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ticle XVII, section 1.³³⁷ The court quickly dismissed this claim, holding that it could not disturb or question the legislature's determination of need³³⁸ in that article XVII, section 1, on its face, "mandates only that the State provide 'for the aid, care and support of the needy . . . in such manner and by such means, as the legislature may from time to time determine.'"³³⁹

FOURTH DEPARTMENT

*In re Jessie C.*³⁴⁰

(decided Feb. 1, 1991)

The defendant, Jessie C., challenged part of New York's Sexual Misconduct Statute, Penal Law section 130.20(1),³⁴¹ as discriminatory on the basis of gender in violation of the equal protection provisions of the federal³⁴² and state³⁴³ constitutions. The appellate division, fourth department, in a unanimous decision reversed the order of the family court. The court held that the statute was unconstitutionally underinclusive and struck the gender exemption portion of the statute.³⁴⁴

The defendant, a 13 year old male, was declared a juvenile delinquent because he committed the offense of sexual misconduct with a 15 year old female in violation of Penal Law section 130.20(1). "The parties stipulated that there was no allegation of force and that the female could not consent to sexual intercourse by reason of her age."³⁴⁵

337. *Lovell*, 573 N.Y.S.2d at 753.

338. *Id.*; see also *Capozzi v. New York State Dep't of Social Servs.*, 137 Misc. 2d 193, 196, 520 N.Y.S.2d 471, 473 (Sup. Ct. Oswego County 1987).

339. *Lovell*, 573 N.Y.S.2d at 753 (quoting N.Y. CONST. art. XVII, § 1), *appeal dismissed without opinion*, 78 N.Y.2d 907, 577 N.E.2d 1059, 573 N.Y.S.2d 467 (1991).

340. 164 A.D.2d 731, 565 N.Y.S.2d 941 (4th Dep't 1991).

341. N.Y. PENAL LAW. § 130.20 (McKinney 1987) ("A person is guilty of sexual misconduct when: 1. Being a male, he engages in sexual intercourse with a female without her consent . . .").

342. U.S. CONST. amend. XIV, § 1.

343. N.Y. CONST. art. 1, § 11.

344. *Jessie C.*, 164 A.D.2d at 734-36, 565 N.Y.S.2d at 943-44.

345. *Id.* at 733, 565 N.Y.S.2d at 942.

The court began its analysis by stating that the statute at issue was discriminatory on its face on the basis of gender³⁴⁶ because it expressly created a classification in which only a male could commit the crime of sexual misconduct.

The court determined that the appropriate standard of review for a statute that treats males and females differently under the Equal Protection Clauses of the Federal and New York State Constitutions is mid-level scrutiny. Under mid-level scrutiny, a statute that is facially discriminatory on the basis of gender “violates equal protection unless the classification is substantially related to the achievement of an important governmental objective.”³⁴⁷ The court, relying on the federal precedent, stated that the prosecution has the burden of identifying “an ‘exceedingly persuasive justification’ for the classification.”³⁴⁸ Among the requirements is the burden of proving “that the gender-based law serves the governmental objective better than would a gender-neutral law.”³⁴⁹

Applying mid-level scrutiny to this case, the court found that the plaintiff, the presentment agency, failed to meet its burden of proof. The court rejected the plaintiff’s contention that the statute serves the important governmental objective of preventing teenage pregnancies. The court noted that a female of any age can be a victim and, therefore, the statute is not specifically tied to prevention of teenage pregnancy.

The court stated that even if it is assumed that the statute serves an important governmental interest in preventing teenage pregnancies, plaintiff “has failed to demonstrate that this objective can be better served by a gender-based law than a

346. *Id.*

347. *Id.* (quoting *People v. Liberta*, 64 N.Y.2d 152, 168, 474 N.E.2d 567, 576, 485 N.Y.S.2d 207, 216 (1984), *cert. denied*, 471 U.S. 1020 (1985); *Caban v. Mohammed*, 441 U.S. 380, 388 (1979)).

348. *Id.* (quoting *Liberta*, 64 N.Y.2d at 170, 474 N.E.2d at 577, 485 N.Y.S.2d at 217; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

349. *Id.* at 733-34, 565 N.Y.S.2d at 942-43 (citing, *inter alia*, *Orr v. Orr*, 440 U.S. 268, 281-82 (1979), *on remand*, 374 So.2d 895 (Al. App. 1979), *cert. denied*, 444 U.S. 1060 (1980)).

gender-neutral law."³⁵⁰ The statute proscribes both forcible and non-forcible sexual intercourse. In *People v. Liberta*,³⁵¹ the court of appeals concluded that a gender-neutral law would better serve to deter forcible sexual behavior.³⁵²

In *Liberta*, the New York Court of Appeals found the gender-based portion of the statutory rape provision violative of the Equal Protection Clauses of both the Federal and New York State Constitutions. Applying the intermediate level of scrutiny, the court reasoned that "[t]o meet their burden of showing that a gender-based law is substantially related to an important governmental objective, the people must set forth an 'exceedingly persuasive justification'"³⁵³ The government has the burden of showing that the gender-based law better serves the important governmental objective than a gender-neutral law. The court of appeals, in *Liberta*, concluded that:

The fact that the act of a female forcibly raping a male may be a difficult or rare occurrence does not mean that the gender exemption satisfies the constitutional test. A gender-neutral law would indisputably better serve, even if only marginally, the objective of deterring and punishing forcible sexual assault.³⁵⁴

In *Jessie*, the court determined that as to non-forcible sexual conduct, the plaintiff failed in its burden of presenting an important reason why a gender-based statute would better serve the objective of deterring teenage pregnancies than a gender-neutral one. The court declined to strike the entire statute, and simply struck the gender exemption.³⁵⁵

In *Craig v. Boren*,³⁵⁶ the United States Supreme Court articulated the intermediate level of scrutiny for the first time as the appropriate standard for evaluating gender-based discrimination claims. In *Craig*, the Supreme Court concluded

350. *Id.* at 734, 565 N.Y.S.2d at 943.

351. 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984).

352. *See id.* at 170, 474 N.E.2d at 577, 485 N.Y.S.2d at 217.

353. *Id.* (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

354. *Id.*

355. *Jessie C.*, 164 A.D.2d at 735, 565 N.Y.S.2d at 943.

356. 429 U.S. 190 (1976).

that intermediate level scrutiny, the standard that governs discrimination against women under the Equal Protection Clause, should be applied to governmental discrimination against men.³⁵⁷ In his dissent, Justice Rehnquist argued that rational basis scrutiny should be applied because the classification drawn in *Craig* only discriminated against males.³⁵⁸ However, the *Craig* majority maintained that discrimination against males is also harmful against women because it furthers old stereotypes and, thus, promotes old notions concerning the roles of men and women in society.³⁵⁹

It is noteworthy that Justice Rehnquist, who believes it is improper for intermediate scrutiny to be used in cases of discrimination against males,³⁶⁰ authored the majority opinion in *Michael M. v. Superior Court*.³⁶¹ In *Michael M.*, the majority applied the *Craig* mid-level scrutiny test to a gender-based California statutory rape law, which made males alone criminally liable for the act of sexual intercourse, and upheld the statute.³⁶² Justice Rehnquist reasoned that classes of men and women are not similarly situated with respect to the subject of pregnancy. First, only women may become pregnant, therefore, "the risk of pregnancy itself constitutes a substantial deterrence to young females."³⁶³ Second, a gender-neutral statute would frustrate the state's interest in effective enforcement because a female would be less likely to report violations of the statute if she would be subject to prosecution.³⁶⁴

Thus, the fourth department, in *Jessie*, applying the same standard of review that the Supreme Court utilized in determining the constitutionality of a gender-based statute in *Michael M.*, reached the opposite conclusion. *Michael M.*, however, involved a statutory rape statute, while *Jessie* involved a sexual misconduct

357. *Id.* at 197-98.

358. *Id.* at 217-18 (Rehnquist, J., dissenting).

359. *Id.* at 198-99.

360. See *supra* note 358 and accompanying text.

361. 450 U.S. 464 (1981).

362. *Id.* at 472-73.

363. *Id.*

364. *Id.* at 473.

provision.

SUPREME COURT

NASSAU COUNTY

Reform Education Financing Inequities Today v. Cuomo³⁶⁵ (decided December 12, 1991)

See the case discussion under EDUCATION ARTICLE.³⁶⁶ As to plaintiff's equal protection claim, the court noted that the court of appeals, in *Board of Education, Levittown Union Free School District v. Nyquist*,³⁶⁷ previously upheld the funding scheme despite disparities in per pupil expenditures among the various districts. The court granted the defendant's motion to dismiss and concluded that the legislature has "[p]rimary responsibility for the provision of fair and equitable educational opportunity" ³⁶⁸

365. No. 2500/91, 1991 N.Y. Misc. LEXIS 725, at *1 (Sup. Ct. Nassau County Dec. 12, 1991).

366. See *supra* notes 279-316 and accompanying text.

367. 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 459 U.S. 1138 (1983).

368. *REFIT*, 1991, N.Y. Misc. LEXIS 725, at *24.