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Constitutionality of Statutory Rape: Michael v. Superior Court of Sonoma County

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CONSTITUTIONALITY OF STATUTORY RAPE: *MICHAEL v. SUPERIOR COURT OF SONOMA COUNTY*

I. INTRODUCTION

In most jurisdictions, "carnal knowledge of a female under a stated age [has been] made a crime by statute."[1] This offense, commonly known as statutory rape, to distinguish it from common law forcible rape, refers to the act of sexual intercourse with a female under a certain age. While proof of the crime hinges on the female's age, the age of the male is generally irrelevant. Further, whereas consent operates as a defense to forcible rape, the consent of an underage female may not be employed as a defense to statutory rape.[2] Instead, the minor female is conclusively presumed to be incapable of understanding the nature and consequences of sexual intercourse.[3] The purpose of such statutes, although recently subject to wide debate and criticism, was originally envisioned to be the "preservation of the chastity of minor females."[4]

In recent years, a substantial majority of states has enacted gender-neutral statutory rape laws.[5] California, as well as a number of other

1. 65 AM. JUR. 2d *Rape* § 15 (1972).

2. State v. Huntsman, 115 Utah 283, —, 204 P.2d 448, 450 (1949); People v. Marks, 130 N.Y.S. 524, 525, 146 A.D. 11, 12 (1911); Murphy v. State, 120 Ind. 115, 115, 22 N.E. 106, 106 (1889).

3. 65 AM. JUR. 2d *Rape* § 16 (1972).

4. K. DECROW, SEXIST JUSTICE 5 (1974). *See* Parsons v. Parker, 160 Va. 810, 813-14, 170 S.E. 1, 2 (1933).

5. The following forty-two states have enacted gender-neutral statutory rape provisions. Only a minority of jurisdictions, however, employ the term "rape" in their statutory language. Instead, the offense is designated sexual abuse, sexual assault, sexual conduct with a minor, or unlawful sexual intercourse. Listed below are those provisions dealing with unlawful sexual intercourse with a victim under a specified age resulting in a felony: Alaska, ALASKA STAT. §§ 11.41.410(a)(3), (a)(4)(A),(B), .440(a)(1) (Supp. 1981) (Sexual assault is committed when the victim is less than 13 and the actor is 16 or older, or when the victim is less than 18 and is entrusted to the care of the actor who is 18 or older. Sexual abuse of a minor is committed when the victim is at least 13 but not yet 16 and the actor is 16 or older.); Arizona, ARIZ. REV. STAT. ANN. §§ 13-1404, -1405(A) (1978) (Sexual abuse is committed when the victim is less than 15. Sexual conduct with a minor is committed when the victim is less than 18.); Arkansas, ARK. STAT. ANN. § 41-1803(c) (1977) (Rape is committed when the victim is less than 11.); Colorado, COLO. REV. STAT. §§ 18-3-403(1)(e), (1)(f), -405(1) (1978) (Sexual assault is committed when the victim is less than 15 and the actor is at least 4 years older than the victim, or when the victim is less than 18 and the actor is the victim's guardian. Sexual assault on a child is committed when the victim is less than 15 and the actor is at least 4 years older than the victim.); Connecticut, CONN. GEN.

states, territories, and the federal government, has retained gender-

STAT. ANN. § 53a-71 (West Supp. 1981) (Sexual assault is committed when the victim is less than 15.); Delaware, DEL. CODE ANN. tit. 11, § 762(b) (Sexual misconduct is committed when the victim is less than 16 and the actor is at least 4 years older than the victim.); Florida, FLA. STAT. ANN. § 794.05(1) (West 1976) (Carnal intercourse with an unmarried person is committed when the victim is less than 18.); Hawaii, HAWAII REV. STAT. §§ 707-730(1)(b), -731(1)(b) (Supp. 1980) (Rape in the first degree is committed when the victim is less than 14 and receives serious bodily injury. Minus such injury, the charge is rape in the second degree.); Illinois, ILL. ANN. STAT. ch. 38, § 11-4(a)(1) (Smith-Hurd 1979) (Indecent liberties with a child is committed when the victim is less than 16 and the actor is 17 or older.); Indiana, IND. CODE ANN. §§ 35-42-4-3(a), (c) (Burns Supp. 1981) (Child molesting is committed when the child is less than 12, or when the child is at least 12 but not yet 16 and the actor is 16 or older.); Iowa, IOWA CODE ANN. §§ 709.3(2), .4(3),(4), (5) (West 1979) (Sexual abuse in the second degree is committed when the victim is less than 12. Sexual abuse in the third degree is committed when the victim is a child (undefined by statute), or when the victim is 14 or 15 and a member of the same household as the actor, or when the actor is at least 6 years older than the victim who is 14 or 15.); Kansas, KAN. STAT. ANN. § 21-3503(1)(a), -3504(a) (Supp. 1979) (Indecent liberties with a child or ward is committed when the victim is less than 16.); Kentucky, KY. REV. STAT. §§ 510.040(1)(b)2, .050(1), .060(1)(b) (1975) (Rape in the first degree is committed when the victim is less than 12. Rape in the second degree is committed when the actor is at least 18 and the victim is less than 14. Rape in the third degree is committed when the actor is at least 21 and the victim is less than 16.); Louisiana, LA. REV. STAT. ANN. § 14.42(3) (West Supp. 1981) (Aggravated rape is committed when the victim is less than 12.); Maine, ME. REV. STAT. ANN. tit. 17-A, §§ 252(1)(A), 254(1) (Supp. 1981) (Rape is committed when the victim is less than 14. Sexual abuse of a minor is committed when the actor is 19, the victim is less than 14 but not yet 16, and the actor is at least 5 years older than the victim.); Maryland, MD. ANN. CODE art 27, §§ 463(a)(3), 464B(a)(3) (Supp. 1981) (Second degree rape is committed when the victim is less than 14 and the actor is at least 4 years older than the victim. A third degree sexual offense is committed when a person engages in sexual contact with a person less than 14. The actor must be at least 4 years older than the victim.); Massachusetts, MASS. GEN. LAW ANN. ch. 252, § 22A (West Supp. 1970 to 1980) (Rape is committed when the victim is less than 16.); Michigan, MICH. COMP. LAWS §§ 750.520b(1)(a) and (b), .520d(1)(a) (Supp. 1968 to 1981) (First degree criminal sexual conduct is committed when the victim is less than 13, or when the victim is at least 13 but not yet 16 and the actor is of the same household. Third degree criminal sexual conduct is committed when the victim is at least 13 but not yet 16.); Minnesota, MINN. STAT. ANN. §§ 609.342(a) and (b), .344(a)(b) (West Supp. 1981) (First and second degree criminal sexual conduct are committed when the victim is less than 13, and the actor is more than 36 months older than the victim, or when the victim is at least 13 but not yet 16 and the actor, who is more than 48 months older than the victim, is in a position of authority over the victim. Third degree criminal sexual conduct is committed when the victim is less than 13 and the actor is no more than 36 months older than the victim, or when the victim is at least 13 but not yet 16 and actor is more than 24 months older than the victim.); Missouri, MO. ANN. STAT. § 566.030(3), .040, .050 (Vernon 1979 & Supp. 1981) (Rape is committed when the victim is less than 14. First degree sexual assault is committed when the victim is 14 or 15. Second degree sexual assault is committed when the actor is at least 17 and the victim is 16.); Montana, MONT. CODE ANN. § 45-5-503(1)(3) (1979) (Sexual intercourse without consent is committed when the victim is less than 16 and the actor is at least 3 years older than the victim.); Nebraska, NEB. REV. STAT. § 28-319(1)(c) (1979) (First degree sexual assault is committed when the victim is less than 16 and the actor is at least 19.); New Hampshire, N.H. REV. STAT. ANN. §§ 632-A:2(X), (XI) (Supp. 1979) (Aggravated felonious sexual assault is committed when the victim is at least 13 but not yet 16 and the actor is of the same household or related by blood, or when the victim is less than 13.); New Jersey, N.J. STAT. ANN. § 2C:14-2a.(1), (2)(a)-(c), c.(4),(5) (West Supp. 1980) (Aggravated sexual assault is committed when the victim is less than 13, or when the victim is at least 13 but not yet 16 and the actor is related to the victim by blood or has supervisory capacity over the victim or is a guardian of the victim. Sexual assault is committed when the victim is at least 16 but not yet 18 and the actor is of the victim's household, or when the victim is at least 13 but not yet 16 and the actor is at least 4 years older than the victim.); New Mexico, N.M. STAT. ANN. § 30-9-11(A)(1), B(1) (1978)

based statutory rape provisions.[6] While the purported rationale behind

(Criminal sexual penetration in the first degree is committed when the victim is less than 13. Criminal sexual penetration in the second degree is committed when the victim is less than 16 and the actor holds a position of authority over the child.); North Carolina, N.C. GEN. STAT. §§ 14-27.2(a)(1), -27.7 (1981) (First degree rape is committed when the victim is less than 12 and the actor is at least 12 and is at least 4 years older than the victim. Unlawful sexual intercourse is committed when the victim is a minor (undefined) and the actor has assumed a parental position over the victim.); North Dakota, N.D. CENT. CODE § 12.1-20-03(1)(d) (Supp. 1981) (Gross sexual imposition is committed when the victim is less than 15.); Ohio, OHIO REV. CODE ANN. §§ 2907.02(A)(3), .04(A) (Baldwin 1979) (Rape is committed when the victim is less than 13. Corruption of a minor is committed when the victim is at least 12 but not over 15 and the actor is at least 18.); Oklahoma, 1981 OKLA. SESS. LAWS ch. 325 (to be codified at OKLA. STAT. tit. 21, §§ 1111(1), 1114(A)(1)) (Rape is committed when the victim is less than 16. First degree rape is committed when the victim is less than 14 and the actor is at least 18.); Oregon, OR. REV. STAT. §§ 163.435(1)(a),(b),(c) (1979) (Contributing to the sexual delinquency of a minor (a misdemeanor) is committed when the victim is less than 18 and the actor is at least 18.); Pennsylvania, 18 PA. CONS. STAT. ANN. § 3122 (Purdon Supp. 1981) (Statutory rape is committed when the victim is less than 14 and the actor is at least 18.); Rhode Island, R.I. GEN. LAWS §§ 11-37-2(A), -6 (1981 & Supp. 1981) (First degree sexual assault is committed when the victim is less than 13. Third degree sexual assault is committed when the victim is at least 13 but not yet 16 and the actor is older than 18.); South Carolina, S.C. CODE § 16-3-655(1)(3) (Supp. 1980) (First degree criminal sexual conduct is committed when the victim is less than 11 and the actor is at least 3 years older than the victim. Second degree criminal sexual conduct is committed when the victim is at least 11 but not more than 14 and the actor is at least 3 years older than the victim. Third degree criminal sexual conduct is committed when the victim is at least 14 but not yet 16 and the actor holds a position of familial or official authority over the victim.); South Dakota, S.D. CODIFIED LAWS ANN. §§ 22-22-1(1)(4),(5) (Supp. 1981) (Second degree rape is committed when the victim is less than 10. Third degree rape is committed when the victim is less than 15.); Tennessee, TENN. CODE ANN. § 39-3703(4) (Supp. 1981) (Aggravated rape is committed when the victim is less than 14.); Utah, UTAH CODE ANN. §§ 76-5-401(1), -401(2) (Supp. 1981) (Unlawful sexual intercourse is committed when the victim is less than 16. Rape is committed when the victim is less than 14.); Vermont, VT. STAT. ANN. tit. 13, § 3252(3) (Supp. 1981) (Sexual assault is committed when the victim is less than 16.); Virginia, VA. CODE §§ 18.2-63, -64.1 (Supp. 1981) (Carnal knowledge of a child is committed when the victim is at least 13 but not yet 15. When the actor is a minor and the victim, who is less than 3 years younger than the actor, consents, the actor is guilty only of fornication. Carnal knowledge of a ward of the state is committed when the minor victim is institutionally confined and is at least 15 and the actor is one who provides services to juveniles under state authority. If the minor victim is less than 3 years younger than the actor, the actor is guilty only of fornication.); Washington, WASH. REV. CODE ANN. §§ 9A.44.070, .080, .090 (Supp. 1981) (First degree statutory rape is committed when the victim is less than 11 and the actor is at least 13. Second degree statutory rape is committed when the victim is at least 11 but not yet 14 and the actor is more than 16. Third degree statutory rape is committed when the victim is at least 14 but not yet 16 and the actor is over 18.); West Virginia, W. VA. CODE §§ 61-8B-3(3), -5(a)(2)(i),(ii) (1977) (First degree sexual assault is committed when the victim is less than 11 and the actor is at least 14. Third degree sexual assault is committed when the victim is less than 16 and is at least 4 years younger than the actor who is at least 16.); Wisconsin, WIS. STAT. ANN. §§ 940.225(1)(d), (2)(e) (West Supp. 1981) (First degree sexual assault is committed when the victim is 12 or younger. Second degree sexual assault is committed when the victim is at least 12 but not yet 18.); Wyoming, WYO. STAT. §§ 6-4-303(a)(v), (c), -305 (1977) (Second degree sexual assault is committed when the victim is less than 12 and the actor is at least 4 years older than the victim, or when the victim is less than 12 and incurs serious bodily injury. Fourth degree sexual assault is committed when the victim is less than 16 and the actor is at least 4 years older than the victim.).

6. The unlawful sexual intercourse statute presently in force in California reads as follows: "Unlawful sexual intercourse is 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). *See also* 18 U.S.C. §§ 1153, 2032; ALA. CODE §§ 13-1-132, -133, -134 (1979);

many of these gender-based statutes—the physical differences between males and females—was once enthusiastically accepted, such laws are presently under attack because they embrace and perpetuate negative stereotypes of the sexes.[7] For example, the typical classification of man as aggressor and woman as passive victim is no more clearly evident than in today's gender-based statutory rape laws which provide that only males may be held criminally culpable. Because of the undesirable legal and social consequences which flow from such gender-based classifications, a statutory rape law of this kind has recently been called into question by the United States Supreme Court.[8]

This Note will begin with a brief discussion of the history of statutory rape, which will be followed by an examination of pertinent cases examining the constitutionality of statutory rape laws in accordance with the standards of review employed in the equal protection context. Next will follow an examination and critique of *Michael v. Superior Court of Sonoma County*,[9] the recent Supreme Court case addressing the constitutionality of a gender-based statutory rape provision. Finally, the need for legislative reform and the adoption of statutory rape laws which protect children of both sexes without constitutionally legitimizing needless and undesirable sex-role stereotypes will be discussed.

II. HISTORICAL PERSPECTIVE OF STATUTORY RAPE

A. *Origins of the Crime*

The first English legislation concerning statutory rape was passed in 1275 A.D. In its original form, the statute read, "[t]he King prohibiteth that none do ravish, nor take away by force, any Maiden within

DEL. CODE ANN. tit. 11, § 762(a) (1979); D.C. CODE ANN. § 22-2801 (Supp. I 1974); GA. CODE ANN. § 26-2018 (1978); IDAHO CODE § 18-6101(1) (1979); LA. REV. STAT. ANN. § 14.80(1) (West Supp. 1980); N.Y. PENAL CODE §§ 130.25(2), .30, .35(3) (McKinney 1975); OR. REV. STAT. §§ 163.355, .365, .375 (1979); 1974 P.R. LAWS ANN. tit. 33, § 4061(a) (Supp. 1980); TEX. PENAL CODE ANN. § 21.09(a) (Vernon Supp. 1981); VA. CODE § 18.2-61 (Supp. 1981); V.I. CODE ANN. tit. 14, §§ 1702, 1703 (1964 & Supp. 1979).

7. *See* Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978), wherein the court refuted the purported pregnancy prevention purpose of New Hampshire's statutory rape provision:

> Certainly the fact that women and not men bear children is a fundamental distinguishing characteristic of the two sexes and as such it can be the basis for *some* gender based legislation; but there is a danger that the very uniqueness of this characteristic makes it an available catchall rationalization for laws that were promulgated with totally different purposes in mind. New Hampshire presents us with not an iota of testimony or evidence that the prevention of pregnancy was a purpose of its statutory rape law.

Id. at 607 (emphasis added).

8. Michael v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

9. 450 U.S. 464 (1981).

Age . . . Here it shall be taken that her age of consent is twelve years old, for that is her age of consent to marriage. . . ."[10] Subsequently, in 1576, the age of consent was lowered to ten years of age.[11] Finally, in 1910, this latter statute was held to be part of the common law originally brought to the United States.[12]

Although the age of consent has subsequently been changed several times to meet the changing demands of the social and moral status quo, the underlying rationale for the need for such legislation has remained relatively constant. Until at least 1960, women were conclusively presumed by lawmakers to be helpless paragons of virtue, incapable of making an intelligent decision when hazards of pregnancy and venereal disease were involved.[13] It was not until the age of consent was raised significantly—eighteen years of age—and the class of potential female victims correspondingly increased, that the injustices of gender-based statutes were revealed. The inequities emerging therefrom included the fact that only males could be held criminally culpable.[14] Similarly, criticism was launched at the male's inability to assert successfully defenses such as "prior-chastity"[15] and the reasonable mis-

10. Statute of Westminster I, 1275, 3 Edw. 1, c. 13 (1 Statutes at Large 83); *see also* Levine, *A More Than Ordinary Case of "Rape" 13 and 14 Elizabeth I*, 7 AM. J. LEGAL HIST. 159, 161-64 (1963).

11. 18 Eliz. c. 7 (1576). California's statutory rape provision, CAL. PENAL CODE § 261.5 (West Supp. 1981), when first enacted, 1850 Cal. Stats., ch. 99, § 47, p. 234, followed the English Statute of 1576.

12. Nider v. Commonwealth, 140 Ky. 684, 687-88, 131 S.W. 1024, 1026 (1910).

13. *See* L. KANOWITZ, WOMEN AND THE LAW 5 (1969). *See also* Bradwell v. State, 16 Wall. 130 (1873), which illustrates the Court's then-existing paternalistic attitude toward women:

> Man is or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity of interests and views which belong, or should belong to the family institution is repugnant to the idea of woman adopting a distinct and independent career from that of her husband. . . .

Id. at 141 (Bradley, J., concurring).

14. *See* note 6 *supra*.

15. This defense allows the introduction of evidence regarding the alleged female-victim's prior chastity. Chastity is considered an issue in the crime, which prevents the court from overlooking the maturity and fault of the female. The defense, in essence, contemplates the situation where an inexperienced male becomes sexually involved with a minor female who is by no means sexually naive. *See* State v. Snow, — Mo. —, 252 S.W. 629 (1923). This case held improper an instruction authorizing acquittal of an individual charged with carnal knowledge of a female under the age of fifteen upon proof of the prosecutrix's previous unchaste character. The court stated:

> There is no [statutory] qualification as to previous chaste character nor is there a minimum age limit for the offender. . . . The prosecuting witness, on cross-examination was required to reveal her life of shame, showing that she had been a common prostitute for

take of a female's age.[16] Further, a major flaw in the statutory rape laws was their failure to distinguish between cases of consensual intercourse between peers, and the case in which an older male exploits a younger female's naivete. Finally, and perhaps most importantly, many statutes, while protecting underage females from sexual abuse, failed to provide the same legal shield to minor males who often are subjects of homosexual assaults.[17] This need for reform, accompanied by increased constitutional litigation under the equal protection clause, has made gender-based classifications a prime candidate for judicial review.

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more than a year before she came to this state. *This evidence was admitted, not as a defense, but as affecting her credibility as a witness.*

Id. at —, 252 S.W. at 631 (emphasis added) (citations omitted).

16. Under such a defense, if the defendant-male can prove that he reasonably believed that the prosecutrix-female-victim had reached the age of consent at the time they engaged in sexual intercourse, the court might absolve the defendant-male from liability. For a discussion of the "reasonable mistake of age" defense, see Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 122-23 (1976).

The following states expressly allow the "reasonable mistake of age" defense by statute: Arizona, ARIZ. REV. STAT. ANN. § 13-1407(B) (1978) (where defendant did not know and could not have reasonably known age of victim); Arkansas, ARK. STAT. ANN. § 41-1802(3) (1977) (if criminality depends on child being below a specified age other than 11, reasonable belief that child was of the specified age or older is a defense); Colorado, COLO. REV. STAT. § 18-3-406(1) (1978) (if criminality depends on child being below 18 and child was in fact at least 15, reasonable belief that child was 18 or older is a defense); Illinois, ILL. CRIM. CODE § 11-4(c), ILL. ANN. STAT. ch. 38, § 11-4(c) (Smith-Hurd 1979) (where defendant reasonably believed the child was 16 or older); Indiana, IND. CODE ANN. § 35-42-4-3(e) (Burns 1979) (where defendant reasonably believed the child was 16 or older); Kentucky, KY. REV. STAT. § 510.030 (1975) (where defendant did not know that victim was less than 16); Maine, ME. REV. STAT. ANN. tit. 17A, § 254(2) (Supp. 1981) (reasonable belief other person attained sixteenth birthday); Minnesota, MINN. STAT. ANN. § 609.344(b) (West Supp. 1980) (if complainant is at least 13 but less than 16 and the defendant is more than 24 months older than complainant, defendant may attempt to prove he believed complainant to be 16 or older); Missouri, MO. ANN. STAT. § 566.020(3) (Vernon 1979) (if criminality depends on child being 14 or 15, reasonable belief that child was 16 or older is a defense); Montana, MONT. CODE ANN. 45-5-506(1) (1979) (if criminality depends on victim being less than 16, reasonable belief that victim was 16 or older is a defense if child is at least 14); Oregon, OR. REV. STAT. § 163.325(2) (1977) (if criminality depends on child being under a specified age other than 16, reasonable belief that child was of that specified age is a defense); Pennsylvania, 18 PA. CONS. STAT. ANN. § 3102 (Purdon Supp. 1979) (if criminality depends on child being below a specified age other than 14, reasonable belief that child was of that age is a defense); Washington, WASH. REV. CODE § 9A.44.030(2) (1981) (if belief based on victim's declaration as to age); West Virginia, W. VA. CODE § 61-8B-13 (1977) (if criminality depends on victim being below a critical age other than 11, defendant's lack of knowledge that victim was below such age may be a defense); Wyoming, WYO. STAT. § 6-4-308(a) (1977) (if criminality depends on victim being below 16, reasonable belief that victim was 16 or older is a defense).

17. Ironically, the State of California makes it unlawful for any person of either sex to molest, annoy, or contribute to the delinquency of anyone under eighteen years of age. Additionally, all persons in California are prohibited from committing any lewd or lascivious act including consensual intercourse with a child under fourteen. CAL. PENAL CODE §§ 272, 288, 647(a) (West Supp. 1981).

B. *Equal Protection Analysis*

The equal protection clause of the fourteenth amendment guarantees that, "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[18] Although all laws and statutes necessarily embody classifications, only some laws are held to violate an individual's constitutional guarantee of equal protection. For example, most classifications which include persons who are similarly situated with respect to the purpose of the law will pass constitutional muster.[19] The Court recognizes and identifies, however, those distinctions between persons or classes which do not justify differing treatment.[20] In so doing, it has created an equal protection analysis which utilizes three standards of review of legislative classifications. Briefly stated, they are the rational basis standard, the intermediate scrutiny standard, and the strict scrutiny standard.[21]

Under the rational basis, or minimum scrutiny standard, the Court will uphold a classification so long as it bears any theoretically rational relation to a legitimate state purpose.[22] In short, one who challenges the law on this basis has the extremely heavy burden of proving that the classification created by the law is essentially arbitrary.[23] This standard of review has been invoked most frequently in the spheres of zoning, taxation, and economic distribution or regulation.[24] In such areas, courts afford great deference to the legislature, as few laws have been declared unconstitutional under this analysis.[25]

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18. U.S. CONST. amend. XIV, § 1.

19. *See, e.g.*, Rinaldi v. Yaeger, 384 U.S. 305 (1966).

> "The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same." Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made."

Id. at 309 (citations omitted). *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 993 (1978).

20. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 993-94 (1978).

21. *See* notes 22-31 *infra* and accompanying text.

22. L. TRIBE, *supra* note 20, at 994-95.

23. *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911), wherein the Court stated,

> The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. . . . One who assails the classification in such a law must carry the burden of showing that it does not not rest upon any reasonable basis, but is essentially arbitrary.

24. L. TRIBE, *supra* note 20, at 1000.

25. "In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." Dandridge v. Williams,

At the other end of the spectrum lies the strict scrutiny standard which is employed by courts when evaluating classifications which have been deemed "suspect," such as race, national origin, and religion.[26] Under this analysis, the Court examines the challenged legislative classification much more closely than under the rational basis test. For a suspect classification to pass constitutional muster, the government must demonstrate a compelling state interest that the classification was designed to promote and that no less restrictive means are available.[27] As one might imagine, this standard is virtually impossible to meet. Once a government classification is deemed "suspect," the imposition of the strict scrutiny standard is generally fatal to its continued legal existence.[28]

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397 U.S. 471, 485 (1970). *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (statutory classifications exempting certain commodities from Sunday sales are not invalid under the Equal Protection Clause); Williamson v. Lee Optical Co., 348 U.S. 483, 488-89 (1955) (to subject opticians to a regulatory system while exempting all sellers of ready-to-wear glasses does not violate the Equal Protection Clause).

26. The Court has designated such classifications as suspect primarily for two reasons. First, the Court has a responsibility to protect politically impotent minority groups, as illustrated by its discussion in United States v. Carolene Products Co., 304 U.S. 144 (1938) (dictum):

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held within the Fourteenth. . . . [L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation [may] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . [S]imilar considerations [may] enter into the review of statutes directed at particular religious, or national, or racial minorities . . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152-53 n.4 (citations omitted). Second, such classifications often attach a stigma of inferiority to those being classified. To date, the Court has most frequently relied on the former reason in determining whether a classification should be deemed "suspect," though the latter element has usually been the primary element in the *definition* of suspect classifications. *See* Graham and Kravitz, *The Evolution of Equal Protection*, 7 HARV. CIV. LIB. L. REV. 105 (1972).

27. *See* Shapiro v. Thompson, 394 U.S. 618 (1969). Invalidating a state waiting period provision denying welfare benefits to otherwise eligible applicants solely because they had recently moved into the jurisdiction, the Court stated:

> [I]n moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necesssary to promote a *compelling* governmental interest, is unconstitutional. . . . [T]here is no need for a state to use the one year waiting period as a safeguard against fraudulent receipt of benefits; for less drastic means are available . . . to minimize that hazard.

Id. at 634, 637 (emphasis in original) (citations and footnote omitted).

28. Memorial Hospital v. Maricopa County, 415 U.S. 250, 269-70 (1974) (invalidating state statute requiring one year's residence in a county before an indigent could receive non-emergency care at county expense); Graham v. Richardson, 403 U.S. 365, 382-83 (1971) (invalidating state welfare laws that imposed residency requirements on aliens and conditioned benefits on citizen-

In regard to gender-based classifications, neither the rational basis standard nor the strict scrutiny standard has been applied by the Supreme Court. Instead, a middle-tier approach has been adopted for such classifications.[29] The fact that a classification arguably discriminates against men rather than women does not shield it from such scrutiny.[30] Generally, to withstand constitutional challenge, classifications based on gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.[31]

C. *Case Discussion*

The United States Supreme Court first enunciated the middle-tier scrutiny standard in *Craig v. Boren*.[32] The case involved a gender-

ship), Shapiro v. Thompson, 394 U.S. 618, 642 (1969) (invalidating one year state residency requirement to obtain welfare benefits); Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating state law making it illegal for any person to marry other than a white or American Indian within the state); Harper v. Virginia Board of Elections, 383 U.S. 663, 670 (1966) (invalidating state poll tax); Brown v. Board of Education, 347 U.S. 483, 495 (1954) (invalidating legally-compelled segregation in public schools); Skinner v. Oklahoma, 316 U.S. 535, 543 (1942) (invalidating state law providing for sterilization of persons convicted two or more times of felonies involving moral turpitude); Stauder v. West Virginia, 100 U.S. 303, 312 (1880) (invalidating state law providing that only white males of 21 years of age or older are eligible to serve as jurors).

29. *See e.g.*, Califano v. Westcott, 443 U.S. 76, 89 (1979) (invalidating a gender-based classification providing benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father, but denying benefits in the case of unemployment of the mother); Caban v. Mohammed, 441 U.S. 380, 389 (1979) (declaring constitutionally invalid a state law which granted unmarried mothers, but not unmarried fathers, the right to withhold consent to adoption of their children); Orr v. Orr, 440 U.S. 268, 272 (1979) (holding that a husband has standing when seeking to avoid an alimony obligation by challenging an underinclusive gender-based divorce statute); Califano v. Webster, 430 U.S. 313, 320-21 (1977) (upholding the constitutionality of a provision of the Social Security Act allowing retired female wage earners higher benefits in the computation of monthly old-age benefits than similarly situated retired male wage earners); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (invalidating a gender-based classification embodied in the Social Security Act requiring a widower, but not a widow, to demonstrate dependency upon the deceased spouse in order to obtain survivor benefits); Craig v. Boren, 429 U.S. 190, 197 (1976) (invalidating a gender-based criminal statute which prohibited the sale of 3.2% beer to males under twenty-one and to females under eighteen); Weinberger v. Wiesenfeld, 420 U.S. 636, 637-38 (1975) (invalidating a provision of the Social Security Act awarding survivor's benefits to widows, but not widowers, responsible for dependent children); Schlesinger v. Ballard, 419 U.S. 498, 510 (1975) (upholding a promotional policy of the Navy which discriminated in favor of female officers); Kahn v. Shevin, 416 U.S. 351, 360 (1974) (upholding a state law granting widows, but not widowers, an annual property tax exemption); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (invalidating a gender-based classification in federal statutes which defined spouses of male members of the armed services as "dependents" for purposes of obtaining military benefits and denied such benefits to spouses of female members absent proof of actual dependency); Reed v. Reed, 404 U.S. 71, 77 (1971) (invalidating a state statute requiring that, as between persons equally entitled to administer a decedent's estate, males should be preferred to females).

30. Craig v. Boren, 429 U.S. 190, 197 (1976).

31. *Id.* at 197, 204. *See* note 29 *supra*.

32. 429 U.S. 190 (1976).

based classification in a criminal statute which burdened a male's right. The challenged statute prohibited the sale of intoxicating 3.2% beer to males under the age of twenty-one and to females under the age of eighteen.[33] Utilizing the intermediate scrutiny standard articulated above, the Court declared the statute in violation of the equal protection clause. The underlying basis for the decision was the failure of the statistical evidence to support the social assumption that males between the ages of eighteen and twenty-one drink and drive any more than females do. Hence, the sex-based classification embodied in the statute was not "substantially related" to the important governmental objective of enhancing traffic safety.[34]

It is well established that the intermediate scrutiny standard is the appropriate mode of analysis in determining the constitutionality of gender-based legislative classifications.[35] It is, therefore, appropriate to examine the application of this standard to statutory rape laws. Since prior to the spring of 1981 the United States Supreme Court had refused to address this issue, this discussion is primarily limited to two federal appellate court decisions addressing the issue, both of which arose in the First Circuit.[36]

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33. *Id.* at 192.

34. *Id.* at 200.

35. *See* note 29 *supra* and accompanying text.

36. Subsequent appellate court decisions have closely followed the equal protection analysis of the principal decision, Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978), which declared constitutionally invalid a gender-based statutory rape law. *See, e.g.*, Navedo v. Preisser, 630 F.2d 636 (8th Cir. 1980), wherein the court invalidated an Iowa statutory rape provision which discriminated between men and women by punishing a male over twenty-five years of age for engaging in sexual intercourse with a female sixteen years old, without punishing a female over twenty-five years for the same offense. In reaching its decision the court stated:

> We agree with the reasoning of the First and Ninth Circuits in *Meloon* and *Hicks* and hold that the state bears the burden of showing that the gender-based classification is substantially related to the achievement of the statute's objectives . . . . The state . . . argues that its statute passes constitutional muster because it aims to prevent unwanted pregnancy among young females, and only females can become pregnant. Admittedly, the prevention of unwanted teenage pregnancy is an important state objective. However, this rationale is also insufficient to support the statute's gender-based classification. . . . The plausibility of a pregnancy rationale for laws of this kind is suspect. As the First Circuit noted in *Meloon*, 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 . . . .

Id. at 640 (citations omitted). *See also* United States v. Hicks, 625 F.2d 216 (9th Cir. 1980). In this decision, the court invalidated a gender-based federal statutory rape provision proscribing carnal knowledge of a female Indian under sixteen years of age. Because the statute at issue was federal, the court examined its constitutionality pursuant to the due process clause of the fifth amendment which forbids the federal government from denying equal protection under the law. The court invoked the traditional equal protection analysis developed for the scrutiny of gender-based classifications.

The first of these decisions is *Meloon v. Helgemoe*,[37] in which the court called into question the constitutionality of a New Hampshire gender-based statute which made it a felony for a male to have sexual intercourse with a consenting female under the age of fifteen.[38] In considering which standard of review to apply, the court stated:

> The statute at issue in this case is a classification based on sex. As such it requires more heightened scrutiny than would be applied to completely non-suspect legislation, but less stringent scrutiny than is typically applied to racial classifications. Moreover, since a criminal statute is involved, the standards governing gender classification must be applied with special sensitivity. . . . In conclusion, we should compare our overall analysis with that of *Craig v. Boren* . . . [although] [t]he present case involves a far more serious criminal penalty than did *Craig* and consequently a far greater legal differential between men and women. . . .[39]

Thus, the court adopted the middle-tier approach enunciated in *Craig*. To withstand constitutional challenge in the First Circuit, classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.

> The government has articulated two purposes behind the statutory scheme: prevention of teenage pregnancy and prevention of physical injuries to young females. . . . But the government has produced not a shred of evidence demonstrating how either objective is "substantially" furthered by punishment only of the male. . . . We conclude, therefore, that on this record the government has not shown that its gender-based assignment of the roles of the "victim" and "perpetrator" bears a substantial relation to its asserted goals.

Id. at 219-22 (citations and footnotes omitted). *Contra*, Hall v. McKenzie, 537 F.2d 1232, 1235 (4th Cir. 1976), wherein the court upheld the constitutionality of a West Virginia statutory rape provision rendering unlawful carnal knowledge by a male, over the age of sixteen, of a previously chaste female between the ages of ten and sixteen. This decision, which preceded Craig v. Boren, 429 U.S. 190 (1976), focused primarily on the disparate consequences stemming from the crime of carnal knowledge of a female under thirteen and carnal knowledge of a male under thirteen.

> For immutable physiological reasons, the possible consequences for the young female are quite different from those for the young male, and the differences provide a persuasive rationale for defining the respective crimes of carnal knowledge of a male and female separately and making different the consequences of conviction. . . . [T]here is a far greater likelihood of physical injury to a sexually immature female of thirteen than to a sexually immature male of thirteen. More important, a possible consequence of carnal knowledge of a thirteen-year-old female may be to cause her to become pregnant—a physiological impossibility for a male. Thus, we think that a rational basis exists not only to treat carnal knowledge of a thirteen-year-old female as a separate, distinct and different crime from carnal knowledge of a thirteen-year-old male, but to prescribe a range of punishment different and more severe for the former than the latter.

Id. at 1235.

37. 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978).

38. 5A N.H. REV. STAT. ANN. 632:1 I(c) (1974) which reads in pertinent part: A male who has sexual intercourse with a female not his wife is guilty of a class A felony if . . . the female is unconscious or less than fifteen years old . . . .

39. 564 F.2d at 604, 608.

The court first considered the objectives of the New Hampshire statutory rape law and the issue of whether those objectives were in fact the objectives at the time the legislation was enacted. The state of New Hampshire indicated its general objective was ". . . to prevent the general exploitation of children through the act of sexual intercourse. . . ."[40] More specifically, the state's goal was the prevention of physical injury resulting from sexual intercourse, and the prevention of teenage pregnancy.[41] While New Hampshire's general objective appears to be a constitutionally permissible goal, as well as a socially desirable objective, the First Circuit struck down the gender-based classification as unconstitutional under the equal protection clause. Implicit in the court's opinion was its recognition that the same objective—the prevention of the sexual exploitation of children through the act of sexual intercourse—could easily be accomplished by a gender-neutral classification.[42] Thus, the statute failed the second requirement of the test for constitutionality—that the classification be substantially related to the achievement of the statute's objectives. Additionally, the court rejected the more specific goal of prevention of teenage pregnancy because it did not accept that such was the purpose of the legislation at the time it was enacted. The court recognized "the very uniqueness of this characteristic makes it an available hindsight catch-all rationalization for laws that were promulgated with totally different purposes in mind."[43] Further, the court seemed to focus on the consensual aspect of the sexual act involved.[44] In so doing, the First Circuit took great care to indicate the limited nature of its holding.[45]

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40. 564 F.2d at 607.

41. *Id.*

42. [W]e are hard put to accept as "fair and substantial" the connection between (1) the fact that one subclass of one gender class of victims has some indeterminate likelihood of suffering an additional injury to which the other gender class is not susceptible and (2) the state's statutory scheme which penalizes only one gender exclusively and protects the other gender exclusively.

Id. at 608.

43. *Id.* at 607.

44. This case presents us with an unusual legal situation. New Hampshire has promulgated a gender-based criminal law which makes it a felony for a male to have sexual intercourse with a consenting female under the age of 15, while it is not a crime of any kind for a woman to have normal sexual intercourse with a male under the age of 15.

Id. at 603.

45. We want to take care to indicate the limited nature of our holding. We have found only one particular statutory rape law to be unconstitutional. We have not reflected on nor do we intend to question the constitutionality of the laws of other states. We express no opinion as to whether on a different record some other statute would pass consitutional muster.

Id. at 609.

It was not surprising, therefore, when the First Circuit upheld a similar gender-based statutory rape law in *Rundlett v. Oliver*,[46] not long after deciding *Meloon*. Directly contrary to its decision in *Meloon*, the First Circuit held that "Maine's statutory rape law did not violate the equal protection clause because the gender-based classification embodied therein was substantially related to the achievement of the governmental objective of preventing physical injury to females under the age of fourteen."[47] The distinction between *Rundlett* and *Meloon* inevitably rests on the facts of each case. Whereas, in *Meloon*, a minor female engaged in consensual sexual intercourse with her male partner, in *Rundlett*, the female victim by no means engaged in consensual intercourse. As described by the dissent, the victim was "overborne by the age of her partner and his status as a teacher in the school she attended. . . . [T]he evidence adduced at the trial strongly suggests that the defendant, at least the first time, had sexual intercourse with the complainant *'by force* and *against her will'*."[48] While it is indeed true that consent does not operate as a defense in a statutory rape case,[49] it appears that the underlying rationale for deciding the constitutionality of gender-based statutes has indirectly, at least in these two cases, turned on that issue. However, the *Rundlett* court found that the classification drawn in the Maine statute was substantially related to the state objective of prevention of physical injury to underage females. Thus, the court purportedly upheld the statute based on its success under traditional middle-tier analysis, not on the female's lack of consent.[50]

The court in *Rundlett* paid great deference to the judgment of the state legislature in promulgating the gender-based statutory rape law.[51] The court failed to inquire whether the stated purpose of preventing physical injury was, in fact, the purpose of the statute when it was enacted. In so doing, the court lightened the burden on the state by requiring only that it demonstrate that "in today's world [there is] a substantial relationship between the statutory classification and a gov-

46. 607 F.2d 495 (1st Cir. 1979).

47. *Id.* at 502.

48. *Id.* at 505 (Bownes, J., dissenting) (emphasis added).

49. 65 AM. JUR. 2d *Rape* § 16 (1972).

50. See note 47 *supra* and accompanying text.

51. "Indeed, we accept the Supreme Judicial Court's conclusion . . . that 'protecting the "life and well-being" of young females was expressly declared as a *principal* reason motivating the legislation from which the Maine statute currently under consideration directly derives.' " 607 F.2d at 501 (emphasis in original).

ernmental objective important enough to sustain such a gender-based classification".[52] In short, the court's judicial reluctance to inquire into the true purpose of the legislation enabled the gender-based statute to survive an attack based upon the equal protection clause.

Based on this authority, in order for a gender-based classification embodied in a statutory rape law to withstand constitutional challenge, it must serve an important governmental objective and must be substantially related to the achievement of that objective. Whether this intermediate level of equal protection analysis requires proof of a legislative purpose revealing an important governmental interest *at the time of enactment* is still open to question. The implications of this uncertainty, however, are clear. Should a court wish to view a gender-based statutory rape law strictly, it will require the purpose asserted in defense of the challenged statute to have been among the actual purposes of the enacting legislation. Under such a standard of review, the "mere incantation of an important governmental purpose" will not shield the legislation from further judicial scrutiny.[53] Conversely, should a court accept *any* purpose proffered by the state which appears presently to be a reasonable goal of the statute, the standard of review will be loosened considerably. Thus, the less strictly a gender-based statutory rape law is viewed, the more likely it is to be upheld.

III. THE *MICHAEL* DECISION

Section 261.5 of the California Penal 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 eighteen years".[54] As such, the statute makes it a crime for men to engage in a specified activity, while it does not permit the prosecution of females for the same offense. By virtue of this discrepancy in the treatment of males and females, the above-mentioned statute produces a gender-based classification which must be substantially related to the achievement of some important governmental objective if it is to withstand constitutional challenge.[55] The purpose of the statute has been

52. Brief for Respondent at 10 in Michael v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

53. Brief of the American Civil Liberties Union and the American Civil Liberties Union of Nothern California as Amicus Curiae at 10 in Michael v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

54. CAL. PENAL CODE § 261.5 (West Supp. 1979).

55. Craig v. Boren, 429 U.S. 190 (1976). *See also* Section II.C. *supra*.

the subject of much debate.[56] The objectives most frequently advanced are one, the statute exists merely to protect the virtue and chastity of young women; two, the statute is intended to combat and prevent the ever-increasing problem of teenage pregnancy; and three, it is intended to protect minor females from the adverse psychic or physical consequences resulting from sexual intercourse.[57] In *Michael v. Superior Court of Sonoma County*,[58] the United States Supreme Court addressed the issue of whether any of the above purported purposes are in fact objectives of the statute in question, and further, whether any satisfy the "important governmental interest test." Specifically, the Court asked whether a statutory rape provision which permits the criminal prosecution of a minor male for participating in consensual sexual intercourse with a minor female while the female is not liable for prosecution under the statute violates the equal protection clause of the fourteenth amendment to the Constitution of the United States.[59]

The Court's query came in response to the complaint filed against Petitioner Michael in July of 1978 in the Municipal Court of Sonoma County in California.[60] It was alleged that seventeen and one-half year old Michael had acted in violation of the California Penal Code[61] when he engaged in sexual intercourse with Sharon, a female under the age of 18. The alleged crime was reported to have occurred when Sharon and her sister were waiting at a bus stop at approximately midnight on June 3, 1978. Michael, accompanied by three friends, asked the two sisters to drink some wine. Sharon and her sister agreed and followed the three males to railroad tracks not far away. After Michael's friends and Sharon's sister left, Sharon and Michael began kissing, whereupon he ordered her to engage in sexual intercourse with him. When she refused, he allegedly slapped her several times until she submitted to the act.[62]

Michael was formally charged by respondent State of California for violation of section 261.5 in a one-count information filed in July of

56. *See generally* Brief for Respondent and Brief of the Petitioner in Michael v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

57. Brief of the Women's Legal Defense Fund as Amicus Curiae at 3 in Michael v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

58. 450 U.S. 464 (1981).

59. *Id.* at 466.

60. The name "Michael" is a pseudonym used for purposes of confidentiality. Brief of the Petitioner at 2 n.1 in Michael v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

61. CAL. PENAL CODE § 261.5 (West Supp. 1979).

62. This evidence was adduced at a preliminary hearing. 450 U.S. at 466.

1978 in the Superior Court of Sonoma County.[63] Alleging that section 261.5 violates both state and federal constitutional theories of equal protection because of the sex-based classifications therein, Michael attempted to have the information set aside. Neither the Sonoma County Court or the California Supreme Court accepted Michael's arguments. Both refused to set the information aside.[64]

Michael subsequently sought review in the Supreme Court of California. In a split decision[65] the California Supreme Court denied Michael's claim that the California statute violated state and federal equal protection principles.[66] In doing so, the court viewed the statute with strict scrutiny:[67]

> Once the state has established a valid and compelling interest in preventing pregnancies among unwed teenage girls . . . . [t]he Legislature is well within its power in imposing criminal sanctions against males alone, because they are the *only* persons who may physiologically cause the result which the law properly seeks to avoid.[68]

Additionally, the California Supreme Court rejected Michael's argument that the statute was both overbroad and underinclusive.[69] Unsuc-

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63. Brief of the United States as Amicus Curiae at 3 in Michael v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

64. *Id.*

65. Justice Mosk dissented and filed an opinion in which Justices Tobriner and Newman concurred. 25 Cal. 3d 608, 601 P.2d 572, 159 Cal. Rptr. 340 (1979).

66. 25 Cal. 3d at 610, 601 P.2d at 573, 159 Cal. Rptr. at 341.

67. In *Sail'er Inn, Inc. v. Kirby*, we considered the issue of suspect classifications based upon sex. Specifically, we there invalidated a statute which prohibited women from tending bar except in limited circumstances. Under the strict scrutiny standard routinely applied when the classification is deemed suspect, we imposed upon the state the burden of establishing not only that the state has a *compelling* interest which justifies the law but that those distinctions drawn by the law are necessary to further the statute's purpose. . . . Unlike the sex-based classification which we invalidated in *Sail'er Inn* . . . the law herein challenged is supported not by mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant. Accordingly, the Legislature is amply justified in retaining its historic statutory rape law. . . .

25 Cal. 3d at 610, 601 P.2d at 574, 159 Cal. Rptr. at 342 (emphasis in original) (citations omitted).

68. *Id.* at 611, 601 P.2d at 575, 159 Cal. Rptr. at 344 (emphasis in original).

69. [Defendant]suggests that the state's interest in preventing pregnancy could be served equally well by removing from the ambit of the statute, either as female victims or male offenders, all those who use birth control devices or techniques and all those otherwise incapable of procreation. We disagree, adopting in this connection the sound reasoning of the Supreme Judicial Court of Maine in *State v. Rundlett*, . . .wherein, responding to a similar argument, it recently said, "We doubt that legislators, intent on use of the criminal law to prevent juvenile pregnancies, would throw a roadblock in the way of effective prosecution as would be created by subjecting an under-age prosecutrix to cross-examination of such additionally embarrassing and uncertain details. Furthermore, we believe legislators' rejection of the defenses suggested . . . reflect[s] their reluc-

cessful at the state supreme court level, Michael sought review in the United States Supreme Court.

In a five to four decision written by Justice Rehnquist, the Court affirmed the judgment of the California Supreme Court,[70] although the rationale upon which the Court based its decision departs somewhat from that employed by the California Supreme Court.

The Court first considered the mode of analysis to be employed when considering the constitutionality of gender-based legislative classifications. Rejecting the approach adopted by the California Supreme Court, Justice Rehnquist stated, "Unlike the California Supreme Court, we have not held that gender-based classifications are 'inherently suspect' and thus we do not apply so-called 'strict scrutiny' to those classifications."[71] The Court then applied the middle-tier approach derived from earlier sex discrimination cases.[72] In so doing, the Court emphasized that if a gender-based classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated, the classification will be upheld.[73] Thus the Court intimated that a legislature might act within constitutional limits if its purpose is to "provide for the special problems of women."[74]

The Court next addressed the purpose behind the California unlawful sexual intercourse law and the collateral issues of whether the state's presently asserted objective was the same purpose for which the statute was originally enacted, and whether the gender-based classification was sufficiently related to the law to pass constitutional muster. In

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tance to rely, for accomplishment of their anti-pregnancy objective, upon the doubtful efficacy of contraceptives. . . ."

We also are unable to accept the contrary argument that the statute is impermissibly *underinclusive* and must, in order to pass constitutional muster, be *broadened* so as to hold the female equally culpable. . . . We note that *all* minors, male and female are protected from sexual abuse under sections 272 (contributing to the delinquency of a minor) and 288 (lewd and lascivious conduct upon the body of a child under 14). Women may be prosecuted under these statutes if they engage in sexual relations with underage males. Section 261.5 merely provides additional protection for minor females in recognition of the demonstrably greater injury, physical and emotional, which they may suffer.

Id. at 612-13, 601 P.2d at 575-76, 159 Cal. Rptr. at 343-44 (emphasis in original).

70. Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart, Powell, and Blackmun affirmed the judgment of the California Supreme Court. Justices Stewart and Blackmun filed separate opinions concurring in the judgment. Justice Brennan filed a dissenting opinion in which Justices White and Marshall joined. Justice Stevens filed a separate dissenting opinion.

71. 450 U.S. at 468.

72. *See* note 29 *supra* and accompanying text.

73. 450 U.S. at 469.

74. *Id.* (quoting Weinberger v. Wisenfeld, 420 U.S. 636, 653 (1975)).

a rather cursory manner, Justice Rehnquist disposed of these issues. He first indicated that, while every piece of legislation is drafted with varied purposes in mind, it is sufficient to find at least one of those many purposes still present in the legislation. Hence, the in-depth inquiry into the primary original purpose of the statute, once vital to the Court,[75] is no longer required. The Court thus accepted at face value the justification offered by the State of California that the purpose of the California statutory rape law was and still is to prevent illegitimate teenage pregnancies. In support of this finding, the majority opinion cited the dramatically high abortion rate among teenage pregnancies, and the overwhelmingly high rate of illegitimate children born as a result of such pregnancies.[76] Indeed, the Court acknowledged and accepted such statistics as evidence of the state's present objective in maintaining a gender-based legislative classification:

> Because virtually all of the significant harmful and inescapably indentifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment.[77]

The Court thereby deemed the California statute to be in compliance with the traditional middle-tier standard of constitutionality imposed upon gender-based classifications.[78]

Petitioner Michael also alleged that the statute in question was impermissibly underinclusive because it did not allow a female to be held

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75. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), where the Court discussed the illegitimacy of automatically approving presently articulated legislative purposes:

> [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. . . . This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.

Id. at 648 & n.16. *Accord*, Califano v. Webster, 430 U.S. 313, 320 (1977); Craig v. Boren, 429 U.S. 190, 200 n.7 (1976); Jiminez v. Weinberger, 417 U.S. 628, 634 (1974); United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 536-37 (1973); Eisenstadt v. Baird, 405 U.S. 438, 448-54 (1972); Reitman v. Mulkey, 387 U.S. 369, 373-34 (1966).

76. In 1976 approximately one million 15-to-19-year-olds became pregnant, one-tenth of all women in that age group. Two-thirds of the pregnancies were illegitimate. Illegitimacy rates for teenagers (births per 1000 unmarried females ages 14 to 19) increased 75% for 14-to-17-year-olds between 1961 and 1974 and 33% for 18-to-19 year olds.

450 U.S. at 470 n.3 (citations omitted).

77. *Id.* at 473.

78. *Id.* at 476.

criminally liable for committing the same act.[79] In response, the majority opinion indicated that, whereas a gender-neutral statute subjecting both males and females to prosecution would serve the goal of preventing teenage pregnancy equally well,[80] it is not the Court's role to rewrite the statute. "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."[81] Moreover, the Court found that effective enforcement of the statute was a vitally important interest to the state. If the statute were cloaked in gender-neutral terms, effective enforcement thereof would be impaired. That is, in light of the already aggravated problem of female-victims' reluctance to report rapes, it would be unwise to frame a statute which serves to encourage such reluctance by making both parties potentially criminally liable.[82]

Similarly, the Court rejected Michael's claim that the California statute was impermissibly overbroad since "it makes unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant."[83] While the statute's purpose is to prevent teenage pregnancy, a concurrent purpose is to protect prepubescent females from serious physical injury resulting from sexual intercourse. The Court thus found it ludicrous that petitioner should suggest that the scope of the statute be limited.[84]

Petitioner then challenged the constitutionality of the California rape statute *as applied*. The basis of his allegation rests in the statute's presumption that, as between two persons under the age of eighteen, the male is the culpable aggressor.[85] While there may be some truth to this statement, the Court refused to entertain it and summarily refuted

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79. *Id.* at 473.

80. *Id.*

81. *Id.* "A state . . . law is not arbitrary although it 'discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy,' not in conflict with the Federal Constitution." Kahn v. Shevin, 416 U.S. 351, 355 (1974) (quoting from Allied Stores v. Bowers, 358 U.S. 522, 528 (1959)).

82. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the 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 "equalize" the deterrents on the sexes.
450 U.S. at 473.

83. *Id.* at 475.

84. "[I]t is ludicrous to suggest that the Constitution requires the California Legislature to limit the scope of its rape statute to older teenagers and exclude young girls." *Id.*

85. Sex-role stereotypes frequently characterize males as aggressors and females as passive victims in the absence of any supporting evidence. When the government supports legislation embodying such generalizations, it is held to bear the burden of demonstrating why gender is

its credibility.[86] In short, the Court simply rejected petitioner's claim, stating that the statute does not embody "the assumption that males are generally the aggressors . . . [but] . . . is instead an attempt by a legislature to prevent illegitimate teenage pregnancy by providing an additional deterrent for men".[87] Justice Rehnquist then closed the Court's opinion by reiterating that, while the statute does discriminate against men, the gender-based classification embodied therein is necessary to effectuate the vital interest at stake, the prevention of teenage pregnancy.[88]

IV. ANALYSIS OF *MICHAEL*

Perhaps the most striking flaw of the *Michael* decision is the Court's failure to base its inquiry on the *actual* purposes of section 261.5 at the time the statute was enacted. The majority opinion identified the prevention of teenage pregnancy as a legitimate state interest without determining whether it was in fact the primary purpose for which the law was passed. In so doing, the Court acted in direct contradiction of its prior rulings, all of which indicate that the purpose asserted in defense of a challenged gender classification must have been among the *actual* purposes of the enacting legislation.[89]

While few persons would dispute the legitimacy of the government's concern with the high rate of teenage pregnancy, it should be recognized that section 261.5 was not promulgated for that purpose. Both the history and the language of the statute convincingly suggest that pregnancy prevention was not among the actual purposes of the statute.[90] For example, when the statute was originally drafted the age of consent was a mere ten years of age.[91] Given that the age of female

valid proxy for a set of other attributes. Orr v. Orr, 440 U.S. 268, 280 (1979); Craig v. Boren, 429 U.S. 190, 204 (1976).

86. 450 U.S. at 475.

87. *Id.*

88. [T]he statute places a burden on males which is not shared by females. But we find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts. Nor is this a case where the gender classification is made "solely for . . . administrative convenience," . . . or rests on "the baggage of sexual stereotypes" . . . . [T]he statute instead reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male.

Id. at 476 (citations omitted).

89. *See* note 75 *supra*.

90. Brief of the American Civil Liberties Union and the American Civil Liberties Union of Northern California as Amicus Curiae at 14 in Michael v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

91. *Id.* at 14-15.

puberty is generally far in excess of ten years, it is obvious the statute was not originally enacted with the prevention of teenage pregnancy in mind. Moreover, while the age of consent was subsequently raised to the age of eighteen in 1913, there is little reason to believe that this action was taken in order to prevent teenage pregnancies. As noted in the amicus curiae brief submitted to the Supreme Court by the American Civil Liberties Union in the *Michael* decision:

> The age of consent was raised to eighteen in 1913, before the radical change in sexual mores which has created the present teenage pregnancy problem . . . . [A] far more plausible explanation for the gradual increase in age of consent is the parallel change in popular views both in regard to the suitable age of women for marriage and the age until which they were deemed appropriately subject to protective legislation.[92]

Additionally, one need only turn to two noted California Supreme Court decisions to divine the true purposes for which section 261.5 was enacted.[93] In these decisions, spanning the years from 1895 to the late 1960's, the California court admitted that protection of a female's virtue, not pregnancy prevention, was the statute's original purpose.[94]

One may ask what danger is caused when a court bases its inquiry on the purported rather than the actual purposes of a gender-based statute which is being constitutionally challenged. The response is that a presently legitimate statutory objective may serve as a "convenient hindsight rationalization for a statute enacted with different purposes in mind."[95] Such hindsight ensures the survival of the original purpose of the statute, protection of women and their immunity from criminal liability in the realm of sexual crimes. Accordingly, statutory rape laws will continue to embody paternalistic notions which serve only to give vitality to undesirable sex-role stereotypes of inequality among the sexes,[96] while laws governing sexual crimes *should* reflect present atti-

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92. *Id.* at 15-16.

93. People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964); People v. Verdegreen, 106 Cal. 211, 39 P. 607 (1895).

94. The obvious purpose of this [statute] is the protection of society by protecting from violation the virtue of young and unsophisticated girls. . . . It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature.

39 P. at 608-09.

95. Brief of the American Civil Liberties Union as Amicus Curiae, *supra* note 90, at 12.

96. Brief of the Women's Legal Defense Fund as Amicus Curiae, *supra* note 57.

The notion underlying the California Penal Code Sec. 261.5—that because young women are incapable of making informed decisions to engage in sexual intercourse it is

tudes and thereby eliminate gender-based classifications. The better approach to examining the constitutionality of a gender-based legislative classification is to inquire into the actual purposes of the statute—those purposes which were in existence at the time the statute was passed. If such purposes are no longer valid because they embrace outmoded social mores, the laws should be stricken.

A second criticism of the *Michael* decision concerns the middle-tier equal protection analysis applied to gender-based classifications. As enunciated above, to withstand constitutional challenge, a classification by gender must serve either a legitimate state interest or an important governmental interest, and must be substantially related to the achievement of that objective. Assuming pregnancy prevention was the actual purpose for which section 261.5 was drafted, and that such purpose qualifies as an important governmental interest, one must still pose the question whether the gender-based classification embodied in section 261.5 is sufficiently related to the achievement of pregnancy prevention. Although the majority opinion clearly concludes that the sufficient relationship standard is satisfied,[97] the following argument is indeed both compelling and persuasive:

> [T]he prevention of pregnancy objective is clearly not substantially served by a statute that criminally penalizes only the potential father for a consensual act of intercourse where the undesirable result—pregnancy—is patently the responsibility of the female as well as the male participant in the act . . . [Moreover] . . . the fact that under California law only penetration and not emission is necessary to complete the crime thoroughly discredits the argument that California Penal Code Sec. 261.5 substantially serves the goal of pregnancy prevention.[98]

Thus, not only did the Court fail to identify the actual purpose of the California statute at the time it was enacted, it further failed to demon-

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appropriate to shield them from the consequences of their folly, while at the same time criminal sanctions may legitimately be imposed on young men because they, by contrast, are sufficiently competent to make such decisions—is simply "romantic paternalism."

Id. at 4. *See also* Frontiero v. Richardson, 411 U.S. 677 (1972), wherein Justice Brennan acknowledges the country's "unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which in practical effect, put women, not on a pedestal, but in a cage." *Id.* at 684.

97. 450 U.S. at 473.

98. Brief of Women's Legal Defense Fund as Amicus Curiae, *supra* note 57, at 5 (citations omitted).

strate a sufficient relationship between the legislative classification and the purpose it adopted as presently legitimate.

A third and final criticism of *Michael* is the majority opinion's failure to examine additional safeguards in the California Penal Code which protect *all* minors from sexual abuse and exploitation. Unlike section 261.5, these additional provisions subject women to criminal liability and embody gender-neutral legislative classifications. For example, section 272 of the California Penal Code makes it unlawful for any person of any sex to molest, annoy, or contribute to the delinquency of any persons under the age of eighteen.[99] Section 288 of the California Penal Code prohibits all persons from committing a lewd or lascivious act, including sexual intercourse, with a child under the age of fourteen.[100] Had Justice Rehnquist made reference to these provisions, the alleged statutory discrimination might not have been viewed with such skepticism. The Court's opinion would carry greater force had it included language similar to that of Justice Stewart's concurrence:

> Section 261.5 is thus but one part of a broad statutory scheme that protects all minors from the problems and risks attendant upon adolescent sexual activity. To be sure, § 261.5 creates an additional measure of punishment for males who engage in sexual intercourse with females between the ages of 14 and 17. The question then is whether the Constitution prohibits a state legislature from imposing this *additional* sanction on a gender-specific basis.[101]

Such an approach would have aided the court in its presentation. At the very least, the gender-based classification might have gained the appearance of being less an encroachment on the equal protection clause than it actually was thought to be by petitioner Michael.

The mere existence of these provisions which serve to protect the young from harmful sexual activity highlights the impermissible nature of the gender-based classification in section 261.5. If in fact these additional safeguards potentially perform the same function as section 261.5 through gender-neutral classifications, then clearly a gender-based classification is unnecessary. In support of this proposition, one need only turn to the forty-two jurisdictions which have revised their statutory rape provisions to include gender-neutral as opposed to gen-

99. CAL. PENAL CODE § 272 (West Supp. 1979 and 1980).
100. CAL. PENAL CODE § 288 (West Supp. 1979).
101. 450 U.S. at 477 (Stewart J., concurring) (emphasis in original) (footnote omitted).

der-specific classifications.[102] Surely these states share California's same concern over the rising incidence of teenage pregnancy and abortion. Unlike California, however, each one of these states has recognized the importance of legislation which protects *all* children from sexual exploitation, while refusing to legitimize needless and undesirable sex-role stereotypes.

Even if one accepts the gender-based classification embodied in the California statute as constitutional, and respects the Court's refusal to rewrite the California legislation, one still recognizes the need for legislative reform of such statutes using gender-neutral terms.

> *A person* commits the crime of sexual assault in the first degree if, . . . being 16 years of age or older, he engages in sexual penetration with another person under 13 years of age or . . . being 18 years of age or older, he engages in sexual penetration with another person who is under 18 years of age and who is entrusted to his care by authority of law; or is his son or daughter, whether adopted, illegitimate, or stepchild.[103]

Such suggestion by the Supreme Court would have given the *Michael* decision greater credibility while not subjecting the Court to criticisms of judicial activism.

V. CONCLUSION

Statutory rape provisions which single out women for special protection from sexual coercion, particularly where men in similar circumstances are equally in need of such protection, are inherently underinclusive. A gender-based statutory rape provision such as section 261.5 of the California Penal Code is insupportable in its present form. Neither the policies underlying the law—preservation of a minor female's chastity or prevention of unwanted teenage pregnancy—nor public sentiment warrants the imposition of criminal liability on the male only. Statutory rape provisions should be drafted in a gender-neutral manner with the express purpose of protecting children of both sexes from sexual abuse and exploitation. Further, such laws should be

102. *See* note 5 *supra*.
103. ALASKA STAT. §§ 11.41.410(a)(3), (a)(4) (Supp. 1981) (emphasis added).

promulgated with the express intent of disposing of needless and undesirable sex-role stereotypes.

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