University of Arkansas at Little Rock Law Review

Volume 5 | Issue 2 Article 8

1982

Constitutional Law—Equal Protection—California's Gender Based Statutory Rape Law Upheld

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CONSTITUTIONAL LAW—EQUAL PROTECTION—CALIFORNIA'S GENDER BASED STATUTORY RAPE LAW UPHELD. *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

The defendant, Michael, and two friends approached two sisters at a bus stop one midnight. Michael, then seventeen and one-half years old, and Sharon, sixteen years old, wandered away from the group and began to kiss.[1] After being struck in the face for rebuffing Michael's advances, Sharon submitted to sexual intercourse.[2] As a result, Michael was convicted of statutory rape under the California Penal Code.[3] Prior to trial, the defendant sought to have the charge dismissed on state[4] and federal[5] constitutional grounds, asserting that California's statutory rape law unlawfully discriminated on the basis of gender. The trial court and the California Court of Appeals denied the request for relief. The California Supreme Court found a compelling state interest in preventing illegitimate teenage pregnancies and upheld the statute.[6] The United States Supreme Court affirmed that judgment. *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

The fourteenth amendment to the Constitution guarantees that similarly situated people will be dealt with in a similar manner by

1. In his concurring opinion, Justice Blackmun said that the factors involved in this case, particularly the victim's initial willing participation, "should make this case an unattractive one to prosecute at all, and especially to prosecute as a felony, rather than as a misdemeanor chargeable under § 261.5. But the State has chosen to prosecute in that manner, and the facts, I reluctantly conclude, may fit the crime." 450 U.S. 464, 484-87 (1981) (Blackmun, J., concurring).

2. For a partial transcript of the preliminary hearing, see 450 U.S. at 483-88 n.* (Blackmun, J., concurring).

3. Section 261.5 of the code defines 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." CAL. PENAL CODE § 261.5 (West Supp. 1981).

4. The petitioner challenged the statute as a denial of equal protection. CAL. CONST. art. I, § 21 provides, "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

5. U.S. CONST. amend. XIV, § 1, provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

6. Michael M. v. Superior Court, 25 Cal. 3d 608, 601 P.2d 572, 159 Cal. Rptr. 340 (1979).

the government.[7] At least one authority views this guarantee, which governs all governmental actions classifying individuals for different benefits or burdens under the law, as the single most important concept in the Constitution for the protection of individual rights.[8]

The Supreme Court has enunciated several forms of analysis in cases involving equal protection challenges.[9] The "rational basis test" is a broad standard that requires the state to have merely a "rational basis" for its statutory classification.[10] Under the rational basis test, the Court looks at the stated purpose of a statute and presumes that it is valid and constitutional,[11] and the burden of proving the contrary is placed on the party challenging the statute.[12] The Court looks first at whether the statute is reasonable[13] and looks then at the classification effected by the statute.[14] If the scope of the statute bears a rational relationship to the stated purpose of the statute, the statute is constitutional.[15] Equal protection challenges based on sex discrimination have consistently failed under the rational basis test,[16] and gender-based statutory rape statutes have been consistently upheld.[17]

A second standard commonly used by the Court is the strict

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7. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 519 (1978) [hereinafter cited as NOWAK].

8. *Id.* at 517.

9. *E.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971); Dandridge v. Williams, 397 U.S. 471 (1970).

10. Weidner, *The Equal Protection Clause: The Continuing Search for Judicial Standards*, 57 U. DET. J. URB. L. 867, 867 (1980); *e.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970); Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955).

11. *E.g.*, McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808-09 (1969).

12. *E.g.*, Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973); Madden v. Kentucky, 309 U.S. 83, 88 (1940).

13. *E.g.*, Dandridge v. Williams, 397 U.S. 471, 487 (1970); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Allied Stores, Inc. v. Bowers, 358 U.S. 522, 528 (1959).

14. The classification may be over-inclusive in that it treats in a similar manner persons who have similar characteristics and some additional persons who do not share the legitimately distinguishing characteristic. The statute may also be under-inclusive in that it includes a small number of persons who fit the purpose of the statute but excludes some who are similarly situated. NOWAK, *supra* note 7, at 521 (1978). *Compare* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (challenged as under-inclusive), *with* Hirabayashi v. United States, 320 U.S. 81 (1943) (challenged as over-inclusive).

15. *E.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974); Reed v. Reed, 404 U.S. 71, 76 (1971).

16. *See* Hoyt v. Florida, 368 U.S. 57, 59-63 (1961); Goesaert v. Cleary, 335 U.S. 464, 465-66 (1948); Muller v. Oregon, 208 U.S. 412, 417-23 (1908).

17. *E.g.*, Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976); People v. Mackey, 46 Cal. App. 3d 755, 120 Cal. Rptr. 157 (1976); *In re* W.E.P., 318 A.2d 286 (D.C. 1974); State v. Elmore, 24 Or. App. 651, 546 P.2d 1117 (1976); Flores v. State, 69 Wis. 2d 509, 230 N.W.2d 637 (1975).

scrutiny test.[18] As the name implies, this standard is more stringent than the rational basis test and places a heavy burden on the state to justify a challenged law or regulation.[19] The Court looks at the actual purpose or effect of the statute. The strict scrutiny test is ordinarily used with suspect classifications[20] that are presumed invalid[21] and are upheld only if there is an extraordinary justification.[22] The United States Supreme Court does not consider sex a suspect classification.[23] The California Supreme Court, however, does consider sex a suspect classification and uses strict scrutiny in cases involving gender-based classifications.[24]

In *Reed v. Reed*[25] the Court enunciated a third standard of review when it invalidated a statute which discriminated on the basis of sex.[26] The test used by the Court established a middle-tier level

18. *E.g.*, Frontiero v. Richardson, 411 U.S. 677, 688 (1973); Korematsu v. United States, 323 U.S. 214, 216 (1944). *See generally* Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807, 812 (1973).

19. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 633-38 (1969); Griswold v. Connecticut, 381 U.S. 479, 497 (1965); Bates v. Little Rock, 361 U.S. 516, 524 (1960).

20. The phrase "suspect classification" was first used by Justice Black in Korematsu v. United States, 323 U.S. 214 (1944), when he said, "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Id.* at 216.

Classifications that have been labeled suspect by the Supreme Court include those based on race, Loving v. Virginia, 388 U.S. 1, 11 (1967); alienage, Graham v. Richardson, 403 U.S. 365, 372 (1971); and national origin, Oyama v. California, 332 U.S. 633, 644-46 (1948). The United States Supreme Court does not, however, consider sex a suspect classification. *See infra* note 23 and accompanying text.

21. *E.g.*, Parham v. Hughes, 441 U.S. 347, 351 (1979).

22. *E.g.*, Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

23. *E.g.*, Stanton v. Stanton, 421 U.S. 7, 13 (1975); Reed v. Reed, 404 U.S. 71 (1971). *But see* Frontiero v. Richardson, 411 U.S. 677, 682 (1973), in which the Court, in a plurality opinion, characterized gender classifications as inherently suspect.

24. Michael M. v. Superior Court, 25 Cal. 3d 608, 610, 601 P.2d 572, 574, 159 Cal. Rptr. 340, 342 (1979); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 17-18, 485 P.2d 529, 539-40, 95 Cal. Rptr. 329, 339-40 (1971). In *Sail'er Inn*, the California court considered the constitutionality of a California law prohibiting women from tending bar unless they or their husbands held a liquor license. The court declared that classifications based on sex should be treated as suspect and struck down the law as violative of the state and federal constitutions. 5 Cal. 3d at 17, 485 P.2d at 538, 95 Cal. Rptr. at 339. For a suggestion that the California court did not use strict scrutiny in *Michael M.*, see Comment, *The Constitutionality of Statutory Rape Laws*, 27 U.C.L.A. L. REV. 757, 784-86 (1980).

25. 404 U.S. 71 (1971). The case involved a mandatory provision of the Idaho Probate Code that gave preference to men over women when persons of the same entitlement class applied for appointment as administrator of a decedent's estate. The plaintiff in *Reed* was the mother of a deceased minor. She sought appointment as administrator but, instead, the court appointed the minor's father, even though he filed his petition seeking the appointment after the mother filed hers.

26. *Id.* at 77. *See* Weidner, *supra* note 10, at 881.

of scrutiny. It required a classification to have a "fair and substantial relationship" to the "object of the legislation."[27] *Reed* was considered a turning point for gender-based equal protection challenges.[28]

Middle-tier scrutiny was further developed in *Craig v. Boren*,[29] in which a two-part test was formulated. To withstand constitutional challenge under *Craig*, a gender-based classification must serve important governmental objectives and must be substantially related to achievement of those objectives.[30] Under *Craig* the actual rather than the stated purpose of the statute is studied.[31] There is no presumption either for or against the validity of the classification,[32] and the burden of proof is on those defending the statute to justify the discrimination.[33] To justify such a classification, the state must show an important and articulated purpose for its use.[34] Statistical evidence,[35] administrative convenience,[36] or the mere assertion by the state that a difference exists between men and women in a particular area[37] have all been held insufficient to meet this burden.

Seven equal protection cases involving gender discrimination were decided by the United States Supreme Court between 1976 and 1979.[38] Of the seven, four statutory schemes were invalidated[39]

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27. 404 U.S. at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

28. 404 U.S. 71, 76 (1971); *see also* Survey, *Equal Protection Challenges to Statutory Rape Law*, 14 CREIGHTON L. REV. 1088, 1090 (1981); Comment, *Unlawful Sexual Intercourse: Old Notions and A Suggested Reform*, 12 PAC. L.J. 217, 221 (1980); Note, *New Hampshire Statutory Rape Provision*, 10 ST. MARY'S L.J. 320, 323-24 (1978).

29. 429 U.S. 190 (1976). The case involved a challenge to an Oklahoma statute making it unlawful to sell liquor to a minor. For purposes of the statute, a minor was defined as a female under 18 and a male under 21.

Craig was the first Supreme Court case involving gender based classifications in a criminal statute. Comment, *supra* note 24, at 789. When a criminal statute is involved, a "special sensitivity" to the classification is merited. McLaughlin v. Florida, 379 U.S 184, 192 (1964); Meloon v. Helgemoe, 564 F.2d 602, 604 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978); *see also* Note, *supra* note 28, at 323.

30. Craig v. Boren, 429 U.S. at 197. *See also* Orr v. Orr, 440 U.S. 268 (1979); Stanton v. Stanton, 421 U.S. 7 (1971).

31. *See* Califano v. Webster, 430 U.S. 313, 317 (1977); Califano v. Goldfarb, 430 U.S. 199, 212-13 (1977). "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

32. Survey, *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 186-88 (1977).

33. Craig v. Boren, 429 U.S. at 197; Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980).

34. Regents of the University of California v. Bakke, 438 U.S. 265, 361 (1978).

35. Craig v. Boren, 429 U.S. at 204.

36. Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 152 (1980).

37. *Id.* at 151.

38. Weidner, *supra* note 10, at 888.

39. Califano v. Westcott, 443 U.S. 76 (1979) (benefits provided to families deprived of

and three were upheld[40] using the *Craig* middle-tier standard. None of these cases specifically involved gender-based statutory rape laws. In lower federal courts, however, four cases challenging gender-based statutory rape laws have been heard in recent years. The courts invalidated three of the statutes under the *Craig* middle-tier scrutiny.[41]

The defendants in the four cases contended that the statutes violated their constitutional guarantee of equal protection because they punished only males. The government in the four cases contended that the statutes were valid because they protected legitimate state interests in preventing unwanted pregnancies and protecting minor females from physical and emotional harm. In *United States v. Hicks*[42] the defendant was convicted of violating two federal statutes[43] that punished males who had carnal knowledge of underaged females; the twenty-five year old defendant in *Navedo v. Preisser*[44] was convicted under Iowa law for having sexual intercourse with a sixteen year old female;[45] and the defendant in *Meloon v. Helgemoe*[46] was convicted under a New Hampshire rape statute which prohibited sexual intercourse with a nonspouse female under fifteen years of age.[47] All three statutes were invalidated on equal protection grounds.[48] The courts placed the burden on the government to produce evidence that would justify the statutes[49] and to

support because of the father's unemployment); Caban v. Mohammed, 441 U.S. 380 (1979) (only unwed mothers allowed to block adoption); Orr v. Orr, 440 U.S. 268 (1979) (alimony duty imposed on men only); Califano v. Goldfarb, 430 U.S. 199 (1977) (women presumed dependent on husbands for Social Security survivor's benefits).

40. Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (Massachusetts veteran's preference statute); Parham v. Hughes, 441 U.S. 347 (1979) (statute prevented unwed father who has not legitimated a child from suing for the wrongful death of the child); Califano v. Webster, 430 U.S. 313 (1977) (Social Security formula provided higher retirement payments to women than to men).

41. Navedo v. Preisser, 630 F.2d 636 (8th Cir. 1980) (IOWA CODE ANN. § 698.1 (West 1946) (repealed 1977) invalidated); United States v. Hicks, 625 F.2d 216 (9th Cir. 1980) (18 U.S.C. §§ 1153, 2032 (1976) invalidated); Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979) (ME. REV. STAT. ANN. tit. 17, § 3151 (1964) (repealed 1976) upheld); Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978) (N.H. REV. STAT. ANN. § 632:1(I)(c) (1974) (repealed 1975) invalidated).

42. 625 F.2d 216 (9th Cir. 1980).

43. 18 U.S.C. §§ 1153, 2032 (1976).

44. 630 F.2d 636 (8th Cir. 1980).

45. IOWA CODE ANN. § 698.1 (West 1946) (repealed 1977).

46. 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978).

47. N.H. REV. STAT. ANN. § 632:1(I)(c) (1974) (repealed 1975).

48. *Navedo*, 630 F.2d at 637; *Hicks*, 625 F.2d at 217; *Meloon*, 564 F.2d at 603.

49. *Navedo*, 630 F.2d at 640; *Hicks*, 625 F.2d at 219; *Meloon*, 564 F.2d at 606. The

show how the gender-based classification substantially furthered the statutes' objectives.[50] The courts found that the government failed to meet that burden.[51] A similar classification was upheld, however, in *Rundlett v. Oliver*,[52] in which the defendant was the junior high school teacher of the complaining witness when he engaged in sexual intercourse with her.[53] The court found that the classification embodied in the statute[54] was substantially related to the achievement of the governmental objective of preventing physical injury to a female under fourteen years of age.[55]

The state interest in specially protecting young females has been held valid by a majority of courts because women are more susceptible than men to such harms as pregnancy,[56] physical injury,[57] and emotional injury.[58] Following this rationale, courts have uniformly upheld the constitutionality of statutory rape[59] as a

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court in *Meloon* found the state's interest in preventing pregnancy and physical injury to young girls did not comport with the New Hampshire law which defined sexual intercourse as "any penetration, however slight; emission not required." N.H. REV. STAT. ANN. § 632:1(I)(c) (1974) (repealed 1975). The court required a positive showing that the objective of the statute in question was to prevent pregnancy. 564 F.2d at 607-08.

50. *Navedo*, 630 F.2d at 641. ("The state, however, has offered no evidence of any kind—legislative history, statistical, or medical—to support these arguments." *Id.* at 639); *Hicks*, 625 F.2d at 219 ("The government had the burden of showing why gender is a 'sufficiently "accurate proxy" ' for prevention of harm arising from contact which inherently requires the participation of both sexes." *Id.* at 220 (citations omitted)); *Meloon*, 564 F.2d at 607 (Pregnancy is a fundamental characteristic distinguishing the two sexes and can be used as an "available hindsight catchall rationalization" for almost any gender-based legislation; moreover, statutory rape legislation traditionally has included very young females for whom pregnancy is no threat.).

51. Navedo v. Preisser, 630 F.2d 636, 640-41 (1980); United States v. Hicks, 625 F.2d 216, 220 (1980); Meloon v. Helgemoe, 564 F.2d 602, 606 (1977).

52. 607 F.2d 495 (1st Cir. 1979).

53. *Id.* at 496. "Although *Rundlett* was expressly tried on the theory that consent was not an issue or a defense, the circumstances of the parties' sexual relationship may have influenced the court's analysis." Comment, *supra* note 24, at 793. The dissent made a similar assertion. 607 F.2d at 505 (Bownes, J., dissenting).

54. ME. REV. STAT. ANN. tit. 17, § 3151 (1964) (repealed 1976).

55. 607 F.2d at 502. The court pointed out, however, that it doubted the acceptability of a pregnancy prevention rationale for a gender-based statute. The court found that the Maine Supreme Court's conclusions about the legislative history of the pregnancy prevention rationale were not based on the statutory language but upon "after-the-fact information drawn from failures to act on the part of the Maine legislature." *Id.* at 502 n.15.

56. *E.g.*, Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976); Acosta v. State, 417 A.2d 373 (Del. 1980).

57. *E.g.*, Barnes v. State, 244 Ga. 302, 260 S.E.2d 40 (1979); State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

58. *See* Hall v. State, 365 So. 2d 1249 (Ala. Crim. App. 1978), *cert. denied*, 365 So. 2d 1253 (Ala. 1979).

59. The earliest codified laws making rape a crime were contained in the Code of Hammurabi, dating about 1700 B.C. "If a man has forced the wife of another man, who has not

crime.[60] Historically males have always been the culpable parties, and the protection of the male's property interest in the female[61] has been the underlying purpose of the law. California's statutory rape law[62] has a similar historical justification.[63]

Although California has not amended its statute,[64] in the last few years more than half of the states have substantially revised their rape laws.[65] The most significant changes in the statutory rape laws have been the elimination of traditional gender-based classifications of the parties involved[66] and the gradations of the offense so that the severity of punishment varies with the conduct or relative ages of the parties.[67] To date, at least thirty-nine states have passed gender-neutral statutory rape laws.[68] It was in this climate of statu-

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known the male, and who still resides in the house of her father, and has lain within her breasts, and he is found, that man shall be slain; that woman is guiltless." CODE OF HAMMURABI § 130 (C. Edwards trans. 1971). *See generally* Smith, *History of Rape and Rape Laws*, 60 WOMEN L.J. 188, 188-89 (1974); Comment, *supra* note 24, at 762; Comment, *Rape Laws, Equal Protection, and Privacy Rights*, 54 TUL. L. REV. 456, 464-69 (1980).

60. *E.g.*, Olson v. State, 95 Nev. 1, 588 P.2d 1018 (1979); People v. Whidden, 51 N.Y.2d 457, 415 N.E.2d 927, 434 N.Y.S.2d 937 (1980); State v. Elmore, 24 Or. App. 651, 546 P.2d 1117 (1976).

61. Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919, 924 (1973). It may be argued that statutory rape laws serve only to preserve the "market value" of virginal young women as potential brides, rather than to protect them from sexual exploitation. *Id.* at 925. This contention is supported by the fact that consent is not a defense to statutory rape. *Id.*

62. California's statutory rape law was part of California's first penal code in 1850. 1850 Cal. Stats., ch. 99, § 47, at 234. Since 1913 the age of consent has been fixed at 18. *See Michael M.*, 450 U.S. at 494-95 n.9; *Michael M.*, 25 Cal. 3d at 618, 601 P.2d at 578, 159 Cal. Rptr. at 346 (Mosk, J., dissenting); Comment, *supra* note 24, at 762 n.39.

63. "Because females generally have not reached puberty by the age of 10, it is inconceivable that a statute designed to prevent pregnancy would be directed at acts of sexual intercourse with females under that age." *Michael M.*, 450 U.S. at 495 n.9 (Brennan, J., dissenting).

64. The California Legislature considered and rejected proposals to render section 261.5 gender-neutral. *Michael M.*, 450 U.S. at 471 n.6.

65. Comment, *supra* note 24, at 765 (quoting Note, *Rape II*, 3 WOMEN'S RIGHTS L. REP. 90, 136 (1977)).

66. "Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex." Orr v. Orr, 440 U.S. 268, 283 (1979); *see also Michael M.*, 450 U.S. at 491-92 (Brennan, J., dissenting) (A state cannot meet its burden without showing that a gender-neutral statute would be a less effective means of achieving that goal.).

67. Comment, *supra* note 24, at 764-66.

68. *E.g.*, ARK. STAT. ANN. § 41-1803(1)(c) (1977); LA. REV. STAT. ANN. § 14:42 (4) (West Supp. 1982); MO. ANN. STAT. §§ 566.030(3), .050 (Vernon 1979 & Supp. 1982); TENN. CODE ANN. §§ 39-3703(3)(B)(4), 39-3711 (Cum. Supp. 1981). For a list of 39 states with gender-neutral statutory rape provisions see, Comment, *supra* note 24, at 765 n.50, and Note, *Gender-Based Statutory Rape Provision Held Invalid*, 59 WASH. U.L.Q. 310, 311 n.9 (1981).

tory reform that the United States Supreme Court granted certiorari to *Michael M.*

In a plurality opinion written by Justice Rehnquist,[69] the Court found that California's statutory rape law did not violate the equal protection clause of the fourteenth amendment. The Court pointed out that gender-based classifications have not been labeled inherently suspect by the United States Supreme Court, and, therefore, they are not subject to strict scrutiny.[70] The Court traced the development of the standard set forth in *Craig v. Boren*[71] that requires the classification to bear a "substantial relationship" to "important governmental objectives."[72] The Court then applied a version of the *Craig* test, substituting the word "sufficient" for "substantial," and held that the "statute is sufficiently related to the State's objectives to pass constitutional muster."[73] The Court said that it has consistently upheld statutes if the gender classification "realistically reflects the fact that the sexes are not similarly situated."[74]

The Court found that the purpose (governmental objective) of the statute is to discourage illicit sexual intercourse with a minor female and thus to prevent illegitimate teenage pregnancies, a matter in which the state has a strong interest.[75] Since only women become pregnant, the Court found they are not situated similarly to men with respect to the risks of sexual intercourse and, in fact, suffer the consequences disproportionately to men.[76] Therefore, the legislature may appropriately punish only the male.[77] According to the Court, "[T]he risk of pregnancy itself constitutes a substantial deterrence to young females."[78] By placing a criminal sanction on males, the deterrents are equalized.[79]

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69. Joined by Chief Justice Burger, Justice Stewart, and Justice Powell. Separate opinions were written by Justice Stewart (concurring), Justice Blackmun (concurring), and Justice Stevens (dissenting).

70. 450 U.S. at 468.

71. 429 U.S. 190 (1976).

72. 450 U.S. at 469.

73. *Id.* at 472-73.

74. *Id.* at 469.

75. *Id.* at 470. In support of its finding of a legitimate state interest, the Court cited statistical evidence on teenage pregnancies, maternal death in teenagers, teenage abortions, illegitimate children as wards of the state, sexual abuse of young females, and educational opportunities for teenage mothers. *Id.* at 470-71 nn. 3-6; *id.* at 479 nn. 7-10 (Stewart, J., concurring).

76. *Id.* at 471.

77. *Id.* at 473.

78. *Id.*

79. *Id.* "In our system of justice, offenders are not deemed less culpable merely because they may suffer additional punishment from sources outside the legal system." *Michael M.*,

In considering the comparative efficacy of a gender-neutral statute, the Court pointed out that the relevant inquiry "is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the California Legislature is within constitutional limitations."[80] In addition, the Court found that enforcement problems would exist under a gender-neutral statute; the female would be less likely to report a violation if she would be subject to prosecution.[81] The Court found that the equal protection clause does not require a legislature to enact a statute so broad that it may be impossible to enforce.[82]

In a dissenting opinion[83] Justice Brennan said the plurality placed too much emphasis on the state's statutory goal and not enough emphasis on whether the statute is substantially related to the achievement of that goal.[84] Justice Brennan found that California had not met its burden of proving that a gender-specific statute is substantially related to a decrease in teenage pregnancies or that a gender-neutral statute would be less effective.[85] To meet this burden, the dissent would have the state show that its statutory rape law—because it punishes only males—"more effectively deters minor females from having sexual intercourse."[86]

Justice Brennan found two serious flaws in the majority's concern about enforcement problems with a gender-neutral statute.[87] The first flaw was a lack of proof.[88] At least thirty-nine states have gender-neutral statutory rape laws,[89] and California introduced no evidence that those states have been handicapped by enforcement problems.[90] The second flaw was that the state must still show that those enforcement problems would make a gender-neutral statute

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25 Cal. 3d at 622, 601 P.2d at 581, 159 Cal. Rptr. at 349 (Mosk, J., dissenting). "In my judgment, the fact that a class of persons is especially vulnerable to a risk that a statute is designed to avoid is a reason for making the statute applicable to that class. . . . I regard a total exemption for the members of the more endangered class as utterly irrational." *Michael M.*, 450 U.S. at 499-500 (Stevens, J., dissenting).

80. 450 U.S. at 473.

81. *Id.* at 473-74.

82. *Id.* at 474.

83. Joined by Justices White and Marshall.

84. 450 U.S. at 488-89.

85. *Id.* at 489 n.2.

86. *Id.* at 491.

87. *Id.* at 492.

88. *Id.* at 492-93.

89. *See supra* note 68.

90. 450 U.S. at 492-93.

less effective.[91] He argued that a gender-neutral law would be a greater deterrent because it would affect twice as many potential violators.[92]

Justice Brennan also questioned whether the actual purpose of California's statutory rape law was to protect young women from the risk of pregnancy.[93] History shows that the law initially rested on the assumption that young women were legally incapable of consenting to an act of sexual intercourse.[94] The dissent suggested that this change in purpose may be why the state was not able to demonstrate the required substantial relationship.[95]

Now that the United States Supreme Court has stated its position and upheld California's law, the federal court trend of finding gender-specific statutory rape laws unconstitutional[96] will likely be reversed.

It is unfortunate that in rendering a significant decision like *Michael M.* the Court failed to provide clear guidelines for lower courts to follow when deciding gender-based discrimination suits. While prevention of teenage pregnancies may be a legitimate state interest,[97] the state did not meet the burden of proof required under the middle-tier level of scrutiny.[98] In fact, Justice Rehnquist seems to alter the test by requiring only a *sufficient* relationship between the classification and the state's objective.[99] This word substitution,

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91. *Id.* at 493.

92. *Id.* at 494.

93. *Id.*

94. *Id.*

95. *Id.* at 496. An interesting account of the oral arguments before the United States Supreme Court in *Michael M.* is reported in The American Lawyer, Jan. 1981, at 38, col. 1.

96. *See supra* note 41 and accompanying text.

97. Common sense indicates that many young people will engage in sexual activity regardless of what the New York Legislature does; and further, that the incidence of venereal disease and premarital pregnancy is affected by the availability or unavailability of contraceptives. Although young persons theoretically may avoid those harms by practicing total abstention, inevitably many will not.

Carey v. Population Serv. Int'l, 431 U.S. 678, 714 (1977) (Stevens, J., concurring).

98. What the Court does offer is a variety of statistical evidence. *See* 450 U.S. at 470-71 nn. 3-6; 25 Cal. 3d at 611-12, 601 P.2d at 574-75, 159 Cal. Rptr. at 342-43.

The United States Supreme Court "has viewed with suspicion attempts to prove legislative intent through the simple production of statistics." Comment, *supra* note 28, at 225. In *Craig*, the Court said "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." 429 U.S. at 204.

99. If the *Michael M.* test is intended to actually *replace* the *Craig* test, the middle-tier standard would appear to be considerably weakened. It is ironic that Justice Rehnquist apparently used the *Craig* test as the basis for his analysis, since he wrote a dissenting opinion in *Craig* in which he specifically objected to the formation of a new test and claimed that

coupled with Justice Rehnquist's failure to clearly articulate a new standard, leaves the applicability of the *Craig* test in doubt. Whether the Court is requiring a substantial or a sufficient relationship, no evidence was offered that shows how a gender-specific statutory rape law prevents teenage pregnancies.[100] Conversely, no reason was given why a gender-neutral law would fail to achieve the same objective.[101] The Court merely offered speculation about enforcement difficulties that might arise under a neutral law.[102] With thirty-nine states currently operating under gender neutral laws,[103] a wealth of data should be available that would prove or disprove that allegation.[104]

The equal protection danger of a gender-specific law is pointed out in the commentary after Arkansas' rape provision.[105] An ac-

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the majority pulled the test out of "thin air." 429 U.S. at 220. He also expressed the fear that the test would "invite subjective judicial preferences or prejudices masquerading as judgments." *Id.* at 221. While Justice Rehnquist refers to the *Craig* test in his opinion in *Michael M.*, he neither expressly adopts nor rejects the test.

100. In fact the Court said, "Where such differing speculations as to the effect of a statute are plausible, we think it appropriate to defer to the decision of the California Supreme Court, 'armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of [the statute], and familiar with the milieu in which that provision would operate. . . .'" 450 U.S. at 474 n.10 (quoting Reitman v. Mulkey, 387 U.S. 369, 378-79 (1967)).

101. Gender-neutral laws were discussed by the Court because the petitioner contended that California's statute was impermissibly under-inclusive and should therefore be broadened. The Court responded by saying, "[T]he relevant inquiry, however, is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the California Legislators is within constitutional limitations." 450 U.S. at 473 (quoting Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1974)). The discussion of gender-neutral alternatives is also a product of the different tests applied in Justice Rehnquist's and Justice Brennan's opinions. 450 U.S. at 494. Under Justice Rehnquist's "sufficiency" test, the state arguably need not include evidence of the effectiveness of a gender-neutral statute to meet its burden of proving a sufficient relationship. However, in Justice Brennan's *Craig*-type substantial relationship test, part of the state's burden seems to be proof that a gender-neutral statute would be less effective than California's gender-specific statute.

102. The Court said that a female would be less likely to report a violation if she would be subject to criminal prosecution. 450 U.S. at 473-74. However, as Judge Mosk of the California Supreme Court pointed out, "The testimony of the female participant is not, as the majority assume, the sole evidence of the offense in every case." 25 Cal. 3d at 622, 601 P.2d 572 at 581, 159 Cal. Rptr. 340 at 349 (Mosk, J., dissenting).

103. *See supra* note 68.

104. In his dissent, Justice Brennan pointed out that California introduced no evidence that states with gender-neutral laws have been handicapped by the enforcement problems the plurality found so persuasive. 450 U.S. at 492-93 (Brennan, J. dissenting).

105. ARK. STAT. ANN. § 41-1803 (1) (1977) provides:

> (1) A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person;
>
> (a) by forcible compulsion; or
>
> (b) who is incapable of consent because he is physically helpless; or

knowledgement of equal protection problems inherent in a gender-based law is further demonstrated by the actions of state legislatures whose laws have been challenged on that basis. After such litigation, several state legislatures revised their statutes to make them gender-neutral.[106]

If the true purpose of the statute is to prevent teenage pregnancies—and there is considerable doubt about that proposition[107]—then the logical approach would be to hold both parties responsible. Since absence of consent is not an element of the crime

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(c) who is less than eleven (11) years old.

The commentary following the statute provides:

> As earlier defined, rape was an offense committed by a male against a female. The Code section contains no reference to the sex of either the offender or the victim. A neuter definition is essential since incorporation of deviate sexual activity into the offense of rape means that a male could be the victim or a female, the perpetrator, of a rape. Though reversal of the traditional roles is unlikely in the context of forcible sexual intercourse, the commission deemed it prudent to avoid any possibility of equal protection problems.

106. For example, after Navedo v. Preisser, 630 F.2d 636 (8th Cir. 1980), which struck down Iowa's former gender-based statute, IOWA CODE ANN. § 698.1 (West 1946), the Iowa legislature enacted a gender-neutral statute, IOWA CODE ANN. §§ 709.3, .4 (West 1979); after Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979), which upheld Maine's former gender-based statute, ME. REV. STAT. ANN. tit. 17, § 3151 (1964), the Maine legislature enacted a gender-neutral statute, ME. REV. STAT. ANN. tit. 17-A § 252(1)(A) (1981); after Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978), which struck down New Hampshire's former gender-based statute, N.H. REV. STAT. ANN. § 632.1(I)(c) (1971), the New Hampshire legislature enacted a gender-neutral statute, N.H. REV. STAT. ANN. §§ 632-A:2(XI) (Supp. 1981).

In the California Supreme Court opinion, the majority pointed out that the legislature could adopt a gender-neutral statute.

> "However, the legislature is not constitutionally compelled to do so, and thus far for reasons satisfying to itself has not done so. Furthermore we note than in all of those states which assertedly have adopted a neutral rule, the change was effected in every instance by *legislative* action. Not a single state has adopted such a rule by *judicial* decree."

25 Cal. 3d at 614-15, 601 P.2d at 576, 159 Cal. Rptr. at 344 (emphasis in original).

The dissent countered that statement by accusing the majority of ignoring the significance of the fact that the reform has taken place. *Id.* at 623, 601 P.2d at 582, 159 Cal. Rptr. at 350.

107. Even the majority expressed doubt about the legislative intent behind the statute.

> [T]he individual legislators may have voted for the statute for a variety of reasons. Some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of chastity and still others about promoting various religious and moral attitudes towards premarital sex.

450 U.S. at 470.

The Court contends however that the question to be considered is whether the legislation violates the equal protection clause, not whether its supporters may have endorsed it for reasons no longer generally accepted. *Id.* at 472 n.7.

and statutory rape is not a forcible act,[108] it does not matter who is the aggressor and who is the innocent party. A law punishing sexual intercourse at a certain age should apply equally to the two parties who break that law, regardless of gender.[109]

The Court's decision in *Michael M.* will probably not be a strong precedent since the decision is based on a plurality opinion, and one of the justices comprising the plurality, Justice Potter Stewart, has since retired.[110] He was replaced by Justice Sandra Day O'Connor.[111] Although Justice O'Connor's position on the subject is not known, it can be speculated that based on her previous actions,[112] she will not join the voting bloc formerly occupied by Justice Stewart.[113] Without her support, the *Michael M.* plurality could shift, resulting in a different ruling on the discrimination inherent in gender-specific statutes.

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108. *See* Comment, *supra* note 24, at 757.

109. Legal burdens should bear some relationship to individual responsibility. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972). Justice Stevens addressed this issue when he said, "I would have no doubt about the validity of a state law prohibiting all unmarried teenagers from engaging in sexual intercourse . . . It cannot be true that the validity of a total ban is an adequate justification for a selective prohibition. . . ." 450 U.S. at 497 (Stevens, J., dissenting).

110. Justice Potter Stewart announced his retirement on July 3, 1981.

111. Justice Sandra Day O'Connor took office Sept. 25, 1981.

112. In 1970 Justice O'Connor voted for a bill that would have legalized abortions in Arizona. In 1974 she voted in the Senate Judiciary Committee and the Republican Caucus against a resolution calling on Congress to amend the Constitution and outlaw abortions. Also in 1974, Justice O'Connor voted against a state bill to ban abortions. For these actions, Justice O'Connor has been criticized by fundamentalist groups who fear she will become a liberal voice on the Supreme Court bench. TIME, July 20, 1981, at 8.

113. In equal protection cases, Justice Stewart frequently joined Justices Rehnquist and Chief Justice Burger to vote to uphold gender-specific statutes. A separate bloc, consisting of Justices Brennan, Marshall, and White, usually voted to strike down the gender-specific statutes. The swing group in the decisions usually consisted of Justices Blackmun, Powell, and Stevens. For an interesting discussion of voting alliances on the Supreme Court, see Weidner, *supra* note 10, at 909-16.