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Sexual Discrimination and Sexual Misconduct: Applying New York's Gender-Specific Sexual Misconduct Law to Consenting Minors

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SEXUAL DISCRIMINATION AND SEXUAL MISCONDUCT: APPLYING NEW YORK'S GENDER-SPECIFIC SEXUAL MISCONDUCT LAW TO CONSENTING MINORS.

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I. INTRODUCTION

In 1996, I met two 16 year-old Brooklyn teenagers, Nelson V. and Joe M. Both attended high school, came from two-parent homes, and had no prior arrests. Both had sexual encounters with two different 14 year-old girls. Both found themselves arrested, fingerprinted, and repeat visitors at the Central Criminal Court building in Brooklyn. Both prosecutions proceeded under § 130.20(1) (Sexual Misconduct); a gender-specific law repeatedly ruled unconstitutional, but then revised by courts to make it gender-neutral. The result is a law unwanted by the Legislature, and silent as to who should be charged when minors engage in sex. The Legislature must devise a distinct statutory rape law that contemplates - and perhaps even restricts - prosecutions in consensual minor sexual encounters.

II. THE SEXUAL MISCONDUCT STATUTE

A. The Unexplained Unequal Treatment of Minors

Nearly unique among New York Penal Laws, § 130.20(1)[1] applies only to males. Cross-referenced to § 130.05, which

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[1] N.Y. Penal Law § 130.20 (McKinney 1998). This section provides in pertinent part: "A person is guilty of sexual misconduct when ... [b]eing a male, he engages in sexual intercourse with a female without her consent ...." *Id.*

defines consent, § 130.20(1) forbids forcible rape, and sex with anyone who cannot give consent because she is physically or mentally incapacitated, or under the age of seventeen[2]. Statutes that treat males and females differently violate constitutional guarantees to equal protection unless the government demonstrates the gender distinction is "substantially related to the achievement of an important governmental objective."[3]

While the first subdivision of the Sexual Misconduct law pertains only to males, nothing in the statute's legislative history explains why.[4] In 1984, all of New York's rape laws applied only to males. Then came the landmark decisions in *People v. Liberta*.[5] Convicted of raping and sodomizing his estranged wife in front of their child, Mr. Liberta argued that male-only rape laws denied him equal protection under the law.[6] Under "intermediate level scrutiny," the Court of Appeals found the rape law did violate the Equal Protection Clause.[7] The court

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[2] *See* N.Y. PENAL LAW § 130.05 (McKinney 1998). This section provides in pertinent part:

> 1. Whether or not specifically stated, it is an element of every offense ... that the sexual act was committed without consent of victim.
> 2. Lack of consent results from (a) forcible compulsion; or (b) incapacity to consent...
> 3. A person is deemed incapable of consent when he is: less than seventeen years old; or mentally defective; or mentally incapacitated; or physically helpless

Id.

[3] Craig v. Boren, 429 U.S. 190, 197 (1976).

[4] *See* N.Y. PENAL LAW § 130.20 (McKinney 1998).

[5] 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984).

[6] *Id.* Liberta's second equal protection argument rested on the marital exemption then in New York's rape laws. The first court dismissed the indictment because of the marital exemption, but the Appellate Division found it unavailing because a temporary order of protection extended to Mrs. Liberta. *Id* at 160, 474 N.E.2d at 570, 485 N.Y.S. 2d at 210. On appeal, he did not argue the exemption applied to him, but that its existence made the law unconstitutional, since it gave those married different protections than rapists like himself. *Id.*

[7] *Id.* at 167-170, 474 N.E.2d at 576-78, 485 N.Y.S.2d at 216-218. "A statute which treats males and females differently violated equal protection unless the classification is substantially related to the achievement of an

deemed arguments that men raped by women somehow suffer less than women raped by men as rooted in "archaic and overbroad generalizations . . . grounded in long-standing stereotypical notions between the sexes."[8] The court regarded the statutory goal of "protecting women's chastity" as illegitimate, and the prevention of unwanted pregnancies an incidental result of rape laws. Instead, the preservation of bodily integrity remained the lawful aim of the rape statutes.[9] Though noting the rarity of rapes perpetrated by females upon males, the court concluded a "gender neutral law would indisputably better serve, even if marginally, the objective of deterring and punishing forced sexual assault."[10] Finding the State failed to justify the gender restriction, the court ruled the rape and sodomy laws unconstitutional.[11]

However, Mr. Liberta did not walk out of jail in 1984. The court - possibly moved by the brutality of his acts - struck the "being a male" language, and upheld the conviction.[12] The court held that when reviewing an unconstitutional gender-specific law a "court may either strike the statute, and thus make it applicable to nobody, or extend coverage of the statute to those formerly

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important governmental objective." *Id.* (citing Caban v. Mohammed, 441 U.S. 280, 388 (1979); Craig v. Boren, 429 U.S. 190, 197 (1976); People v. Whidden, 51 N.Y.2d 457, 460, 415 N.E.2d 927, 434 N.Y.S.2d 932, 928 (1980)).

[8] *Id.* at 167, 474 N.E.2d at 577, 485 N.Y.S.2d at 217.

[9] *Id.* at 168-69, 474 N.E.2d at 577, 485 N.Y.S.2d at 216. "[T]he very fact that the statute proscribes 'forcible compulsion' shows that its overriding purpose is to protect a woman from an unwanted, forcible, and often violent sexual intrusion into her body." *Id.*

[10] *Id.* at 170, 474 N.E.2d at 577, 485 N.Y.S.2d at 217.

[11] *Id.*, 474 N.E.2d at 578, 485 N.Y.S.2d at 217. The sodomy statutes are not gender-specific, but contained the dubious marital exemptions which the court also found unconstitutional. The court noted the common-law doctrine underpinning the marital exemptions - that wives belonged to their husbands - came from a bygone era no longer deserving of legal reinforcement. *Id.* at 164-67, 474 N.E.2d at 573, 485 N.Y.S.2d at 213-15. In addition, the court reasoned rape by a spouse was equally as painful, humiliating, and deserving of punishment as rape by a stranger, or rape by a woman of a man. *Id.* at 166, 474 N.E.2d at 575, 485 N.Y.S. at 215.

[12] *Id.* at 172, 474 N.E.2d at 579, 485 N.Y.S.2d at 219.

excluded."[13] Such court must decide "what course the Legislature would have chosen to follow had it foreseen [a] conclusion as to underinclusiveness."[14] Weighing the striking all of New York's forcible rape laws and extending their coverage to women, the court concluded the Legislature would have wanted the latter.[15]

As a result of *Liberta*, the New York State Legislature removed the male-only language in two of New York's rape statutes, Rape in the Second Degree,[16] and Rape in the Third Degree[17] - the latter law covering statutory rape where the defendant is over twenty-one years old.[18] Earlier versions of the bill earmarked the Sexual Misconduct law for gender-neutralization, but, without explanation, that proposal was left off the final legislation.[19]

B. The Sexual Misconduct Law and Statutory Rape

In 1989, New York courts started applying the *Liberta* holding to Sexual Misconduct cases. In *People v. Dieudonne*,[20] the defendants were convicted of Sexual Misconduct for consensual sex with a minor female. In reviewing the conviction, the court agreed with the defense's equal protection argument, finding no evidence that singling out males for punishment furthered an important governmental objective.[21] The court also followed *Liberta* by eliminating the male-only language, and not reversing the conviction.[22] Nevertheless, in the "interests of justice," the

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[13] *Id.* at 170, 474 N.E.2d at 578, 485 N.Y.S.2d at 218.

[14] *Id.* (citing Califano v. Westcott, 443 U.S. 76, 89 (1979); Welsh v. United States, 398 U.S. 333, 361 (1970); Skinner v. Oklahoma, 316 U.S. 535, 543 (1942)).

[15] *Id.* at 172-73, 474 N.E.2d at 579-80, 485 N.Y.S.2d at 219.

[16] *See* N.Y. PENAL LAW § 130.30 (McKinney 1998). This section now provides that "[a] person" may be guilty of rape. *Id.*

[17] *See* N.Y. PENAL LAW § 130.25 (McKinney 1998).

[18] 1987 N.Y. LAWS 509.

[19] Donnino, Practice Commentaries, N.Y. PENAL LAW § 130 at 571 (McKinney 1987).

[20] 143 Misc. 2d 559, 544 N.Y.S.2d 705 (2d Dep't 1989).

[21] *Id.* at 560, 544 N.Y.S.2d at 705.

[22] *Id.* at 561, 544 N.Y.S.2d at 705.

court vacated the sentences.[23] In 1991, the Fourth Department also found § 130.20(1) violated the Equal Protection Clause.[24] Again, like in *Liberta*, the court excised the male-only language and upheld the prosecution. However, as in *Dieudonne*, the court acted in the "interests of justice," this time dismissing the case of a 13 year-old who had otherwise consensual sex with a 15 year-old female.[25] In another recent case, a Delaware County judge declared § 130.20(1) unconstitutional as written, upheld prosecution under gender-neutral interpretation of the law, and then dismissed the case in the "interests of justice."[26]

It is important to note that while consensual sex with a teenage minor - usually called statutory rape - is covered by the Sexual Misconduct statute, that is not all that law covers. Male-only statutory rape laws passed constitutional scrutiny in 1981, when the Supreme Court decided *Michael M. v. Superior Court of Sonoma County*.[27] The California law focused only on males engaging in sex with women too young to give consent.[28] The Court found the law advanced the legitimate governmental interest of preventing teenage pregnancies; that while females faced "the natural sanction" of pregnancy, young boys did not.[29] The gender-restriction facilitated enforcement by insulating from prosecution females who reported sexual incidents.[30] The Court

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[23] *Id.*

[24] *In re* Jessie C., 164 A.D.2d 731, 734, 565 N.Y.S.2d 941, 943 (4th Dep't 1991). *See* U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states in pertinent part: "No state shall...deny to any person within its jurisdiction equal protection of the laws." *Id.*

[25] *Id.* at 736, 565 N.Y.S.2d at 944.

[26] People v. M.K.R., 166 Misc. 2d 456, 632 N.Y.S.2d 382 (Crim. Ct. Delaware County 1995).

[27] 450 U.S. 464 (1981).

[28] CAL. PENAL CODE § 261.5 (West 1981). California Penal Code defined unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." *Id.*

[29] *Michael M.*, 450 U.S. at 471-72.

[30] *Id.* at 475.

deferred to the California Supreme Court's findings that its legislature considered these goals when enacting the statute.[31]

In contrast to the California law, § 130.20(1) does not punish only sexual intercourse with a female minor, but all nonconsensual sex, including forcible rape. Section 130.05(2)(b)[32] requires consent for sex, and subdivision (3)(a)[33] defines consent as something unattainable from a person under seventeen. These provisions do not distinguish between the sexes.[34] For § 130.20(1) to survive an equal protection challenge, the State must demonstrate the gender restriction also makes sense when lack of consent is based on force, or when the victim is mentally retarded or chemically incapacitated. The New York Court of Appeals has already ruled forcible rape laws preserve personal safety, and only remotely serve to prevent pregnancies.[35] Since § 130.20(1) is a more extensive statute, the alleged important governmental objective of "reduction of teen pregnancies" relied on in *Michael M.* cannot suffice for the New York law under intermediate scrutiny.[36]

The Fourth Department noted the catch-all nature of §130.20(1) when it ruled it unconstitutional as written despite *Michael M.* and a previous Court of Appeals decision on New York's felony statutory rape law.[37] In *People v. Whidden*,[38] the Court of Appeals upheld a gender-specific rape statute which listed specific ages required to prosecute males only. The court ruled that this gender classification could properly rest with the Legislature's

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[31] *Id.* at 472.

[32] N.Y. PENAL LAW § 130.05(2) (McKinney 1998). This section states in pertinent part: "Lack of consent results from incapacity to consent . . ." *Id.*

[33] N.Y. PENAL LAW § 130.05(3) (McKinney 1998). This section states in pertinent part: "A person is deemed incapable of consent when he is ... less than seventeen years old . . ." *Id.*

[34] *See* N.Y. PENAL LAW § 130.05 (McKinney 1998).

[35] *Liberta*, 64 N.Y.2d at 168, 474 N.E.2d at 576, 485 N.Y.S.2d at 216.

[36] *See* Michael M. v. Super. Ct., 450 U.S. 464, 471 (1981).

[37] *In re* Jessie C., 164 A.D.2d 731, 565 N.Y.S.2d 941 (4th Dep't 1991).

[38] 51 N.Y.2d 455, 415 N.E.2d 927, 434 N.Y.S.2d 932 (1980). Penal Law §130.25 then stated "a male is guilty of rape in the third degree when . . . being twenty-one years old or more, he engages in sexual intercourse with a female less than seventeen years old." *Id.* at 459.

permissible goal of reducing the likelihood of teen pregnancies and the exploitation of young women by older men.[39] Because § 130.20(1) proscribes both forcible and nonforcible intercourse, the Fourth Department found it fell into the same category as the gender-specific rape laws declared unconstitutional in *Liberta*.[40] The court also found no "substantial relationship" between the objective of preventing pregnancy and a statute that permits irresponsible young women to engage in sex with teenage boys without facing criminal sanction.[41]

III. THE QUESTIONABLE INTERPRETATIONS OF A QUESTIONABLE LAW

A. *Upholding Convictions Under Underinclusive, Unconstitutional Laws*

In *Liberta*,[42] the Court of Appeals saved the conviction of a violent rapist by removing the male-only provision of the rape law.[43] Relying on *Liberta*, recent courts similarly struck the unconstitutional gender restriction of the Sexual Misconduct law, rewrote the law as gender-neutral, but then curtailed prosecutions in the interests of justice. However, *Liberta* was flawed, relying on cases which did not support the decision to revise and retain an unconstitutional law.[44]

Courts rarely strike an invalid provision of a *criminal* law to expand the statute's coverage.[45] The Supreme Court cases relied

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[39] *Id.* at 460-61, 415 N.E.2d at 928, 434 N.Y.S.2d at 938.

[40] *In re Jessie C.*, 164 A.D.2d at 733, 565 N.Y.S.2d at 943. Despite *Whidden* the Legislature revised the Rape in the Third Degree law in 1987 by removing the male-only restriction. 1987 N.Y. LAWS 509.

[41] *Id.* at 733, 565 N.Y.S.2d at 943.

[42] 64 N.Y. 2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984).

[43] *Id.* at 172-73, 474 N.E.2d at 579, 485 N.Y.S.2d at 219.

[44] *Id.*

[45] Bouie v. City of Columbia, 378 U.S. 347, 352 (1964) (reversing trespass convictions of Civil Rights protesters because only as judicially interpreted did trespass statute punish a "refusal to leave") (citing Pierce v. United States, 314 U.S. 306, 311 (1941)). "[J]udicial enlargement of a criminal act by

on in *Liberta* dealt mostly with underinclusive benefits statutes.[46] The Court recited Justice Harlan's dicta that courts facing an underinclusive law "may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion."[47] However, Harlan explained that when a statute "authorizes no positive action [like criminal laws], there is no occasion to consider remedial" options like extending coverage.[48] Thus in *Welsh v. United States*,[49] Justice Harlan voted to reverse Welsh's conviction because the religious component of the Draft law's conscientious objector exemption was underinclusive and violated the Establishment Clause.[50] He noted the other choice, striking the exemption entirely, would not help Mr. Welsh who faced a five years sentence.[51] Similarly, the Supreme Court faced with other underinclusive laws did not expand the breadth of the law, but ended prosecution under it.[52] If not dismissing the case, the

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interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Id.*

[46] *Liberta*, 64 N.Y.2d 152, 170, 474 N.E.2d 567, 577, 485 N.Y.S.2d 207, 218 (citing Califano v. Westcott, 443 U.S. 76 (1979) (removing gender restriction that permitted additional welfare aid only to families whose father was recently unemployed). In addition, the parties in *Westcott* agreed that extension rather than invalidation of the statute was proper; the only issue was whether the revised law should extend benefits to any family where a parent was suddenly unemployed or to just those where the "principal wage earner" lost his or her job. *Califano*, 443 U.S. at 91.

[47] *Liberta*, 64 N.Y.2d at 170, 474 N.E.2d at 578, 485 N.Y.S.2d at 218 (citing Welsh v. United States, 398 U.S. 333, 362 (1970) (Harlan, J., concurring)).

[48] Welsh v. United States, 398 U.S. at 362 (Harlan, J., concurring).

[49] 398 U.S. 333 (1970).

[50] *Id.* at 356.

[51] *Id.* "Since this created a religious benefit not accorded to petitioner, it is clear to me that this conviction must be reversed under the Establishment Clause . . . unless Mr. Welsh is to go remediless." *Id.* (citing Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 247 (1931)).

[52] *See* City of Ladue v. Gilleo, 512 U.S. 43 (1994) (striking ordinance banning signs that contained numerous exceptions as underinclusive); R.A.V.

Court at least relieved the extra burden placed on the unequally treated party, rather than extend the treatment to those exempted by the flawed law. Thus, in *Skinner v. Oklahoma*,[53] the Court vacated a sterilization order where the state law mandated habitual thieves suffer the procedure, but not similarly situated parties like recidivist embezzlers.[54] The Court left Oklahoma to decide whether it would sterilize embezzlers as well.[55]

The other cases relied on by the *Liberta* court for invalidating part of a statute but permitting continued prosecution did not support its conclusion. The cases either dealt with unconstitutional and easily severable amendments,[56] or instances where the courts followed the directions of a severability clause.[57]

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v. City of St. Paul, 505 U.S. 377 (1992) (striking hate speech law as unconstitutional because it imposed special prohibitions on certain speakers).

[53] 316 U.S. 535 (1942).

[54] *Id.* at 541-43.

[55] *Id.* at 543. The Court stated "[i]t is by no means clear whether, if an excision were made, this particular constitutional difficulty might be solved by enlarging on the one hand on the other the class of criminals who might be sterilized." *Id. Cf.* Nat'l Life Ins. Co. v. United States, 277 U.S. 508, 534-535 (1928) (Brandeis, J., dissenting).

[56] *Liberta*, 64 N.Y.2d at 171, 474 N.E.2d at 578, 485 N.Y.S.2d at 218 (citing United States v. Jackson, 390 U.S. 570 (1968) (finding the death penalty provision unconstitutional, but severed the provision because it was a separate amendment passed 60 years after the initial statute). *See also Liberta*, 64 N.Y.2d at 172 n.15, 485 N.Y.S.2d at 173 n.15, 474 N.E.2d at 579 n.15 (citing Iowa v. Books, 225 N.W.2d 322, 325 (1975) (relying on severability clause, striking only underinclusive provision in amendment added after statute's passage); Ohio v. Burgun, 359 N.E.2d 1018 (Ohio Ct. App. 1976) (reversing conviction, and striking underinclusive exemption contained in separate provision, and passed after original statute); Tom & Jerry, Inc. v. Liquor Control Comm'n, 160 N.W.2d 232, 238 (Neb. 1968) (upholding statute but invalidating an underinclusive amendment that was "not an inducement to passage.")).

[57] *Liberta*, 64 N.Y.2d at 173 n. 15, 485 N.Y.S.2d at 173 n.15, 474 N.E.2d at 579 n.15 (citing Plas v. State, 598 P.2d 966 (Alaska 1979) (relying on severability clause to remove "by a female" language from prostitution statute, and upholding conviction)). *Also cited*, City of Duluth v. Sarette, 283 N.W.2d 533 (Minn., 1979) (after reversing conviction, striking invalid statutory exception under severability clause); People v. Henry, 21 P.2d 672, 677 (Cal. Ct. App. 1933)) (striking arbitrary exemption of certain carriers but upholding

No scrutiny of the "severability provisions" of the rape laws arose in *Liberta*; nor did the Fourth Department or the Appellate Term investigate the statutory history of the Sexual Misconduct law. The Sexual Misconduct statute was created in 1965 when the Legislature revised the entire Penal Law.[58] The provision derives from two older felony laws. Displeased with the "stigma" a felony conviction posed for young men who "may well have been persuaded by the victim into committing the act [i.e. intercourse or sodomy]," the Legislature sought a lesser sanction.[59] Restricting application of the law only to boys was not explained. In addition, C.P.L. § 170.35[60] provides for the dismissal of prosecutions under unconstitutional laws; it does not suggest curing the ill by permitting the prosecutor to punish even more persons.[61] Moreover, the Court of Appeals declined to expand the scope of the gender-specific public exposure law,[62] or the underinclusive consensual sodomy law.[63]

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portion of statute convicting defendant noting "the act itself has the usual savings clause . . ."); State v. McClearly, 308 S.E.2d 883 (N.C. Ct. App. 1983)) (striking underinclusive exemption placed in separate provision of gambling statute, relying on severability clause).

[58] *See* Governor's Memoranda on Bills Approved, *reprinted in* 1965 N.Y. Legis. Ann. 530. The *Revised Penal Law of 1965* was the first significant and comprehensive revision of the Penal Law since 1881. *See also* Morris Plascowe, *Sex Offenses in the New Penal Law,* 32 BROOK. L. REV. 274 (1966).

[59] *Id.*

[60] N.Y. PENAL LAW § 170.35(1) (McKinney 1998). The section states in pertinent part: "An information, simplified information, prosecutor's information or misdemeanor complaint, or a count thereof, is defective within the meaning of paragraph (a) of subsection one of section 170.30 when ... [t]he statute defining the offense charged is unconstitutional or otherwise invalid." *Id.*

[61] *Id.*

[62] People v. Santorelli, 80 N.Y.2d 875, 881, 600 N.E.2d 232, 234, 587 N.Y.S.2d 601, 605 (1992) (Titone, J., concurring) (arguing for dismissal because "public exposure" law unjustifiably listed additional body parts only women could not expose).

[63] People v. Onofre, 51 N.Y.2d 476, 495, 415 N.E.2d 936, 943, 434 N.Y.S.2d 947, 954 (1980) (striking consensual sodomy law because it prohibited only non-married persons from engaging in such acts, and overturned the defendant's conviction),

Finally, the expansion remedy sanctioned in *Liberta* and repeated with respect to the Sexual Misconduct law, only exacerbated the Equal Protection problem that befell the defendant. The *Liberta* court conceded its remedy "does treat the defendant differently than, for example, a married man who, while living with his wife, raped her prior to this decision."[64] The court claimed this discrepancy was "justified by the limitations imposed ... by the notice requirements of the due process clause."[65] When Mario Liberta's habeas writ reached the Second Circuit, that Court of Appeals soundly ridiculed the rationalization:

> [W]e cannot agree that this lack of power validates what may otherwise be unconstitutional under the federal equal protection clause. Before the Court of Appeals decision, the distinctions it held to be unconstitutionally discriminatory were the law in New York and in full force when Liberta was convicted. His conviction is thus a result of the precise discrimination invalidated by the court, and his federal equal protection claim cannot be avoided because courts lack power to apply judicially expanded criminal statutes retroactively. Had the original New York rape and sodomy legislation applied only to black persons, for example, its later expansion by the New York Court of Appeals to person of all races would not validate the convictions of blacks that occurred before the judicial expansions.[66]

Thus in *Liberta*, the New York Court of Appeals acknowledged a constitutional flaw raised by the defendant, that did discriminate

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[64] *Liberta*, 64 N.Y.2d at 173, 474 N.E.2d at 579, 485 N.Y.S.2d at 219.

[65] *Id.*

[66] Liberta v. Kelly, 839 F.2d 77, 81 (2d Cir. 1988). The Second Circuit affirmed the conviction nonetheless, finding the New York rape laws did not violate the Equal Protection clause. *Id.* (emphasis added). The court observed the male-only language coincided with the statutory requirement of "penetration" and concluded the fear of unwanted pregnancy resulting from rape was a uniquely female concern permitting different treatment of the sexes. *Id.* at 83.

against the defendant, but that would be ignored to uphold the defendant's conviction.[67]

B. Perverting an Extraneous Law to Save It

Even assuming "extending" the scope of a criminal statute may rescue a prosecution, a court is supposed to ask "what course the Legislature would have chosen to follow had it foreseen our conclusion as to underinclusiveness."[68] However, with §130.20(1), legislative "foresight" is not even an issue; the Legislature "saw" the *Liberta* court rule male-only rape laws violated the Constitution. Thus in 1987, the Legislature acted to revise those laws and make **some** of them gender neutral.[69] The Legislature's Law Revision Commission advised removal of marital and gender classifications as early as 1985.[70] Nevertheless, the final bill passed specifically and inexplicably left the male-only language in the Sexual Misconduct law.[71] Therefore, it would seem the message left by the Legislature's scrupulous avoidance of redressing the gender classification of §130.20(1) is that it did not want women to face prosecution under the misdemeanor Sexual Misconduct law. Perhaps legislators did not want young women prosecuted for consensual sexual encounters with slightly underaged males. Nevertheless, the other courts that rewrote § 130.20(1) without the male-only statement succeeded in saving a statute by extending its coverage to a portion of the population the Legislature clearly never sought to punish.[72]

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[67] *Liberta*, 64 N.Y.2d at 172-73, 474 N.E.2d at 579, 485 N.Y.S.2d at 219.

[68] *Id.* at 171, 474 N.E.2d at 578, 485 N.Y.S.2d at 218.

[69] 1987 N.Y. LAWS 510, §§ 1, 2.

[70] Law Rev. Comm. ON FEMALE AND MARITAL EXEMPTIONS CONTAINED IN ARTICLE 130.00 OF THE PENAL LAW, LEG. DOC. NO. 65[1], *reprinted in* The State of New York Law Revision Commission Report (1986).

[71] *In re Jessie C.*, 164 A.D.2d at 735, 565 N.Y.S.2d at 943. *See also* Donnino, Practice Commentaries, N.Y. PENAL LAW § 130 (McKinney 1987).

[72] *Cf.* Scales v. United States, 367 U.S. 203, 211 (1961) (holding that "[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not carry this to the point of perverting the

Not only is the expansion of § 130.20 contraindicated by legislative efforts, but it is unnecessary. New York's statutory scheme for sex offenses is replete with redundant statutes covering the same behavior. Penal Law § 130.35(1)[73] proscribes forcible law (Rape in the First Degree). Indeed, in forcible rape cases, the elements of Sexual Misconduct and Rape in the First Degree merge.[74] Similarly, § 130.25 (Rape in the Third Degree) punishes nonconsensual sexual intercourse where incapacity due to age is not an issue - and unlike § 130.35 or § 130.20(1), it applies to both genders. Section 130.30[75] criminalizes sex between one eighteen and older, with one under fourteen. Section 130.25(2)[76] classifies as a E felony sex between a minor and a person twenty-one or older. Even consensual sex between minors is covered by another statute, P.L. § 130.55[77] (Sexual

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purpose of the statute" or judicially rewriting it); Heckler v. Matthews, 465 U.S. 728, 739 n.5 (1984) (noting that "[a]lthough the choice between extension and nullification is within the competence of federal district court, and ordinarily extension, rather than nullification, is the proper course, the court should not, of course, use its remedial powers to circumvent the intent of the legislature") (citations omitted).

[73] *See* N.Y. PENAL LAW § 130.35 (1) (McKinney 1998).

[74] People v. McEaddy, 30 N.Y.2d 519, 280 N.E.2d 891, 330 N.Y.S.2d 65 (1972) (holding defendant not guilty of rape in the first degree because of insufficient evidence of force could not be convicted of § 130.20(1) on a forcible compulsion theory).

[75] N.Y. PENAL LAW § 130.30 (McKinney 1998). This section states: "A person is guilty of rape in the second degree when, being eighteen years old or more, he or she engages in sexual intercourse with another person whom the actor is not married less that fourteen years old." *Id.*

[76] N.Y. PENAL LAW § 130.25 (2) (McKinney 1998). This section states in pertinent part that: "A person is guilty of rape in the third degree when...[b]eing twenty-one years old or more, he or she engages in sexual intercourse with another person to whom the actor is not married less than seventeen years old." *Id.*

[77] N.Y. PENAL LAW § 130.55 (McKinney 1998). The provision states:

> A person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter's consent; except that in any prosecution under this section, it is an affirmative defense that (a) such other person's lack of consent was due solely to incapacity to consent by reason of being less than seventeen years old, and

Abuse in the Third Degree). A class B misdemeanor, this law punishes any "sexual contact" committed without consent.[78] However, the law provides an affirmative defense where the lack of consent is premised solely to incapacity to consent because the complaint is less than seventeen (but older than 14), and where the defendant is less than five years older than the complainant.[79] Thus, a teenage boy like Nelson V., who admits to sex with his fourteen year-old girl-friend, has an affirmative defense to the lesser B misdemeanor, but none to the more serious A misdemeanor, Sexual Misconduct charge. With all this built-in redundancy in the sex offense statutory scheme, the momentary loss of § 130.20(1) would not reap a "disastrous effect on the public interest and safety," like striking the felony rape and sodomy laws at issue in *Liberta*.[80]

C. So Which Kids Get Charged?

In the cases of Nelson V. and Joe M., all parties were over fourteen years of age, but under seventeen. Since the females lacked the ability to legally consent to sex, they could not be charged as "accomplices" under New York law.[81] Likewise, if

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(b) such other person was more that fourteen years old, and
(c) the defendant was less than five years older than such other person.

Id.

[78] *Id.*

[79] *See* N.Y. PENAL Law § 130.55 (McKinney 1987).

[80] *Liberta*, 64 N.Y.2d at 171, 474 N.E.2d at 578, 485 N.Y.S.2d at 218 (noting the historically serious treatment afforded "forcible sexual assaults."). *See also* Welsh v. United States, 398 U.S. 333, 365 (1970) (examining whether to extend or nullify, the court should "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.").

[81] People v. Fielding, 39 N.Y.2d 607, 611, 385 N.Y.S.2d 17 (1976); People v. Facey, 115 A.D.2d 11, 14, 499 N.Y.S.2d 517, 519 (4th Dep't 1986). *Compare with* Michael M. v. Sonoma County Super. Ct., 450 U.S. 464, 476 (1980) (Stewart, J., concurring) (defending California's male-only statutory rape law, noting other provisions permitted prosecution of underaged females as accomplices).

the girls had been charged first under a gender-neutral §130.20(1), the boys would have been insulated from accomplice liability. Thus, by removing the gender classification, the courts removed the mechanism for designating culpability when both parties are underaged. Gender-neutralizing § 130.20 invites a race to the courthouse to determine "victim" and "defendant" when both could be charged, but only one may be prosecuted.

In addition, the judicially revised Sexual Misconduct law invites selective prosecution. If prosecutors refuse to charge females, extending statutory coverage to both sexes is meaningless. If both persons are underage, and a District Attorney only prosecuted boys because of their gender, similarly situated parties are treated unequally, once again violating guarantees of equal protection.[82] Therefore, attempts to repair the equal protection problem by eliminating the gender restriction may merely remove the *de jure* discrimination to a *de facto* level.

The queer judicial interpretation of § 130.20(1) also invites differential treatment by the courts. In all the aforementioned cases (*Dieudonne*, *In re Jessie C.*, and *M.K.R.*) after revising the law, the courts still forestalled prosecutions by acting "in the interests of justice."[83] In *Jessie C.*, the boy was thirteen and the girl fifteen;[84] in *M.K.R.*, the boy sixteen, the girl fourteen.[85] Both Nelson V. and Joe M. were sixteen, and the girls fourteen. However, despite their lack of criminal records, their youth, and the undisputed fact that the sex was consensual, the Clayton motions[86] of both boys were denied. Both walked away with

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[82] 303 W. 42d St. Corp. v. Klein, 46 N.Y.2d 686, 389 N.E.2d 815, 416 N.Y.S.2d 219 (1979); University Club v. City of New York, 655 F. Supp. 1323 (S.D.N.Y. 1987); *see generally* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

[83] *In re Jessie C.*, 164 A.D.2d at 735, 565 N.Y.S.2d at 944; People v. Dieudonne, 143 Misc. 2d 559, 560, 544 N.Y.S.2d 704, 705 (Sup. Ct. New York County 1989); People v. M.K.R., 166 Misc. 2d 456, 463, 632 N.Y.S.2d 382, 384 (Crim. Ct. Delaware County 1995).

[84] 164 A.D.2d at 733, 565 N.Y.S.2d at 942.

[85] 166 Misc. 2d at 458, 632 N.Y.S.2d at 383.

[86] *See* Hon. Stephen G. Crane, *Pretrial Hearings in Criminal Cases*, N.Y.S. BAR ASSOC. (1991). The Clayton Motion is named for People v. Clayton 41 A.D.2d 204, 342 N.Y.S.2d 106 (2nd Dep't 1973), the case that established

Adjournments in Contemplation of Dismissals (ACD's), thanks in part to judges applying more subtle pressure on the District Attorney's office. However, these dispositions came after several court appearances, hearings, or other pretrial work, motions, replies, and responses. Defendants and complainants missed time from school. All suffered from the inadequacy of a flawed statute and the subsequent errant opinions that leave § 130.20(1) on a fence where every prosecution of underage, consenting minors may end up in a Clayton hearing. Striking this provision would force the Legislature to act, and properly consider what role the Sexual Misconduct law serves in the arsenal of sexual offense statutes, and how to best tailor it to serve those goals.

IV. SOME SUGGESTED STATUTORY REVISIONS

A. Back to Boys Only?

A male-only law punishing underage boys for sexual encounters with underaged girls was previously upheld in *Michael M.*[87] Perhaps the only required revision is some distinct provision separate from the current catch-all § 130.20(1). A male-only law avoids the "designation of culpability" problem resulting for a gender-neutral statute, for only boys face charges. However, in *Michael M.*, the dissent leveled several sharp criticisms that bear repeating. First, any statutory rape law faces enforcement difficulties given the consensual nature of the proscribed behavior, and neither party wishing to prosecute.[88] Second, a male-only law reinforces sexist notions that sexual encounters ultimately remain the choice and responsibility of males.[89] Third,

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that a court may dismiss an indictment in the interest of justice. *See also* N.Y. CRIM. PROC. LAW § 210.40 (McKinney 1998).

[87] 450 U.S. 464, 476 (1981).

[88] *Id.* at 492 (Brennan, J., dissenting) (relating the low nationwide statistics on enforcement of statutory rape laws).

[89] *Id.* at 499 (Stevens, J., dissenting).

> [I]f we view the government's interests as that of a *parens partiae* seeking to protect its subjects from harming themselves, the discrimination is actually perverse. Would a

what of the promiscuous young female? Under the plurality's view, statutory rape laws protect society from unwanted teenage pregnancies.[90] A "boys only" law may permit girls to repeatedly inflict on society such resource draining offspring, or let criminal instigators off where reproduction does not occur.[91]

Finally, a boys only law ignores certain temporal changes in society. Even California revamped their statutory rape law to cover female offenders.[92] Only five states retain gender specific rape statutes.[93] The hue and cry amongst recent welfare reformers is to remove incentives for young mothers to get pregnant; what Justice Rehnquist called a "natural sanction," today's lawmakers deride as "natural windfall."[94] New York permits abortion on demand, with no parental notification or consent requirements. Condoms are increasingly available. As one Brooklyn judge noted, both boys and girls face sexually

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> rational parent making rules for the conduct of twin children of opposite sex simultaneously forbid the son and authorize the daughter to engage in conduct that is especially harmful to the daughter?

Id. (Stevens, J., dissenting).

[90] *Id.* at 475 (Stevens, J., dissenting).

[91] *Id.* at 502 (Marshall, J., dissenting). "If a discarded male partner informs on a promiscuous female, a timely threat of prosecution might well prevent the precise harm the statue is intended to minimize." *Id.* (Marshall, J., dissenting).

[92] Susannah Miller, *The Overturning of Michael M.: Statutory Rape Law Becomes Gender Neutral in California*, 5 UCLA WOMEN'S L.J. 289 (Fall 1994). Ms. Miller chronicles how outrage over widely publicized incidents where older women seduced teenage boys prompted the legislature to reconsider its position.

[93] *See* People v. Yates, 168 Misc. 2d 101, 109 n. 10, 637 N.Y.S.2d 625 n. 10, 630 n. 10 (Sup. Ct. New York County 1996). "According to a 1995 table of statutes compiled by the National Victim Center in Arlington, VA., these states" include Alabama, Georgia, Idaho, Kansas, and Mississippi. *Id.*

[94] Michael M. v. Sonoma County Super. Ct., 450 U.S. 464 (1980). Justice Rehnquist stated "[t]he risk of pregnancy itself constitutes a substantial deterrence to young females. No similar *natural sanctions* deter males. A criminal sanction imposed solely on males thus serves to roughly 'equalize' the deterrents of the sexes." *Id.* at 473 (emphasis added).

transmitted diseases such as AIDS.[95] Thus pregnancy is neither the only nor the greatest deterrent to teenage sexual activity.

B. Prosecuting Both Sexes Equally

As noted, in 1987 the Legislature removed the male-only language of two sex offenses but did not change § 130.20(1). Over the last few years, both houses have proposed gender-neutralizing that law.[96] Each bill would replace the "being a male" language of the Sexual Misconduct law with "he or she."[97] In addition, the measure would also make gender neutral the crimes of sexual abuse and first degree rape.[98]

Mainly, the Legislative proposals just sanction the work of the *Liberta*[99] and *Jessie C.*[100] courts. While frequently gaining bipartisan support, the proposals do not squarely address the issue of underage minors having sex. There remains the problem with designating culpability, which invites a "race to the courthouse" to decide who is prosecuted. Moreover, the possibility of a dismissal in the "interests of justice" might decline with the legislative approval of a gender-neutral law.

C. Gender Neutral with a Defense

Perhaps a better solution already resides within a lesser included offense of Sexual Misconduct. As mentioned, § 130.55

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[95] People v. Nathan, No. 95K053815, slip op. at 3 (N.Y. Crim. Ct. Kings County, Mar. 8, 1996) (upholding information charging 38 year-old woman for sex with a teenage boy under § 130.20(1)).

[96] N.Y.A.744, 214th Sess. (1991); N.Y.A.3362, 216th Sess. (1993) N.Y.A. 2078, 216th Sess. (1993). N.Y. S. 6580, 218th Sess. (1995). N.Y.A. 4832, 220th Sess. (1997) N.Y.A.148, 220th Sess. (1997).

[97] N.Y.A.148, 220th Sess. (1997).

[98] *Id.* However, the sexual abuse statutes do not appear to be facially gender specific. *See* N.Y. PENAL LAW §§ 130.55, 130.60, 130.65, 130.67, 130.70. (McKinney 1984). These provisions all use the pronoun "he" which does not designate males-only under New York law. *See* N.Y. PENAL LAW § 10.00(7) (McKinney 1998).

[99] 64 N.Y. 2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984).

[100] 164 A.D.2d 731, 565 N.Y.S.2d 941 (4th Dep't 1991).

(Sexual Abuse in the Third Degree) punishes any nonconsensual sexual contact with one proviso: if the consent is lacking only due to age, and the defendant is within five years of the complainant, he or she has an affirmative defense.[101] This defense was added to "exclude from criminality such things as the heavy necking party between fourteen, fifteen, or sixteen year old victim and another young though criminally responsible person of sixteen years of slightly greater age."[102] With respect to sexual intercourse, the societal concerns of teenage pregnancy or spreading disease may warrant a tighter age differential. Perhaps the defense should be retricted to persons within three years of the younger's age. Therefore, boys or girls seventeen or younger would have a defense if fornicating with a fourteen year old. Persons under sixteen could not be convicted of Sexual Misconduct when copulating with a fellow teenager of at least fourteen. An eighteen year-old who "fraternizes" with a fourteen year-old may still face prosecution. Such a person introduces on a presumably less mature and responsible person the ill-effects of sex, including disease or pregnancy. Exploitation of younger persons by older ones forms the basis of several current sex offense laws.[103] It is under this notion of exploitation that the Court of Appeal upheld the male-only felony statutory rape law in *Whidden*.[104]

This sliding scale would, as best as a law can, compensate for the varying degrees of teen maturity. Considering New York's youthful offender laws, most teens who violate § 130.20(1) would escape a criminal record even if convicted.[105] By effectively

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[101] *See* N.Y. PENAL LAW § 130.55 (McKinney 1998).

[102] Donnino, Practice Commentaries, N.Y. PENAL LAW § 130 at 571 (McKinney 1987) (citing Staff Comments of the Commission of Revision of the Penal Law. McKinney's Special Pamphlet (1965) p. 276)).

[103] N.Y. PENAL LAW § 130.25 - Rape in the Third degree; § 130.35(3) - Rape in the First degree; § 130.50(3) - Sodomy in the First Degree; § 130.65(3) - Sexual Abuse in the Third Degree. (McKinney 1998).

[104] People v. Whidden, 51 N.Y.2d 457, 465, 434 N.Y.S.2d 936, 939 (1980).

[105] N.Y. CRIM. PROC. LAW §§ 720.10-720.35. These provisions mandate the sealing of convictions of all first-time misdemeanor offenders under the age of nineteen, and limits to six months the jail sentence the minor may face. *Id.*

decriminalizing most teenage sex, the State would save the expense of trials, useless probationary review. Prosecutors could pursue other matters without fearing attacks by "aggrieved" parents. The specific age delineation would displace a District Attorney's subjective evaluation of maturity, eschewing selective prosecution or other due process problems.

V. CONCLUSION

Of course, the Legislature could just decriminalize consensual sex between minors altogether. Add to § 130.20(1) the phrase "except where lack of consent is premised solely upon incapacity due to age and the person [i.e. suspect] is also incapable of consenting due to age." Minors who exploit drunken or physically helpless peers would still face prosecution. This revised law might be more realistic by being less paternalistic - and not permit parents who failed to inculcate certain values on their children to pester prosecutors into converting a "rite of passage" into a challenge of Constitutional rights.

Whatever approach is eventually adopted, hopefully its pitfalls and practicalities will face a thorough examination within the legislative process. Child psychologists, sociologists, health care professionals, etc. may bring more developed theories to the debate. What if any role does criminal prosecution serve in deterring kids from having sex? If the only legitimate purpose statutory rape laws can serve concern public health as opposed to public morals, does incarceration up to a six months in jail succeed where education fails? These valid questions remain unanswered while prosecutors undertake (often half-heartedly) costly prosecutions of teens under an invalid law. Given the limits of judicial correction, and the lack of limits on prosecutorial discretion, legislative revision of the Sexual Misconduct statute is in order, and overdue.