaching almost 97% by 2009. <sup>96</sup>

<sup>90</sup> N.Y. Jud. Law § 4 (McKinney 2020).

<sup>91</sup> Cal. Penal Code § 859.1 (West 2020).

<sup>92</sup> 18 Cal. Jur. 3d Criminal Law: Crimes Against the Person IX B Refs.

<sup>93</sup> *Leeke v. Timmerman*, 454 U.S. 83 (1981)

<sup>96</sup> [https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html?\\_r=0](https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html?_r=0)

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
	include based on how the original charge(s) is/are classified. <sup>94</sup>	<p>Plea bargaining for the below felonies is prohibited unless (i) there is insufficient evidence to prove prosecution’s case, (ii) unable to obtain testimony from a material witness or (iii) reduction/dismissal would not substantially change sentence. Court must find that one of the three circumstances applies. [Only those felonies that are relevant are listed below]</p> <ol style="list-style-type: none"> <li>1. Rape</li> <li>2. Sodomy and oral copulation by force, violence, duress, menace, or a threat of great bodily harm</li> <li>3. Lewd acts on a child under 14 years old</li> <li>4. Assault with intent to commit rape<sup>95</sup></li> </ol>	Courts have upheld the use of plea bargains to waive constitutional rights in exchange for a presumably more lenient sentence. <sup>97</sup>
15. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children? YES/NO	Yes – see above.	No – see above.	Yes – see above.
16. Please provide information on the statute of limitations for prosecuting rape.	<ol style="list-style-type: none"> <li>1. Class A felony/first degree rape – no statute of limitations</li> <li>2. Rape/criminal sexual act 2 = within 20 years of commission or within 10 years of first reported to law enforcement, whichever is earlier</li> <li>3. Third degree rape/criminal sexual act = within 10 years of commission</li> </ol>	Most rape/sex offenses have no statute of limitations. These are outlined in Cal. Penal Code § 799(b), which covers almost all instances of rape/sexual assault. Examples of offenses that are not covered include (i) rape, forcible acts of sexual penetration, sodomy or oral copulation where the defendant pretended to be someone known to the victim, (ii) forcible acts of sexual penetration, sodomy or oral copulation where the victim is incapable of consent by reason of a mental disorder and both the	<p>The felonies in Chapter 109A, 110, 117 or section 1591 of Title 18 (encompassing aggravated sexual abuse, sexual abuse, sexual abuse of a ward or child, abusive sexual contact and other sex crimes) may be prosecuted at any time.<sup>101</sup></p> <p>Note: the general federal statute of limitations, disregarding such exceptions, is five years.</p>

<sup>94</sup> NY Crim. Proc. Law § 220.10.

<sup>95</sup> 20A Cal. Jur. 3d *Criminal Law: Pretrial Proceedings* § 905, Westlaw (database updated August 2020).

<sup>97</sup> *Brady v. United States*, 397 U.S. 742 (1970)

<sup>101</sup> 18 U.S.C. § 3299

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
	4. Other felonies = within 5 years <sup>98</sup>	<p>defendant and victim are confined to a facility for treatment of a mental disorder and (iii) sodomy or oral copulation where the victim and defendant are both incarcerated.<sup>99</sup></p> <p>For offenses not covered by § 799(b), if the victim was under 18 years old, prosecution may commence up until the victim’s 40th birthday. Under certain circumstances (described below), prosecution can occur after this statute of limitations expires. For offenses not covered by either of the above, the statute of limitations is 10 years.<sup>100</sup></p>	
17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood? YES/NO	<p>Yes –</p> <ol style="list-style-type: none"> <li>1. First degree course of sexual conduct against a child = no statute of limitations</li> <li>2. Second degree course of sexual conduct against a child = within five years of most recent act of sexual conduct</li> <li>3. Sexual offense (other than in § 30.10, 2(a) against a child, statute of limitation begins after child turns 23 or offense is reported, whichever occurs earlier<sup>102</sup></li> </ol>	<p>Yes –</p> <p>“Notwithstanding any other limitation of time described in this chapter, prosecution for a felony offense described in Section 261, 286, 288, 288.5, 288a, or 289, or Section 289.5, as enacted by Chapter 293 of the Statutes of 1991 relating to penetration by an unknown object, that is alleged to have been committed when the victim was under 18 years of age, may be commenced any time prior to the victim’s 40th birthday.”<sup>103</sup></p> <p>If Cal. Penal Code § 799(b) (described above) does not apply, a criminal complaint may be filed w/in one year of date of report to law enforcement “by a person of any age alleging that he or she, while under 18 years of age, was the victim of a crime described in Section 261, 286, 287, 288, 288.5, or 289, former Section 288a, or Section 289.5, as</p>	<p>Yes-</p> <p>“No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution during the life of the child, or for ten years after the offense, whichever is longer.”<sup>105</sup></p>

<sup>98</sup> N.Y. Crim. Proc. Law § 30.10.

<sup>99</sup> Cal. Penal Code §§ 799(b), 261(a)(5), 286(e), (h), (j), 287(e), (h), (j), 289(c), (f) (West 2020).

<sup>100</sup> Cal. Penal Code §§ 801.1(a)(1), (b), 803(f)(1)-(2).

<sup>102</sup> N.Y. Crim. Proc. Law § 30.10.

<sup>103</sup> Cal. Penal Code § 801.1(a)(1) (West 2020).

<sup>105</sup> 18 U.S.C. § 3283

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
		<p>enacted by Chapter 293 of the Statutes of 1991 relating to penetration by an unknown object.” If all of the following occur:</p> <ol style="list-style-type: none"> <li>1. the limitation period described in Section 801.1 above expires</li> <li>2. the crime involved “substantial sexual conduct, as described subdivision (b) of Section 1203.66 [“penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender.”], excluding masturbation that is not mutual</li> <li>3. there is independent evidence corroborating the allegation - must be clear and convincing if the victim was 21 or older at time of report.<sup>104</sup></li> </ol> <p>(See also <a href="https://leginfo.ca.gov/faces/code_s_displaySection.xhtml?sectionNum=803&amp;lawCode=PEN">https://leginfo.ca.gov/faces/code_s_displaySection.xhtml?sectionNum=803&amp;lawCode=PEN</a>)</p>	
<p>18. Are there mandatory requirements for proof of rape, such as medical evidence or the need for witnesses? YES/NO If yes, please specify.</p>	<p>Cannot be convicted solely based on victim’s incapacity to consent based only on victim’s testimony. Must be supported by other evidence that (i) establishes that attempt was made to engage victim in sexual intercourse, contact or conduct and (ii) connects the defendant to the offense/attempted offense. Applies to any offense under § 130.<sup>106</sup></p> <p>Must prove actual penetration to establish sexual intercourse. Can be proven by</p>	<p>Yes</p> <p>Must prove that victim did not consent. For rape of nonspouse, must prove that defendant and victim were not married when offense occurred. In cases where victim is unable to consent due to mental disorder or developmental/physical disability, must prove that disorder/disability made victim incapable of giving consent.<sup>109</sup></p>	<p>Not mentioned</p>

<sup>104</sup> Cal. Penal Code §§ 803(f)(1)-(2), 1203.66(b).

<sup>106</sup> N.Y. Penal Law § 130.16

<sup>109</sup> 18 Cal. Jur. 3d *Criminal Law: Crimes Against the Person* § 616, Westlaw (database updated August 2020).

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
	<p>circumstantial or medical evidence. <i>People v. McDade</i> (2009) provides an example of a case using circumstantial evidence.<sup>107</sup></p> <p>Corroboration requirement (“defendant charged with a sex offense could not be convicted solely upon the testimony of the victim alone”) only applies in cases where lack of consent is based “solely on the victim’s mental defect or mental incapacity.” This requirement has become less strict over time.<sup>108</sup></p>	<p>Penetration, “however slight,” is required. Circumstantial evidence can be enough to support rape conviction and prove penetration.<sup>110</sup></p>	
<p>19. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman’s sexual history during trial? YES/NO</p>	<p>Yes – evidence concerning victim’s sexual conduct is inadmissible unless:</p> <ol style="list-style-type: none"> <li>1. Specific instances of prior sexual conduct with accused</li> <li>2. Convicted of offense under section 230.00 w/in 3 years prior to offense under prosecution</li> <li>3. Rebutts evidence introduced by people of victim’s failure to engage in sexual intercourse, conduct or contact during a period of time</li> <li>4. Rebutts evidence introduced by the people which proves/tends to prove that accused is cause of pregnancy/disease of victim or source of semen found in victim</li> <li>5. Determined by court outside of hearing of jury/such hearing as court</li> </ol>	<p>Yes – with exceptions below.</p> <p>Cal Evidence Code section 782: In order to include evidence concerning victim’s sexual conduct:</p> <ol style="list-style-type: none"> <li>1. Defense must introduce a motion showing the relevance of the evidence and relevancy in attacking victim’s credibility</li> <li>2. Written motion must be accompanied by a sealed affidavit, which will be unsealed to determine if there should be a hearing and then resealed</li> <li>3. If court finds evidence sufficient, there will be a hearing to question the victim without the jury present</li> <li>4. After hearing, if court finds that evidence is relevant and admissible, the court will make an order stating</li> </ol>	<p>Yes –</p> <p>Rule 412 of the Federal Rules of Evidence prohibits evidence offered to prove that a victim engaged in other sexual behavior or evidence to prove a victim’s sexual predisposition, though there are exceptions.</p> <p>In a criminal case, evidence of specific instances of sexual behavior by the victim offered to prove that another party was the source of physical evidence, evidence of specific instances of sexual behavior by the victim with the accused to prove consent and evidence that the exclusion of which would violate the constitutional rights of the defendant is admissible.<sup>114</sup></p>

<sup>107</sup> 35A N.Y. Jur. 2D *Criminal Law: Principles and Offenses* § 609, Westlaw (database updated August 2020); *People v. McDade*, 883 N.Y.S.2d 615 (N.Y. App. Div. 2009).

<sup>108</sup> 6 New York Criminal Practice § 59.08[1] (2020).

<sup>110</sup> Id. §§ 577, 617.

<sup>114</sup> Fed. R. Evid. 412.

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
	<p>may require to be relevant and admissible in interest of justice<sup>111</sup></p>	<p>what evidence the defendant can introduce and nature of questioning</p> <p>5. Affidavit can only be unsealed under certain circumstances<sup>112</sup></p> <p>Evidence of opinion, reputation or sexual conduct of victim is not admissible to prove consent.</p> <p>Evidence of specific instances of victim’s sexual conduct can be introduced as evidence of false claims of rape.</p> <p>Evidence of victim’s sexual conduct introduced by defendant to deny that intercourse occurred with the victim is immaterial.</p> <p>Evidence concerning how victim was dressed is inadmissible to show consent but can be determined by the court to be relevant and admissible in the interests of justice.</p> <p>Evidence of victim’s sexual conduct with the defendant is admissible.</p> <p>Evidence of victim’s past sexual conduct with people other than the defendant is admissible to attack victim’s credibility.</p> <p>Court can exclude evidence if its value is outweighed by probability that it will cause prejudice or mislead the jury.<sup>113</sup></p>	
<p>20. Are there procedural criminal law provisions aimed to avoid re-victimizations during the</p>	<p>Yes, but not much –</p> <p>NY has procedures that are not specific to rape/sex offenses. The victim can get a temporary order of protection, directing the</p>	<p>Yes, but not much –</p> <p>If victim is 15 years old or younger or developmentally disabled, testimony at the preliminary hearing can be video recorded. If</p>	<p>A victim of a crime has the following rights:</p> <p>(1) The right to be reasonably protected from the accused.</p>

<sup>111</sup> N.Y. Crim. Proc. Law § 60.42; 6 New York Criminal Practice § 59.08[2] (2020).

<sup>112</sup> Cal. Evid. Code § 782 (Deering 2020)

<sup>113</sup> 18 Cal. Jur. 3d *Criminal Law: Crimes Against the Person* § 561, Westlaw (database updated August 2020).

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
<p>prosecution and court hearings? YES/NO</p> <p>If yes, please specify.</p>	<p>offender to stay away from victim’s home, school, business or employment; refrain from harassing, intimidating, threatening, etc. the victim<sup>115</sup></p> <p>Victim can also choose to have an advocate from a local rape crisis program accompany them to medical exams and interviews with police/prosecutor.<sup>116</sup></p>	<p>the court finds that further testimony would cause the victim emotional trauma, the video recording can be admitted instead.</p> <p>The recording is subject to a protective order and must be destroyed five years after the judgement or after final judgement of an appeal.<sup>117</sup></p> <p>Victim cannot be placed in custody for contempt for refusing to testify about sexual assault.<sup>118</sup></p> <p>Can refuse to disclose confidential communication between victim and sexual assault counselor.<sup>119</sup></p>	<p>(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.</p> <p>(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.</p> <p>(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.</p> <p>(5) The reasonable right to confer with the attorney for the Government in the case.</p> <p>(6) The right to full and timely restitution as provided in law.</p> <p>(7) The right to proceedings free from unreasonable delay.</p> <p>(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.</p>

<sup>115</sup> 32A N.Y. Jur. 2D *Criminal Law: Procedure* § 1491, Westlaw (database updated August 2020).

<sup>116</sup> N.Y.S. Dept. of Health, *New York State Sexual Assault Victim Bill of Rights*, <https://ovs.ny.gov/sites/default/files/brochure/nys-sa-victim-bill-rights.pdf> (Feb. 2020)

<sup>117</sup> 18 Cal. Jur. 3d *Criminal Law: Crimes Against the Person* § 566, Westlaw (database updated August 2020).

<sup>118</sup> 18 Cal. Jur. 3d *Criminal Law: Crimes Against the Person* § 561, Westlaw (database updated August 2020).

<sup>119</sup> 18 Cal. Jur. 3d *Criminal Law: Crimes Against the Person* § 565, Westlaw (database updated August 2020).

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
			<p>(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.</p> <p>(10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.<sup>120</sup></p>
<b>War and/or Conflict</b>			
21. Is rape criminalized as a war crime or crime against humanity? YES/NO	N/A	N/A	Yes <sup>121</sup>
22. Is there a statute of limitations for prosecuting rape in war or in conflict contexts? YES/NO	N/A	N/A	Yes – 5 years <sup>122</sup>
23. Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? YES/NO	N/A	N/A	No
24. Has the Rome Statute of the International Criminal Court (ICC) been ratified? YES/NO	N/A	N/A	The US signed the treaty on December 31, 2000 but informed the Secretary-General on May 6, 2002 that it does not intend to become a party to the treaty. <sup>123</sup>

<sup>120</sup> 18 U.S.C. § 3771

<sup>121</sup> 18 U.S.C. § 2441

<sup>122</sup> 18 U.S.C. § 3282

<sup>123</sup> [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-10&chapter=18&lang=en#12](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en#12)

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
<b>Data</b>			
<p>25. Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.</p>	<p>According to the NYS Division of Criminal Justice Services, 6,363 rapes (rate per 100,000 population = 32.1) were reported in NYS in 2017.<sup>124</sup></p> <p>Reported rapes:</p> <p>2017:  <a href="https://www.criminaljustice.ny.gov/crimnet/ojsa/Crime-in-NYS-2017-9-24-18.pdf">https://www.criminaljustice.ny.gov/crimnet/ojsa/Crime-in-NYS-2017-9-24-18.pdf</a></p> <p>2016:  <a href="https://www.criminaljustice.ny.gov/crimnet/ojsa/NYSCrimeReport2016.pdf">https://www.criminaljustice.ny.gov/crimnet/ojsa/NYSCrimeReport2016.pdf</a></p> <p>2015:  <a href="https://www.criminaljustice.ny.gov/crimnet/ojsa/NYSCrimeReport2015.pdf">https://www.criminaljustice.ny.gov/crimnet/ojsa/NYSCrimeReport2015.pdf</a></p> <p>Arrests, arraignments, and convictions for felony and misdemeanor sex offenses:</p> <p>2018:  <a href="https://www.criminaljustice.ny.gov/crimnet/ojsa/dar/DAR-4Q-2018-NewYorkState.pdf">https://www.criminaljustice.ny.gov/crimnet/ojsa/dar/DAR-4Q-2018-NewYorkState.pdf</a></p> <p>2017:  <a href="https://www.criminaljustice.ny.gov/crimnet/ojsa/dar/DAR-4Q-2017-NewYorkState.pdf">https://www.criminaljustice.ny.gov/crimnet/ojsa/dar/DAR-4Q-2017-NewYorkState.pdf</a></p>	<p>According to the California Department of Justice, 14,720 rapes (rate per 100,000 population = 36.8) were reported to CA law enforcement agencies in 2019.<sup>125</sup></p> <p>Reported rapes, crimes cleared, arrests for rape, dispositions and convictions for violent offenses (includes rape)</p> <p>2019: <a href="https://data-openjustice.doj.ca.gov/sites/default/files/2020-06/Crime%20In%20CA%202019.pdf">https://data-openjustice.doj.ca.gov/sites/default/files/2020-06/Crime%20In%20CA%202019.pdf</a></p> <p>2018: <a href="https://data-openjustice.doj.ca.gov/sites/default/files/2019-07/Crime%20In%20CA%202018%2020190701.pdf">https://data-openjustice.doj.ca.gov/sites/default/files/2019-07/Crime%20In%20CA%202018%2020190701.pdf</a></p> <p>2017: <a href="https://data-openjustice.doj.ca.gov/sites/default/files/2019-06/cd17.pdf">https://data-openjustice.doj.ca.gov/sites/default/files/2019-06/cd17.pdf</a></p> <p>2016: <a href="https://data-openjustice.doj.ca.gov/sites/default/files/2019-06/cd16.pdf">https://data-openjustice.doj.ca.gov/sites/default/files/2019-06/cd16.pdf</a></p> <p>2015: <a href="https://data-openjustice.doj.ca.gov/sites/default/files/2019-06/cd15.pdf">https://data-openjustice.doj.ca.gov/sites/default/files/2019-06/cd15.pdf</a></p> <p>Arrests:  <a href="https://openjustice.doj.ca.gov/exploration/crime-statistics/arrests">https://openjustice.doj.ca.gov/exploration/crime-statistics/arrests</a></p>	<p>According to the FBI, there were an estimated 135,755 rapes reported to law enforcement in 2017.<sup>126</sup></p> <p>In the US, 230 assaults out of every 1000 are reported to the police, 46 lead to arrest, 9 cases get referred to prosecutors, 5 cases lead to a felony conviction and 4.6 rapists will be incarcerated.<sup>127</sup></p> <p><a href="https://www.bjs.gov/content/pub/pdf/cv18.pdf">https://www.bjs.gov/content/pub/pdf/cv18.pdf</a></p>

<sup>124</sup> <https://www.criminaljustice.ny.gov/crimnet/ojsa/Crime-in-NYS-2017-9-24-18.pdf>

<sup>125</sup> <https://data-openjustice.doj.ca.gov/sites/default/files/2020-06/Crime%20In%20CA%202019.pdf>

<sup>126</sup> <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/rape>

<sup>127</sup> <https://www.rainn.org/statistics/criminal-justice-system>

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
		Arrest dispositions: <a href="https://openjustice.doj.ca.gov/exploration/crime-statistics/arrest-dispositions">https://openjustice.doj.ca.gov/exploration/crime-statistics/arrest-dispositions</a>  Crimes and clearances: <a href="https://openjustice.doj.ca.gov/exploration/crime-statistics/crimes-clearances">https://openjustice.doj.ca.gov/exploration/crime-statistics/crimes-clearances</a>	
<b>Other</b>			
26. Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.	NAP	NAP	<u>1—Repeal of the Federal Marriage Exception to Statutory Rape</u>  We strongly endorse the repeal of 18 U.S.C. Section 2243(a), the federal marriage exception to statutory rape. Approximately 248,000 children were wed in the US between 2000 and 2010, the majority of such cases being girls (sometimes as young as 12) marrying adult men. <sup>128</sup> Child marriage in the United States is regulated on a state-by-state basis; in numerous states, laws are insufficient to protect against forced and coercive marriages. <sup>129</sup> Research has found that young girls who marry are at a higher risk for intimate partner violence as compared to people who marry in adulthood. <sup>130</sup> Child marriage may increase incidences of statutory rape by way of “providing easier, legal, and thus possibly more frequent access to a young person’s body.” <sup>131</sup> As a result, inadequate state laws leave children vulnerable to forced and coercive marriages, enabling the conditions under which statutory rape can occur, while

<sup>128</sup> <https://www.unchainedatlast.org/child-marriage-shocking-statistics/>

<sup>129</sup> Vijayasri G. Aryama, I Don't: The Need for a Solution to the Child Marriage Problem in the United States, 39 WOMEN's Rts. L. REP. 386, 387, 390 (2018).

<sup>130</sup> Judith McFarlane, Angeles Nava, Heidi Gilroy & John Maddoux, Child Brides, Forced Marriage, and Partner Violence in America, 127 Obstet Gynecol 706, 706 (2016).

<sup>131</sup> Amber Plumlee, Don't Put a Ring on It: Abolishing the Marital Defense to Statutory Rape, 41 WOMEN's Rts. L. REP. 95, 110 (2019).

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
			<p>18 U.S.C. Section 2243(a) then hinders the prosecution of such rape.</p> <p><u>2—Removal of Barriers to Reporting and Accountability When Rape is Perpetrated by the State or Government</u></p> <p>In both prisons and ICE detention facilities within the United States, reporting procedures for sexual- and gender-based violence, including rape, are often complex and not clearly communicated to inmates or detainees.<sup>132</sup></p> <p>In such situations, filing a grievance requires victims to request the forms from guards, who may be complicit in the abuse in question, and/or capable of retaliation.<sup>133</sup></p> <p>In prisons, an inmate may fear that reporting sexual- and gender-based violence will lead to further abuse or jeopardize a release date. Once a report is made, an internal investigation must determine that the report is credible in order to support the inmates claim. Using data from the Bureau of Justice Statistics Survey of Sexual Violence, research has found that only 13% of reports by inmates were found to be substantiated (and that 46% of substantiated reports involved staff members). Additionally, if an inmate’s report is determined to be unfounded, such inmate risks being charged with a new offense or cited for filing a false</p>

<sup>132</sup> *Reporting Sexual Victimization During Incarceration: Using Ecological Theory as a Framework to Inform and Guide Future Research*, Sage Publishing, Jan. 2018, At 94-106; *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, Human Rights Watch (Aug 25, 2010), <https://www.hrw.org/report/2010/08/25/detained-and-risk/sexual-abuse-and-harassment-united-states-immigration-detention>

<sup>133</sup> *Reporting Sexual Victimization During Incarceration: Using Ecological Theory as a Framework to Inform and Guide Future Research*, Sage Publishing, Jan. 2018, At 94-106; *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, Human Rights Watch (Aug 25, 2010), <https://www.hrw.org/report/2010/08/25/detained-and-risk/sexual-abuse-and-harassment-united-states-immigration-detention>

Question	The State of New York (NY)	The State of California (CA)	The U.S. Federal Laws
			<p>report. The Prison Litigation Reform Act (1996) introduced additional barriers to reporting for inmates: namely, that an inmate must exhaust all internal prison procedures before recourse may be sought through the court system.<sup>134</sup></p> <p>In ICE detention facilities, detainees have the added threat of deportation, and may fear that reporting abuse may result in deportation as a retaliatory measure. A detainee may only report sexual- and gender-based violence to those employed or contracted by ICE. Additionally, detainees often lack legal representation, which further exacerbates such difficulties.<sup>135</sup></p> <p>It is imperative to address such barriers to reporting sexual- and gender-based violence, especially rape and (due in part to the channels through which such a report must be proffered and proven), to accountability once a report is filed.</p>

<sup>134</sup> *Reporting Sexual Victimization During Incarceration: Using Ecological Theory as a Framework to Inform and Guide Future Research*, Sage Publishing, Jan. 2018, At 94-106; Paul Guerino and Allen J. Beck, Ph.D., *Prison Rape Elimination Act of 2003 (PREA): Sexual Victimization Reported by Adult Correctional Authorities, 2007–2008*, DOJ Office of Justice Programs Bureau of Justice Statistics, Jan. 2011, At 1, <https://www.bjs.gov/content/pub/pdf/svraca0708.pdf>

<sup>135</sup> *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, Human Rights Watch (Aug 25, 2010), <https://www.hrw.org/report/2010/08/25/detained-and-risk/sexual-abuse-and-harassment-united-states-immigration-detention>

## Appendix 1: New York State Statutes

**Rape:** sexual intercourse (penal-vaginal penetration)<sup>136</sup>

**Criminal sexual act:** oral or anal sexual conduct<sup>137</sup>

Below is the same for rape and criminal sexual act.

1. First degree:
  - a. Forcible compulsion
  - b. Incapable of consent because physically helpless
  - c. Other person less than 11 years old
  - d. Other person less than 13 and actor is 18 or older
2. Second degree:
  - a. Actor is 18 or older and other person is less than 15
  - b. Unable to consent because mentally disabled or mentally incapacitated
3. Third degree:
  - a. Incapable of consent by reason of some factor other than being less than 17 years old
  - b. Actor is 21 years or older and other person is less than 17
  - c. Lack of consent is by reason of some factor other than incapacity to consent

**Sexual abuse:** sexual contact (any touching of sexual/intimate parts of a person for purpose of gratifying sexual desire)<sup>138</sup>

1. First degree:
  - a. Forcible compulsion
  - b. Incapable of consent because physically helpless
  - c. Other person less than 11 years old
  - d. Other person less than 13 and actor is 21 or older
2. Second degree:
  - a. Incapable of consent by reason of some factor other than being less than 17 years old
  - b. Other person is less than 14 years old
3. Third degree:
  - a. Without other person's consent
  - b. Affirmative defenses: (i) lack of consent was due solely to other person being less than 17 years old, (ii) other person was more than 14 years old and (iii) defendant was less than 5 years older

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<sup>136</sup> N.Y. Penal Law §§ 130.00, 130.35, 130.30, 130.25; 6 New York Criminal Practice § 59.03 (2020).

<sup>137</sup> N.Y. Penal Law §§ 130.50, 130.45, 130.40.

<sup>138</sup> Id. §§ 130.65, 130.60, 130.55.

**Aggravated sexual abuse:**<sup>139</sup>

1. First degree: insertion of a foreign object causing physical injury
  - a. By forcible compulsion
  - b. Incapable of consent because physically helpless
  - c. Less than 11 years old
2. Second degree: insertion of a finger causing physical injury
  - a. By forcible compulsion
  - b. Incapable of consent because physically helpless
  - c. Less than 11 years old
3. Third degree: insertion of a foreign object
  - a. By forcible compulsion
  - b. Incapable of consent because physically helpless
  - c. Less than 11 years old
  - d. Causing physical injury and other person is incapable of consent because mentally disabled or mentally incapacitated
4. Fourth degree:
  - a. Insertion of a foreign object and other person is incapable of consent by some factor other than being less than 17 years old
  - b. Insertion of a finder causing physical injury and other person is incapable of consent by some factor other than being less than 17 years old

**Forcible touching:**<sup>140</sup>

1. forcibly touches sexual/intimate parts of another person for purpose of degrading/abusing such person or gratifying actor's sexual desire
2. sexual contact for purpose of gratifying actor's sexual desire with intent to degrade/abuse other person while other person is a passenger on a busy, train or subway car
3. Includes squeezing, grabbing or pinching

**Predatory sexual assault:**<sup>141</sup>

1. rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree and (i) causes serious physical injury to victim or (ii) uses/threatens use of a dangerous instrument
2. rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree against one or more people
3. previously been convicted of a felony under § 130, incest (§ 255.25) or use of a child in a sexual performance (§ 263.05)

**Predatory sexual assault against a child:** actor is 18 years old or more and commits rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree and victim less than 13 years.<sup>142</sup>

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<sup>139</sup> Id. §§ 130.70, 130.67, 130.66, 130.665-a.

<sup>140</sup> Id. § 130.52.

<sup>141</sup> Id. § 130.95.

<sup>142</sup> Id. § 130.96.

**Persistent sexual abuse:** forcible touching, or second/third degree sexual abuse and w/in the past 10 years (excluding time when incarcerated) had been convicted 2+ times of forcible touching, or second/third degree sexual abuse, or committing or attempting to commit any felony under § 130.<sup>143</sup>

**Sexual misconduct:**<sup>144</sup>

1. sexual intercourse without consent
2. oral/anal sexual conduct without consent
3. sexual conduct with animal or dead human body

**Sex trafficking:** intentionally advances or profits from prostitution by:<sup>145</sup>

1. unlawfully providing to a person who is patronized with intent to impair that person's judgement (i) narcotic drug or preparation, (ii) concentrated cannabis, (iii) methadone or (iv) gamma-hydroxybutyrate (GHB) or flunitrazepan/Rohypnol
2. making material false statements, misstatements or omissions to induce/maintain the person being patronized to engage/continue to engage in prostitution activity
3. withholding, destroying, or confiscating a passport, immigration document, or any other government id with intent to impair freedom of movement
4. requiring prostitution be performed to retire, repay or service a real or purported debt
5. using force or engaging in scheme, plan or pattern to compel/induce person being patronized to engage/continue to engage in prostitution by means of instilling fear that if the person doesn't comply, the actor or another person will:
  - a. cause physical injury, serious physical injury or death to a person
  - b. cause damage to property, other than property of the actor
  - c. engage in other conduct constituting a felony or unlawful imprisonment in second degree under § 130.05
  - d. accuse some person of a crime or cause criminal charges or deportation proceedings to be instituted against some person
  - e. expose a secret or publicize an asserted fact (true or false) tending to subject some person to hatred, contempt or ridicule
  - f. testify/provide information or withhold information/testimony with respect to another's legal claim or defense
  - g. use or abuse position as a public servant by performing/failing to perform official duties
  - h. perform any other act which would not in itself materially benefit the actor but which is calculated to harm the person who is patronized

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<sup>143</sup> Id. § 130.53.

<sup>144</sup> Id. § 130.20.

<sup>145</sup> Id. § 230.34.