Loyola of Los Angeles Law Review

Volume 16 | Number 1 Article 3

1-1-1983

The Constitutionality of Gender-Based Statutes Ostensibly Aimed at Males: The Implications of Michael M. v. Superior Court

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THE CONSTITUTIONALITY OF GENDER-BASED STATUTES OSTENSIBLY AIMED AT MALES: THE IMPLICATIONS OF *MICHAEL M. v. SUPERIOR COURT*

> [A]bsent a compelling reason for doing so, equal protection forbids the law to foster one standard of socially acceptable conduct for males and another for females.[1]

I. INTRODUCTION

Since the enactment of California's first penal statute in 1850, California law has imposed a criminal penalty upon any male who engages in sexual intercourse with a female under a designated age, unless the female is his wife.[2] The penalty is currently imposed by section 261.5 of the Penal Code, California's statutory rape law.[3] Until 1979, the California Supreme Court consistently recognized that the purpose of the statute was the protection of female virtue.[4]

In 1979, the California Supreme Court declared for the first time in the statute's 130-year history that its purpose was the prevention of pregnancy in minor unwed females.[5] The court held that despite its discriminatory classification, section 261.5 did not violate the equal protection provisions of either the California[6] or United States[7] Constitutions. The court reasoned that because only females can become pregnant[8] and only males cause pregnancy in females, sex is the only possible classification to identify victim and offender.[9] In *Michael M. v.*

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1. Michael M. v. Superior Court, 25 Cal. 3d 608, 624-25, 601 P.2d 572, 583, 159 Cal. Rptr. 340, 351 (1979) (Mosk, J., dissenting), *aff'd,* 450 U.S. 464 (1981).

2. 1850 Cal. Stat. 234, ch. 99, § 47 (current version at CAL. PENAL CODE § 261.5 (West Supp. 1981)). The statute was reenacted in 1872, CAL. PENAL CODE § 261.1; amended three times: 1889 Cal. Stat. 223, ch. 191, § 1; 1897 Cal. Stat. 201, ch. 139, § 1; 1913 Cal. Stat. 212, ch. 122, § 1; and recodified: 1970 Cal. Stat. 2406, ch. 1301, § 2.

3. Section 261.5 provides: "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."

4. *See infra* text accompanying notes 116-17 & 121-22.

5. Michael M. v. Superior Court, 25 Cal. 3d 608, 601 P.2d 572, 159 Cal. Rptr. 340 (1979), *aff'd,* 450 U.S. 464 (1981).

6. CAL. CONST. art. I, § 7.

7. U.S. CONST. amend. XIV.

8. 25 Cal. 3d 608, 611, 601 P.2d 572, 574, 159 Cal. Rptr. 340, 342 (1979), *aff'd,* 450 U.S. 464 (1981).

9. *Id.* at 612, 601 P.2d at 575, 159 Cal. Rptr. at 343. The court sustained the constitu-

Superior Court,[10] the United States Supreme Court, in a plurality opinion,[11] affirmed the decision of the state supreme court.

This note questions whether historical evidence and legal precedent support the Court's acceptance of pregnancy prevention as the actual purpose of section 261.5. It concludes that the currently articulated purpose was invoked by the State as an after-the-fact rationalization to justify a statute that was not in fact enacted with this purpose in view.

This note suggests that: (1) The California Supreme Court inappropriately failed to conduct a searching inquiry into the actual purpose of section 261.5, as distinct from the ostensible purpose, and that the United States Supreme Court similarly failed to conduct its own independent examination of this issue; (2) the Supreme Court failed to require the State to make a persuasive showing that the discriminatory classification substantially deters teenage pregnancy; (3) the Court overlooked the more subtle discriminatory effects of section 261.5 on both males and females; and (4) by focusing on the desirability of preventing illegitimate teenage pregnancy, the Court ignored crucial components of the appropriate equal protection standard established to review challenges to gender-based laws. This note concludes that in so doing, the Court not only reached an untenable result, but, at the same time, greatly weakened the test for ascertaining the constitutionality of gender-based classifications ostensibly aimed at males.

Finally, this note discusses the ramifications of *Michael M.* with respect to the future of section 261.5. All state gender-based statutory rape laws have been adopted by legislative action; no state court has overturned a gender-based statutory rape law.[12] This note suggests that the decision of the California Supreme Court in this case forecloses the possibility of such action by the judiciary, with but two exceptions. First, the passage of an equal rights amendment would provide the judiciary with explicit constitutional authority for stringent review of

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tionality of § 261.5 by a narrow majority. The opinion was written by Justice Richardson. Chief Justice Bird and Justices Clark and Manuel concurred. Justice Mosk filed a dissenting opinion, joined by Justices Tobriner and Newman.

10. 450 U.S. 464 (1981). Justice Rehnquist announced the judgment of the Court and delivered an opinion in which Chief Justice Burger and Justices Stewart and Powell joined. Justices Stewart and Blackmun filed separate concurring opinions. Justice Brennan wrote a dissenting opinion in which Justices White and Marshall joined. Justice Stevens wrote a separate dissenting opinion.

11. In this note any reference to the United States Supreme Court's opinion in *Michael M.* will refer to the plurality opinion.

12. *See* Michael M. v. Superior Court, 25 Cal. 3d 608, 614-15, 601 P.2d 572, 576, 159 Cal. Rptr. 340, 344, *aff'd,* 450 U.S. 464 (1981).

gender classifications.[13] Second, a challenge to the statute in a case presenting either evidence of female culpability or of the absence of force or coercion on the part of a minor male defendant might surmount the constitutional hurdle established in *Michael M.* This note concludes with the observation that, at present, legislative action is the only effective process for a change in the gender-based status of section 261.5.

II. FACTS OF THE CASE

Late one evening in 1978, two teenagers met at a bus stop in Northern California. Sharon, age sixteen and a half, and her twenty-one-year old sister were waiting for the bus and drinking whiskey when Michael, age seventeen and a half, and two other boys stopped and offered to share some wine with the girls. The group drifted off together, drinking and talking. Soon Michael and Sharon separated from the others and engaged in a private romantic interlude in nearby bushes. At one point Sharon resisted Michael's attentions, but he continued to kiss her without further resistance on her part. They were interrupted by Sharon's sister who asked Sharon if she was ready to leave. Sharon replied that she was not and switched her amorous attentions to another boy.

Sometime later, after the others had departed, Sharon and Michael went to a nearby park and resumed their sexual activities on a park bench. When Sharon refused to have intercourse with Michael he struck her several times, and she consented. Afterwards, Michael left Sharon in the park.[14] A neighbor found her and notified the police.[15]

Michael M. was subsequently arrested and charged with a felony violation of section 261.5.[16] In his petition prior to trial, he challenged the constitutionality of the statute on the ground that it unlawfully dis-

13. State and federal equal rights amendments are based on the principle that the law cannot discriminate on the basis of sex: Any differential treatment must rest upon the particular characteristics of the individuals affected or characteristics unique to one sex. If, however, a state attempted to justify a discriminatory law by employing the unique physical differences rationale, an equal rights amendment would authorize strict scrutiny of the statute. In theory, a court would require that the challenged law be necessary to the achievement of a compelling state interest. *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L.J. 871, 893-96 (1971); *see also infra* note 231 and accompanying text.

14. Telephone interview with Gregory Jilka, petitioner's attorney (August 9, 1981).

15. *Id.* Sharon testified to all the other facts at a preliminary hearing. Joint Appendix at 16-37, Michael M. v. Superior Court, 450 U.S. 464 (1981).

16. 25 Cal. 3d 608, 610, 601 P.2d 572, 574, 159 Cal. Rptr. 340, 342 (1979), *aff'd,* 450 U.S. 464 (1981). This pseudonym was adopted pursuant to California's policy of protecting the

criminated on the basis of gender.[17] Although he conceded that the state had a compelling interest in preventing pregnancy in unwed teenage females, he contended that the actual purpose of the statute was to protect the virtue of young females. As such, he argued, the statute was invalid because it rested on archaic stereotypes.[18] Moreover, he contended that the statute was impermissibly overinclusive because it prohibited intercourse among persons incapable of procreation or those who employed birth control.[19] He also contended that the statute was impermissibly underinclusive because it ignored any degree of female responsibility for the sexual act. Finally, he urged that the state's interest in pregnancy prevention could be as well served by a gender-neutral statute as by a gender-based statute.[20]

III. THE CALIFORNIA SUPREME COURT'S REASONING

In *Michael M. v. Superior Court,*[21] the California Supreme Court began its analysis by observing that California law regards gender as a suspect classification warranting strict scrutiny. Accordingly, the State had the burden of establishing both a compelling interest that would justify the law and that the classification was necessary to further the statute's purpose.[22] The State asserted that section 261.5 was enacted to reduce the incidence of pregnancy in unwed minor females and introduced an impressive body of statistical data to demonstrate the severity of the problem.[23]

The supreme court accepted at face value the State's articulation of the purpose of the statute and declared that the admittedly discriminatory classification was "readily justified" by this important objective.[24] The court reasoned that because only females become pregnant, and only males can cause the result which the law properly seeks to avoid, a classification based on gender is necessary to identify victim

identity of minors. *See* R. FORMICHI, CALIFORNIA STYLE MANUAL §§ 213-14, 245-46 (2d rev. ed. 1977).

17. 450 U.S. at 467.

18. *Id.* at 472 n.7.

19. *Id.* at 475.

20. *Id.* at 473.

21. 25 Cal. 3d 608, 610, 601 P.2d 572, 574, 159 Cal. Rptr. 340, 342 (1979), *aff'd,* 450 U.S. 464 (1981).

22. *Id.* at 610, 601 P.2d at 574, 159 Cal. Rptr. at 342.

23. *Id.* at 611-12, 601 P.2d at 574-75, 159 Cal. Rptr. at 342-43. The court equated a number of evils with unwed teenage pregnancies, including the fact that most such pregnancies are unwanted, births to teenage mothers pose substantially increased medical risks, and most teenage mothers never complete high school. *Id.*

24. *Id.* at 611, 601 P.2d at 574, 159 Cal. Rptr. at 342.

and offender.[25]

The court rejected the petitioner's contention that section 261.5 is both impermissibly over and underinclusive. The court observed that the legislature could properly include within the ambit of the statute even those persons who, as female victims or male offenders, employ birth control devices or techniques and those persons otherwise incapable of procreation.[26] The court stated:

> We doubt that legislators, intent on use of the criminal law to prevent juvenile pregnancies, would throw such 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 reluctance to rely, for accomplishment of their anti-pregnancy objective, upon the doubtful efficacy of contraceptives and the truth of the inevitable claim of non-emission by a male charged with statutory rape.[27]

The court similarly rejected the argument that the statute must be broadened to hold the female equally culpable. Females, the court reasoned, are vulnerable to greater risks and adverse consequences of pregnancy; thus, the differing degrees of culpability are justified. In addition, the court stated that the inclusion of females would effectively eliminate any possibility of prosecution because if females were subject to prosecution they would be unlikely to report violations of the statute. Furthermore, the statute was enacted to protect, not penalize, young females.[28] The court noted that section 261.5 is only one part of a wider statutory scheme that protects all minors from sexual abuse; the statute merely provides additional protection for minor females in recognition of the demonstrably greater injury, physical and emotional, that they may suffer.[29]

IV. THE UNITED STATES SUPREME COURT'S REASONING

With few modifications, the United States Supreme Court substantially adopted the analysis of the state court in its review of *Michael M.*

25. *Id.* at 612, 601 P.2d at 575, 159 Cal. Rptr. at 343.
26. *Id.* at 612-13, 601 P.2d at 575, 159 Cal. Rptr. at 343.
27. *Id.* at 613, 601 P.2d at 575, 159 Cal. Rptr. at 343 (quoting State v. Rundlett, 391 A.2d 815, 821 n.18 (Me. 1978)).
28. 25 Cal. 3d at 613-14, 601 P.2d at 575-76, 159 Cal. Rptr. at 343-44.
29. *Id.* at 613, 601 P.2d at 576, 159 Cal. Rptr. at 344.

v. Superior Court.[30] The Court observed that, in contrast to the California court, it has not treated gender-based classifications as inherently suspect, hence deserving of strict judicial scrutiny, but that it has required such classifications to bear a "substantial relationship" to "important governmental objectives."[31] The Court found the purpose underlying section 261.5 to be less than clear, but chose to defer to the California court's acceptance of the purpose asserted by the State. The Court concluded that at least one of the purposes of the statute was the prevention of illegitimate teenage pregnancy.[32] The Court also concluded that the State demonstrated a strong interest in preventing such pregnancies in light of its showing that such pregnancies constituted a serious social problem.[33]

The fundamental issue of the case, the Court stated, was "whether a State may attack the problem of sexual intercourse and teenage pregnancy directly by prohibiting a male from having sexual intercourse with a minor female."[34] The Court reasoned that males and females are not similarly situated with respect to the problems and risks of sexual intercourse because virtually all the adverse consequences befall the female.[35] The Court found it reasonable for the California Legislature to exclude females from punishment because the risk of pregnancy serves as a natural deterrent to young females, while no similar deterrent exists for males. A criminal sanction imposed on the male thus operates roughly to "equalize" the deterrents on the sexes.[36]

The Court rejected as irrelevant petitioner's argument that a gender-neutral statute might serve the state's goal as well as section 261.5. The relevant issue, the Court insisted, was not whether the statute was drafted as precisely as it might have been, but whether its provisions were within constitutional limits.[37] Furthermore, the Court found persuasive the State's contention that the inclusion of females might effectively frustrate its interest in statutory enforcement.[38]

The Court also rejected as "ludicrous" petitioner's contention that the statute was impermissibly overbroad because it prohibited intercourse with females too young to conceive, and found the age of the

30. 450 U.S. 464 (1981).
31. *Id.* at 469.
32. *Id.* at 469-70.
33. *Id.* at 470-71.
34. *Id.* at 472 (footnote omitted).
35. *Id.* at 471.
36. *Id.* at 473.
37. *Id.*
38. *Id.* at 473-74.

male irrelevant because young men are as capable as older men of inflicting pregnancy on females.[39] The Court concluded that section 261.5 does not discriminate against females, and that even though the discriminatory rule burdens males, the latter are in no need of the special solicitude of the courts.[40]

V. EQUAL PROTECTION AND GENDER-BASED STATUTORY RAPE LAWS

A. The Standard of Review

In *Michael M.,* petitioner invoked the equal protection clause of the fourteenth amendment[41] as a bar to his prosecution for statutory rape. Constitutional challenges to gender-based statutory rape laws have been based, for the most part, on alleged violations of this clause.[42] Traditionally, the Court required only a rational relationship between discriminatory classifications and permissible state objectives.[43] Where the purpose of a statute was not clearly stated by the legislature, the Court accepted without further inquiry the assertions of those currently defending the law, or the Court itself suggested hypothetical legislative goals.[44] Any real or hypothetical goal grounded in the public interest was held constitutionally permissible, and the Court exhibited extreme deference to the legislative definition of the public interest "either out of judicial sympathy for the difficulties of the legislative process or out of a belief in judicial restraint generally."[45] Prior to 1977, courts routinely invoked the rational relationship test to review

39. *Id.* at 475.

40. *Id.* at 475-76.

41. U.S. CONST. amend. XIV.

42. Discriminatory federal statutes are challenged as violative of the due process clause of the fifth amendment. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 & n.2 (1975).

43. *See, e.g.,* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) ("The equal protection clause . . . 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.").

44. *See, e.g.,* McGowan v. Maryland, 366 U.S. 420, 425-28 (1961) (upholding Maryland statute requiring closing of certain businesses on Sundays; suggesting that although such laws had genesis in religion, present permissible legislative goal could be desire to set aside Sunday as secular day of rest for enhancement of public welfare); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 563 (1947) (upholding Louisiana statute requiring apprenticeship as prerequisite to harbor pilot licensing even though apprentices selected by relatives and friends; hypothesizing that "the benefits to morale and *esprit de corps* which family and neighborly tradition might contribute . . . might have prompted the legislature to permit Louisiana pilot officers to select those with whom they would serve").

45. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 995 (1978).

the constitutionality of gender-based statutory rape laws.[46] Opinions reflected the judicial deference characteristic of this test and, not surprisingly, these statutes were upheld as rationally related to permissible governmental objectives.[47]

Conversely, the Court has devised a strict scrutiny test to review classifications based on suspect criteria.[48] Under the strict scrutiny test the Court has not deferred to legislative judgment but has determined itself if the classification was necessary to the achievement of a compelling state interest and if the stated interest was the actual purpose of the law.[49]

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46. *But see* Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977) (equal protection challenge to New Hampshire's gender-based statutory rape law reviewed under intermediate scrutiny test), *cert. denied*, 436 U.S. 950 (1978). For a more detailed discussion of this case see *infra* notes 78-86 and accompanying text.

47. Because the United States Supreme Court had not reviewed an equal protection challenge to a statutory rape law before *Michael M.*, it is necessary to examine state and lower federal court decisions for the analysis applied to such challenges. Two cases are illustrative.

In Flores v. State, 69 Wis. 2d 509, 230 N.W.2d 637 (1975), petitioner challenged Wisconsin's gender-based statutory rape law. The Wisconsin Supreme Court stated that gender-based classifications were to be reviewed under the rational relationship test, rather than the strict scrutiny test, and suggested two possible purposes underlying this gender-based classification: (1) the prevention of pregnancy in minor females and (2) the protection of such females from sexual exploitation. The court determined that these hypothetical goals adequately justified the classification. *Id.* at 510-11, 230 N.W.2d at 638. The court did not consider the vulnerability of minor males to exploitation, nor how the exclusion of minor females from the statutory proscription advanced the goal of pregnancy prevention.

In Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976), the defendant was convicted of violating a West Virginia statutory rape law for engaging in consensual sexual intercourse with a thirteen-year-old girl. The Fourth Circuit stated that when compared to their male peers, thirteen-year-old females were more vulnerable to physical injury from sexual intercourse, and that males might cause such females to become pregnant. Thus, the court determined that there was a rational basis for treating intercourse between males and thirteen-year-old females as a separate and distinct crime. *Id.* at 1235. The *Hall* court did not examine how the statutory exclusion of females served to prevent pregnancy; neither did it explain how the slight incidence of pregnancy in thirteen-year-old girls served to justify this rationale.

48. To term a legislative classification "suspect" suggests that it may have resulted from prejudice against the group it burdens. In Korematsu v. United States, 323 U.S. 214 (1944), the Court held that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." *Id.* at 216.

Certain classifications based on alienage have also been deemed suspect. Because aliens cannot vote, they are a politically powerless minority and have often suffered economic and social disadvantage. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

49. *See* Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978). "[H]istory demonstrates that legislatures have repeatedly treated suspect classes . . . not only arbitrarily but frequently with animus, or in a way that

Traditionally, gender classifications have not received strict scrutiny; however, section 261.5 presents a powerful illustration for the argument that gender classifications should be deemed suspect. The statute implicitly classifies women as weak, passive victims incapable of intelligent decisions about their sexuality,[50] and it implicitly equates maleness with aggressiveness.[51] A majority of the Court, however, has never invoked the strict scrutiny standard in its review of classifications based on sex.[52]

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denies the equal moral worth of the individuals concerned. . . . This suspicion of legislative bias [has justified] the anti-democratic intervention of the Supreme Court into the law-making process." *Id.* at 954.

Furthermore, the Court has not tolerated approximations. The party defending the statute has had the burden of proving that it is so narrowly drawn that it furthers only the legitimate interests at stake and that it embodies the least discriminatory alternative available for achieving the state's purpose. See McLaughlin v. Florida, 379 U.S. 184 (1964) (invalidating Florida criminal statute which prohibited cohabitation of unwed interracial couples) for a full discussion of the principles underlying strict scrutiny.

50. *Michael M.,* 25 Cal. 3d at 623-25, 601 P.2d at 582-83, 159 Cal. Rptr. at 350-51 (Mosk, J., dissenting).

51. *See Michael M.,* 450 U.S. at 500-01 (Stevens, J., dissenting) (statute reflects legislative judgment that males are aggressors).

52. Classifications that discriminate on the basis of gender are analogous to those that discriminate on the basis of race. Color and sex are unchangeable, readily observable, and easily stereotyped characteristics long associated with discriminatory assumptions which are usually unrelated to any innate individual differences. Caban v. Mohammed, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting) (New York statute favoring unwed mothers over unwed fathers as adoptive parents held unconstitutional).

However, only four members of the Court have ever recognized the "long and unfortunate history of sex discrimination" in the United States as a justification for deeming classifications based on sex inherently suspect. Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (invalidating federal statutory scheme that automatically granted dependents' benefits to wives of armed services personnel but forced husbands to prove dependent status).

The political status of the lapsed equal rights amendment served as a primary justification for the different standards of review accorded race and gender. On several occasions, particular justices demonstrated their reluctance to apply strict scrutiny while a proposal for such a major constitutional amendment was pending. In *Frontiero,* Justice Powell, joined by Chief Justice Burger and Justice Blackmun, stated that he felt compelled to withhold strict scrutiny of gender classifications until passage of the equal rights amendment. *Id.* at 692 (Powell, J., concurring):

> The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. . . . [D]emocratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

In Craig v. Boren, 429 U.S. 190 (1976) (invalidating law forbidding sale of 3.2% beer to males under 21 but permitting such sale to females over 18), Chief Justice Burger reiterated his position in *Frontiero* and stated that "[w]ithout an independent constitutional basis supporting the right asserted or disfavoring the classification adopted, I can justify no substantive constitutional protection other than the . . . [minimal] protection afforded by the . . . [rational relationship test]." *Id.* at 217 (Burger, C.J., dissenting) (citations omitted).

In 1976, the Court articulated the intermediate scrutiny test it was to invoke in its review of *Michael M.*[53] In *Craig v. Boren,*[54] the Court held that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[55] As the label implies, the intermediate scrutiny test denotes a standard midway between the rational relationship test and the strict scrutiny test.

The Court explained in *Craig* why a heightened level of review is appropriate for gender-based classifications:

> In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.[56]

Three years after *Craig,* in *Caban v. Mohammed,*[57] Justice Stewart noted that gender classifications "are in many settings invidious because they relegate a person to the place set aside for the group on the basis of an attribute that the person cannot change."[58] The Court has continued to hold gender classifications invidiously discriminatory when based on no greater justification than assumptions regarding the innate capabilities of the sexes, stereotypes of the proper roles for men and women or assumptions regarding inferior social status.[59] Further-

53. The Court had set the stage for the new level of review it was to apply to gender-based classifications four years earlier in Reed v. Reed, 404 U.S. 71 (1971). The *Reed* opinion invalidated an Idaho law which preferred male over female relatives as administrators of decedents' estates. *Id.* at 74. Under the rational relationship test, the elimination of one class of claimants would have served a legitimate goal by reducing the workload of the probate courts, but the Court found the mandatory preference for males arbitrary and held that "the choice in this context may not lawfully be mandated solely on the basis of sex." *Id.* at 77.

Although the language of the case is cast in rational relationship terms, "[o]nly by importing some special suspicion of sex-related means from [a] new equal protection area can the result be made entirely persuasive." Gunther, *The Supreme Court, 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 34 (1972).

54. 429 U.S. 190 (1976).

55. *Id.* at 197.

56. *Id.* at 199.

57. 441 U.S. 380 (1979).

58. *Id.* at 398 (Stewart, J., dissenting).

59. *See, e.g.,* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidating provision of Social Security Act granting survivors' benefits to widows with children while denying such benefits to widowers with children). "[T]he notion that men are more likely than women to be the primary supporters of their [families] . . . is not . . . without support. . . . But such a

more, the Court has expressly held that classifications that discriminate against males, as well as those that discriminate against females, are subject to intermediate scrutiny.[60]

Application of the intermediate scrutiny test to a law that discriminated against males is illustrated by *Craig* itself. At issue in *Craig* was an Oklahoma statute which provided criminal penalties for the sale of beer with an alcoholic content of 3.2% to males under age twenty-one and females under age eighteen. The Court accepted, for purposes of discussion, the district court's identification of traffic safety as the purpose of the legislation, but found the statistical evidence offered inadequate to support a conclusion that the classification closely served to advance that goal.[61] The Court deemed the connection between traffic safety and gender too tenuous.[62] The studies introduced by the State documented an increase in drunk driving both in and out of the state,[63]

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gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and [who] . . . contribute significantly to their families' support." *Id.* at 645; Stanton v. Stanton, 421 U.S. 7 (1975). The *Stanton* Court held that a Utah statute, which decreed that males reached majority at 21 and females at 18, and which also provided that upon divorce the parents of the female became responsible for their daughter's support until she reached the age of 18, while the parents of males had to support their sons until they reached 21 could not survive equal protection attack under any test.

> No longer is the female destined solely for the house and the rearing of the family, and only the male for the marketplace and the world of ideas. . . . If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl. . . . [I]f the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.

Id. at 14-15; Frontiero v. Richardson, 411 U.S. 677, 686 (1973): "[S]ex . . . is an immutable characteristic determined solely by the accident of birth. . . . [It] frequently bears no relation to ability to perform or contribute to society." (footnote omitted).

60. Orr v. Orr, 440 U.S. 268, 279 (1979); *accord* Caban v. Mohammed, 441 U.S. 380 (1979); Craig v. Boren, 429 U.S. 190 (1976).

61. *Craig v. Boren*, 429 U.S. at 199-200, 204. One survey established that 16.5% of men had been drinking within two hours of driving while 11.4% of women had been drinking. Similarly, 14.6% of males exceeded the legal blood alcohol concentration level while 11.47% of women exceeded the level. *Id.* at 203 & n.16. In 1973, 0.18% of the females aged 18 to 20 were arrested in Oklahoma for driving under the influence of alcohol compared to 2% of the males in the same age group. *Id.* at 201. Figures for all ages indicated that male arrests for alcohol-related offenses increased with age. *Id.* at 200 n.8. The Court determined that these statistics did not justify the employment of gender as a classifying device. *Id.* at 201.

The Court found that no survey measured the use and dangerousness of 3.2% beer as compared to alcohol generally, a significant detail because Oklahoma considered 3.2% beer non-intoxicating, and no findings were related to the sex-age differentials at issue. *Id.* at 203. Moreover, because the statute only prohibited the sale of 3.2% beer to young males, not its consumption, the Court held that the classification did not substantially advance the goal of traffic safety. *Id.* at 204.

62. *Id.* at 202, 204.

63. *Id.* at 200-01.

but the State failed to demonstrate that the statutory scheme served as a deterrent to such behavior in Oklahoma. In fact, the disproportionately high arrest statistics for young males indicated that the statutory scheme was a futile means of controlling driving behavior.[64]

Because every law must be based on a constitutionally permissible objective, and because the reasonableness of a classification depends on the degree to which it advances that objective, the first step in any equal protection analysis is to determine the purpose of the challenged statute.[65] Under the intermediate scrutiny test applied to gender-based classifications, the Court has insisted on proof of a law's actual purpose, as illuminated by its language, structure, legislative history, and operative effect. Accordingly, the Court has rejected "after-the-fact rationalizations" asserted to justify a law that was not in fact adopted with the asserted purpose in mind, regardless of the justifiability of the currently asserted purpose.[66]

In *Weinberger v. Wiesenfeld,*[67] the Court held that a legislature may "provide for the special problems of women,"[68] but the "mere recitation of a benign, compensatory purpose is not an automatic shield

64. *Id.* at 202 n.14: "[T]he disproportionately high arrest statistics for young males—and, indeed, the growing alcohol-related arrest figures for all ages and sexes—simply may be taken to document the relative futility of controlling driving behavior by the 3.2% beer statute . . . ."

65. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV., 341, 344-47 (1949).

66. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (invalidating school district's mandatory maternity leave policies). In a concurring opinion Justice Powell observed that although the stated objectives of the challenged policies (teacher absenteeism, classroom discipline, the safety of students, pregnant teachers, and their unborn children) were no doubt legitimate concerns, they were unsupported, after-the-fact rationalizations. Rather, the record strongly indicated that the policies were adopted to keep obviously pregnant teachers from students' view. *Id.* at 653 (Powell, J., concurring).

One commentator notes that when a rule is defended with a consideration that did not, in fact, contribute to its enactment, the rule should be invalidated under the intermediate scrutiny test. L. TRIBE, *supra* note 45, § 16-30, at 1086.

> [I]t seems sound to resist upholding a significant deprivation of liberty or a substantial discrimination on a basis that did not occur to those responsible for the injury . . . . [S]uch resistance deprives the enacting body of nothing it deliberately . . . sought but only of the windfall it would receive if the product of its work were to survive for reasons that played no proper role . . . in the enacting process. Moreover, if the only reason a rule is struck down is that its justification has been conceived only after the fact, re-enactment for the proper reason remains a possibility. And from the perspective of the individual adversely affected by the results of a lawmaking process, justice requires at least some sensitivity to whether the process that produced a challenged rule was itself an example of the very evil to be avoided . . . rather than a considered effort to overcome that evil . . . .

Id. at 1086-87 (footnotes omitted).

67. 420 U.S. 636 (1975).

68. *Id.* at 653.

which protects against any inquiry into the actual purposes underlying a statutory scheme."[69] The Court scrutinized both the language and legislative history of the challenged statute and found it apparent that Congress' objective in providing Social Security benefits to widows with young children was not to compensate women who were, because of economic discrimination, unable to provide for themselves. Rather, it was clear that Congress intended to permit mothers to choose not to work so as to care for their children.[70]

If, as in *Craig,* the express language of a statute is not indicative of its purpose and the legislative history does not clarify the statute's objectives, the Court has analyzed the relationship between the currently asserted purposes and the gender-based classification.[71] Where

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69. *Id.* at 648 (footnote omitted).

70. *Id.* at 648-49.

Compare Califano v. Goldfarb, 430 U.S. 199 (1977) (striking down provision of Social Security Act which granted survivors' benefits to widows regardless of prior dependency but which granted such benefits to widowers only if they could prove they had been dependent on deceased wives for at least half of their support) *with* Califano v. Webster, 430 U.S. 313 (1977) (per curiam) (upholding provision of Social Security Act which provided for discriminatory benefits computation scheme favoring female wage earners).

In *Goldfarb*, the Government argued that the challenged statute reflected a valid congressional assumption that widowers were less likely to be dependent on spouses than widows and that Congress deliberately intended to remedy the greater needs of the latter. 430 U.S. at 207, 216-17. The Court conducted a full inquiry into the actual purposes of the statute to resolve these issues and found that, regardless of a couple's actual income or standard of living, the express terms of the statute granted benefits automatically to widows and to any widower who could prove he had been dependent on his wife for more than half of his support. *Id.* at 213. The Court also found that the general statutory scheme, of which the challenged provision was a part, showed that dependence, not need, was the crucial factor in determining the categories of beneficiaries. *Id.* at 213-14.

The Court reviewed the legislative history of the statute and found no congressional intent to remedy the effects of prior discrimination on nondependent widows. *Id.* at 216. In fact, there was every indication that the statute was based on the stereotyped presumption that men are responsible for the support of their families, *id.* at 215, which, as the Court had previously held in *Wiesenfeld*, denigrated the efforts of working women who supported their families. The Court also found that when the challenged provision was enacted, Congress assumed it to be the equivalent of a provision for benefits to widows under a previous statute which itself had been enacted to equalize the protection given to dependents of both sexes, rather than to benefit nondependent wives. *Id.* at 216.

In *Webster*, the petitioner asserted that the discriminatory scheme at issue was irrational. The Court again conducted a full inquiry into the actual purpose of the statute and found that because its terms expressly provided that retirement benefits were to be based on past earnings, the statute operated directly to compensate women for past economic discrimination. 430 U.S. at 318. The Court also examined the legislative history of the provision and found, in contrast to *Goldfarb*, that Congress had directly addressed the justification for differing treatment of the sexes and "purposely enacted the more favorable treatment for female wage earners to compensate for past employment discrimination against women." *Id.*

71. *See, e.g.*, 429 U.S. at 199-200 & n.7.

it has found the relationship to be "unduly tenuous," the Court has concluded either that the asserted purpose could not have been the actual legislative goal or that the classification was unreasonable and therefore invalid.[72] Furthermore, where the Court has found that the highest court of a state merely accepted at face value questionable assertions of legislative purpose, the Court has not deferred to the state court but, instead, has instituted its own inquiry de novo.[73]

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72. *See, e.g., id.* at 202, 204. In Califano v. Goldfarb, 430 U.S. 199 (1977), Justice Stevens discussed the hypothetical justifications suggested for the classification. He noted that although only 10% of the women were nondependent and that the statute expedited the processing of the applications of the remaining 90% (dependent wives), the offsetting cost imposed on the nation in order to achieve this administrative convenience was staggering: automatic payment made to the remaining 10% totaled $750 million a year. He was, therefore, convinced that administrative convenience could not have been the actual reason for the discrimination. *Id.* at 219-20 (Stevens, J., concurring).

He also argued that the disparate treatment of widows and widowers was not a product of a conscious purpose to redress past economic discrimination against women because only nondependent widows benefited from the disparate treatment. He stated that "[r]espect for the legislative process precludes the assumption that the statutory discrimination is the product of such irrational lawmaking." *Id.* at 221. He concluded that a statute which effected an unequal distribution of economic benefits on the basis of sex alone was sufficiently questionable because " 'due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve [the] interest' " asserted by the Government. *Id.* at 223 (citations omitted).

73. *Compare* Reitman v. Mulkey, 387 U.S. 369 (1967) (affirming judgment of California Supreme Court that an amendment to California Constitution permitting owners of property to dispose of their holdings as they chose unconstitutionally involved state in racial discrimination in housing market) *with* Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating Massachusetts statutory scheme which made it more difficult for single, then married, persons to obtain contraceptives).

In *Reitman*, the Court held that the California Supreme Court "quite properly undertook to examine the constitutionality of [the amendment] in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.' " 387 U.S. at 373 (citations omitted). The Court stated that the finding of the state court was especially worthy of its consideration. *Id.* at 374. Because the amendment had been challenged within months of its passage, there were no prior decisions reflecting the view of the state court concerning the purpose, scope, and operative effect of the amendment that conflicted with the present finding. *See id.* at 372-73. In the absence of a sound rebuttal by the parties defending the amendment, the Court found no reason for rejecting the judgment of the California Supreme Court. *Id.* at 381.

Prior to the decision in *Baird*, the Masschusetts Supreme Court had determined that the purposes of the challenged statutory scheme were to protect both the health and morals of state citizens by deterring premarital sex. The *Baird* Court, however, stated that the actual statutory purposes remained unclear. 405 U.S. at 442, 448. As for the morals justification, the Court found it unreasonable to assume that by proscribing the sale of contraceptives to unwed citizens, the state had "prescribed pregnancy and the birth of an unwanted child as punishment for fornication." *Id.* at 448.

Furthermore, contraceptives that were to be used for the prevention of disease were not statutorily proscribed; contraceptives had to be obtained from physicians and pharmacists, and federal and state laws already regulated the distribution of harmful drugs. Thus, health

In addition to identifying the purpose of the law, the Court, since *Craig,* has required that gender classifications closely serve the achievement of important governmental interests.[74] In this area, the Court has exhibited less tolerance for overinclusiveness recognizing that while the majority might properly belong within the class, "a gender-based classification need not ring false to work a discrimination that in the individual case might be invidious."[75] Furthermore, where the state's interest could have been as well served by a gender-neutral statute as by one that discriminates on the basis of sex, the Court has held the latter constitutionally impermissible.[76] Finally, under the intermediate scrutiny test, the Court has required the Government, rather than the party challenging the statute, to prove by an exceedingly persuasive demonstration that the gender classification substantially ad-

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could "no more reasonably be regarded as [a statutory] purpose than the deterrence of premarital sexual relations." *Id.* at 448-52. The Court concluded that the only possible justification for the statutory scheme was a per se prohibition on the use of contraceptives as immoral and held that because the distribution of contraceptives to married persons could not be prohibited, a ban on distribution to unmarried persons was equally impermissible. *Id.* at 452-53.

74. *See, e.g.*, 429 U.S. at 200 (1976).

75. *Caban v. Mohammed*, 441 U.S. at 398 (1979) (Stewart, J., dissenting on ground that sexes not similarly situated in area covered by challenged statute).

In *Caban*, a father of illegitimate children challenged a New York statute that permitted only mothers to block adoption of their illegitimate children by withholding consent. The New York Court of Appeals had found that if the consent of unmarried fathers were required, adoption of their children could be severely hindered: Such fathers were often impossible to locate when adoption proceedings were brought, whereas mothers were more likely to remain with their children. *Id.* at 392.

The Court determined that the classification was impermissibly overinclusive, however, and held that even if the state high court were "correct that unmarried fathers often desert their families, . . . then allowing those fathers who remain[ed] with their families a right to object to the termination of their parental rights [would] pose little threat to the State's ability to order adoption in most cases." *Id.* at 392-93 n.13.

76. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979), where the Court found that Alabama's challenged alimony scheme could not be upheld on the basis of the state's preference for allocation of family responsibilities under which the wife was presumed dependent and the husband was presumed liable for her support. Because the scheme also provided for individualized hearings where the parties' relative financial circumstances were considered, there was no justification for a presumption of dependency and responsibility based on gender. *Id.* at 281-82. The Court held that where a "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." *Id.* at 283; Caban v. Mohammed, 441 U.S. 380 (1979). In *Caban*, the Court noted "alternatives to the gender-based distinction of [New York's adoption statute] . . . to emphasize that the state interests asserted in support of the statutory classification could be protected through . . . mechanisms more closely attuned to those interests." *Id.* at 393 n.13.

vances the purpose of the statute.[77]

B. The Standard of Review Applied to Gender-Based Statutory Rape Laws

Federal circuit courts reviewing challenges to gender-based statutory rape laws in the interim between *Craig* and *Michael M.* have applied the intermediate scrutiny test. In *Meloon v. Helgemoe,*[78] the First Circuit Court of Appeals invalidated a New Hampshire law that penalized any male who engaged in intercourse with a female under age fifteen. The State asserted that the purposes of the statute were to protect children from the exploitation associated with intercourse and, in particular, to prevent physical injury and pregnancy in young females. The State justified the classification on the grounds that females are more likely than males to be victimized; they are more vulnerable than males to physical injury; and only females become pregnant.[79] Conversely, the State contended that because most males under fifteen are incapable of intercourse, they could not be victimized and that since pedophilia[80] is more common in males, there are potentially more male

77. In Kirchberg v. Feenstra, 450 U.S. 445 (1981), a Louisiana statute providing a husband, as "head and master" of property jointly owned with his wife, the unilateral right to dispose of such property without his wife's consent was held to violate the equal protection clause. *Id.* at 456. The Court stated that "the burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an 'exceedingly persuasive justification' for the challenged classification." *Id.* at 461 (citations omitted).

In Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980), a provision of the Missouri workers' compensation statute that automatically granted work-related death benefits to widows, but which required widowers to prove dependence on their wives' earnings was found unconstitutional on the ground that it impermissibly discriminated against both working wives and widowers of deceased workers. The Court held:

> The burden . . . is on those defending the discrimination to make out the claimed justification, and this burden is not carried simply by noting that in 1925 the state legislature thought widows to be more in need of prompt help than men or that today "the substantive difference in the economic standing of working men and women justifies the advantage" given to widows. . . . It may be that there is empirical support for the proposition that men are more likely to be the principal supporters of their spouses and families, . . . but the bare assertion of this argument falls far short of justifying gender-based discrimination on the grounds of administrative convenience. Yet neither the [Missouri Supreme Court] nor appellees in this Court essay any persuasive demonstration as to what the economic consequences to the State or to the beneficiaries might be if, in one way or another, men and women, whether as wage earners or survivors, were treated equally under the workers' compensation law, thus eliminating the double-edged discrimination described in . . . this opinion.

Id. at 151-52 (citations omitted).

78. 564 F.2d 602 (1st Cir.), *cert. denied*, 436 U.S. 950 (1977).

79. *Id.* at 605-06.

80. Pedophilia is a sexual condition in which children are the preferred sexual object.

than female offenders.[81]

The *Meloon* court found the statute to be impermissibly underinclusive. Because the statute defined intercourse as any sexual contact involving the slightest vaginal penetration, and adult females could coerce or force prepubescent boys to perform such an act, young boys were subject to victimization but were denied statutory protection. Moreover, because the State offered no evidence of the incidence of pedophilia in males, or of the percentage of pedophiles who violated the statute, its justification for penalizing only males was unfounded.[82]

The court refused to accept the pregnancy prevention rationale in the absence of any evidence to support it. The court reasoned that the provisions of the statute, in fact, reflected a contrary conclusion: The age of consent was set at fifteen and thus the preponderance of the class consisted of prepubescent females; no proof of seminal emission was required; and no birth control defense was permitted. Furthermore, the court warned that because pregnancy was a condition unique to females, its very uniqueness made it a convenient hindsight rationale for laws actually enacted for different reasons.[83]

The court found the physical injury rationale imprecise and overinclusive: Because the statute protected all females under age fifteen, it included consenting females who were not prone to injury.[84] Moreover, the State offered no showing of how often genital injury occurred "even for the adult-child scenario, particularly in light of the 'penetration, however slight' definition of the offense."[85] The court concluded that it could not find a substantial 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."[86]

Conversely, in *Rundlett v. Oliver,*[87] the same court upheld a Maine law that punished males who engaged in intercourse with females under age fourteen. The court determined that of the two asserted stat-

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WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1665 (1966).

81. 564 F.2d at 605-06.
82. *Id.* at 606-07.
83. *Id.* at 607-08 & n.6.
84. *Id.* at 608.
85. *Id.*
86. *Id.*
87. 607 F.2d 495 (1st Cir. 1979).

utory purposes, the prevention of physical injury and pregnancy in young females, the former was supported by the legislative history of an antecedent statute and by prior judicial interpretation of the existing statute.[88] Furthermore, the State offered substantial evidence to support its assertion that females under age fourteen, unlike their male peers, are often the victims of physical injury caused by males. The court held that the State had met its burden of proving that the classification closely served the achievement of an actual and important governmental objective. Thus, the court concluded that it was not necessary to examine the purported relationship between the classification and the pregnancy prevention rationale.[89]

A consistent application of the intermediate scrutiny test enabled the First Circuit to uphold the statute in *Rundlett* and strike down that in *Meloon.* The court explained that because the statute under attack in *Rundlett* set the age of female victims lower than the statute challenged in *Meloon,* the former statute provided "greater congruity between the class of victims and the potential risk of injury to them that is sought to be prevented."[90] Thus, the court determined that the classification embodied in the Maine law was substantially related to the law's purpose. Conversely, in *Meloon,* the New Hampshire classification "covered a far larger class of female victims than the injury prevention justification would warrant."[91] Accordingly, it was not substantially related to the statute's asserted purpose.

In *United States v. Hicks,*[92] the Ninth Circuit Court of Appeals

88. *Id.* at 500-02. As the dissent pointed out, however, Maine's Supreme Judicial Court relied on the legislative history of a Massachusetts statutory rape law, and no evidence was offered to show that when the Maine Legislature copied it 200 years later any particular objective was considered. *Id.* at 505-06 (Bownes, J., dissenting).

89. *Id.* at 502-03. Moreover, in *Rundlett*, the First Circuit underlined its holding in *Meloon* by noting:

> [W]e remain in doubt as to the acceptability of justifying a gender-based classification on the basis of a pregnancy prevention rationale. We would find that justification particularly troubling in the case at bar. First, the Maine Supreme Judicial Court's conclusions of legislative history on this point need not be accorded the same degree of deference we have given . . . [to the prevention of physical injury rationale], since that court's fashioning of the pregnancy prevention purpose was based, not on language found in the statute itself or its antecedents, but upon after-the-fact inferences drawn from failures to act on the part of the Maine legislature. Second, we doubt that the Maine legislature, having adjudged that persons under a certain age are incapable of giving informed consent to the act of sexual intercourse, would choose to penalize only a male under-aged partner for taking the . . . risk of conceiving a child.

Id. at 502 n.15.

90. *Id.* at 502.

91. *Id.*

92. 625 F.2d 216 (9th Cir. 1980), *vacated and remanded*, 450 U.S. 1036 (1981) (in light of

invalidated statutes proscribing statutory rape in areas under federal jurisdiction. The court followed the approach of the *Craig* Court[93] in determining the actual purposes of the statutes and assumed, for purposes of discussion, the truth of the proclaimed objectives: the prevention of physical injury and pregnancy in females under sixteen.[94] The *Hicks* court refused to accept bare assertions in lieu of a demonstrated relationship between the classifications and statutory objectives, especially with criminal liability at issue. The court relied on *Caban* and *Craig* as authority for its ruling that "once an appropriate party invokes constitutional scrutiny of a statutory gender classification, the government must shoulder the burdens of producing evidence and proving a constitutionally-sufficient justification" for the discrimination.[95] The court distinguished *Rundlett* and found that in *Hicks,* the Government had neither demonstrated that males are, or should be, held responsible for causing the prohibited sexual contact, nor that by punishing only males the challenged statutes reduced the incidence of pregnancy.[96] The *Hicks* court also found no evidence that females are the only victims of sexual contact or that they suffer physical injury from such contact.[97]

The Eighth Circuit Court of Appeals, in *Navedo v. Preisser,*[98] invalidated Iowa's statutory rape law that discriminated against males over age twenty-five who engaged in intercourse with females under sixteen. The State claimed that the statute was intended to protect minor females from pregnancy, physical injury, and emotional trauma.[99] The State, however, introduced no evidence to demonstrate the validity of these assertions and failed to justify its contention that females over age twenty-five cannot physically harm males under age sixteen, or that young females are more likely than young males to suffer emotional distress.[100] Despite a prior ruling by the Iowa Supreme Court that the Iowa Legislature had enacted the statute to reduce the incidence of teenage pregnancy and its attendant problems, the *Navedo* court held that "[a]lthough a court should accept the purpose of a statute offered

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Michael M. v. Superior Court, 450 U.S. 464 (1981)), *rev'd*, 657 F.2d 244 (9th Cir. 1981) (in light of United States v. Sangrey, 648 F.2d 597 (9th Cir. 1981) (see *infra* note 227 for discussion of *Sangrey*)).

93. 429 U.S. 190 (1976). *See also supra* text accompanying notes 61-64.

94. 625 F.2d at 219-20 & n.5.

95. *Id.* at 219 (citing 441 U.S. 380 (1979); 429 U.S. 190 (1976)).

96. 625 F.2d at 220-21 n.8.

97. *Id.* at 220.

98. 630 F.2d 636 (8th Cir. 1980).

99. *Id.* at 638.

100. *Id.* at 639-40.

by the state or its courts, despite a lack of legislative history, we remain free to inquire into the actual purpose of the statute if the proffered justification is not plausible."[101]

The *Navedo* court relied on *Meloon*[102] in finding pregnancy prevention rationales especially suspect as hindsight rationalizations. The court also noted that the general doubts expressed by the First Circuit were reinforced by the peculiar structure of the Iowa statute: By excluding males under twenty-five, the classification did not encompass the very group most likely to impregnate teenage females. The court concluded that this critical underinclusiveness vitiated the State's pregnancy prevention rationale.[103]

In *Michael M.,* however, the Supreme Court distinguished *Meloon* and *Navedo*[104] from *Rundlett* on the basis that New Hampshire and Iowa had failed to establish a greater incidence of injury in females than males, while Maine had done so. The Court drew a parallel between the heightened risk of injury established in *Rundlett* and California's demonstration that females "suffer disproportionately the deleterious consequences of illegitimate pregnancy."[105] Furthermore, the Court stated that because both the *Meloon* and *Navedo* courts had held that pregnancy prevention was not the actual purpose of the challenged legislation, neither court had addressed the issue of whether the respective classifications were substantially related to the prevention of teenage pregnancy.[106]

This statement evinces a misreading of *Navedo.* The Eighth Circuit clearly held that because the challenged statute excluded the class of males most likely to impregnate minor females, it was impermissibly underinclusive with respect to the pregnancy prevention rationale.[107] The opinion specifically states that "[b]ecause the state has failed to show that its gender-based classification *substantially furthers* the prevention of . . . pregnancy caused by sexual intercourse with an older person, we hold that the . . . statute . . . violates the equal protection

101. *Id.* (citing *Caban v. Mohammed*, 441 U.S. at 389; Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977); *Craig v. Boren*, 429 U.S. at 199 n.7; Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975)).

102. 564 F.2d 602 (1st Cir.), *cert. denied*, 436 U.S. 950 (1978)). *See also supra* text accompanying note 83.

103. 630 F.2d at 640-41.

104. No attempt was made to distinguish *Hicks*, which was then before the Court on petition for certiorari. United States v. Hicks, 625 F.2d 216 (9th Cir.), *petition for cert. filed*, 49 U.S.L.W. 3305 (U.S. Oct. 14, 1980) (No. 80-602). *See supra* note 92.

105. 450 U.S. at 474 n.10.

106. *Id.*

107. 630 F.2d at 640-41.

clause."[108]

VI. ANALYSIS

A. The Purpose of Section 261.5

The finding of the California Supreme Court in *Michael M.* that pregnancy prevention is the purpose of section 261.5[109] has no historical support, and it marks an abrupt break with that court's prior holdings that the legislature enacted section 261.5 for the express purpose of protecting the virtue of young females.[110]

1. Historical background

Early English statutory rape laws contained a conclusive presumption that a female below a certain age was incapable of consenting to sexual intercourse.[111] The presumption was allegedly justified on the ground that such females were incapable of exercising the judgment and discretion necessary to give meaningful consent.[112] This consent standard, which subsequently was incorporated into California's first rape statute,[113] was reiterated by the California Supreme Court in *People v. Gordon.*[114] In its review of this early statutory rape prosecution, the court stated that "[i]t is . . . a presumption of law that a girl under ten years of age is incapable of consenting to the offense of rape."[115] Several years later, in *People v. Verdegreen,*[116] the court explained that:

> The obvious purpose of [the statute] is the protection of soci-

108. *Id.* at 641 (emphasis added) (footnote omitted).

109. 25 Cal. 3d at 610-11, 601 P.2d at 574-75, 159 Cal. Rptr. at 342-43.

110. One year before the California Supreme Court's decision in *Michael M.*, a state court of appeal held that pregnancy prevention was the purpose of the California statute. People v. McKellar, 81 Cal. App. 3d 367, 146 Cal. Rptr. 327 (1978).

The Court of Appeal cited no authority for this novel proposition but, instead, chose to rely on the State's unsupported assertion that when the legislature enacted § 261.5, its primary concern was to prevent pregnancy in minor females. *Id.* at 369, 146 Cal. Rptr. at 331. At a subsequent hearing the California Supreme Court retransferred the case to the Court of Appeal ordering that it be refiled with reference to *Michael M.* People v. McKellar, No. CR 20594 (Cal. Sup. Ct. Jan. 24, 1980).

111. Statute of Westminster I, 1275, 3 Edw., ch. 13; 18 Eliz., ch. 7, § 4 (1576) (age of consent 10 years).

112. 4 W. BLACKSTONE, COMMENTARIES *211.

113. 1850 Cal. Stat. 234, ch. 99, § 47 (current statutory rape provision at CAL. PENAL CODE § 261.5 (West Supp. 1982)). The statute contained a provision defining statutory rape as intercourse with a female under the age of 10.

114. 70 Cal. 467, 11 P. 762 (1886).

115. *Id.* at 468, 11 P. at 763.

116. 106 Cal. 211, 39 P. 607 (1895) (defendant convicted of assault with intent to commit statutory rape of seven-year-old girl).

> ety 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. The incapacity extends to the act and all its incidents.[117]

While it seems reasonable to assume that a girl under ten is too young to understand the nature and consequences of sexual intercourse, this rationale fades as the age of consent approaches adulthood. Yet, the age of consent in California was increased by statutory amendment from ten to fourteen in 1889, to sixteen in 1897, and to its present level, eighteen, in 1913.[118] Moreover, although a minor female who married with consent was deemed sufficiently emancipated and mature to divorce and remarry without parental authority,[119] she still was deemed incapable of consenting to extra-marital intercourse.[120]

Thus, when the legislature raised the age of consent to eighteen an additional rationale must have supported this expansion of the statutory provision. The California Supreme Court's holding in *People v. Hernandez*[121] is enlightening:

> [T]he consent standard has been deemed to be required by important policy goals. . . . The law's concern . . . is explained in part by a popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a young woman. An unwise disposition of her sexual favor is deemed to do harm both to herself and the social mores by which the community's conduct patterns are established. Hence, the law of statutory rape intervenes in an effort to avoid such a disposition.[122]

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117. *Id.* at 214-15, 39 P. at 608-09.

118. 1889 Cal. Stat. 223, ch. 191, § 1; 1897 Cal. Stat. 201, ch. 139, § 1; 1913 Cal. Stat. 212, ch. 122, § 1 (current version at CAL. PENAL CODE § 261.5 (West Supp. 1982)).

119. *See* CAL. CIV. CODE § 204 (West 1982) (authority of parent ceases upon marriage of child) (originally enacted 1872).

120. In People v. Courtney, 180 Cal. App. 2d 61, 4 Cal. Rptr. 274 (2d Dist. 1960) (defendant convicted of statutory rape for engaging in intercouse with married woman under 18), the Court of Appeal implicitly held that the only proper exercise of a minor female's sexuality lay within the bonds of the conjugal relationship.

121. 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964) (girl 17 years and 9 months old voluntarily engaged in intercourse with defendant, who was subsequently convicted of statutory rape).

122. *Id.* at 531, 393 P.2d at 674, 39 Cal. Rptr. at 362. The opinion underscores the over-

Because the female has been deemed incapable of consent, it follows that males have been conclusively presumed responsible for the act regardless of actual guilt or innocence.[123] Furthermore, because California's statutory rape law has never imposed criminal sanctions against adult females for engaging in sexual intercourse with under age males, the law has reflected the legislature's belief that minor males, unlike their female peers, have been capable of giving meaningful consent.[124]

This double standard conflicts with traditional social, legislative, and judicial assumptions that females mature at an earlier age than do males.[125] One study of sexually active teenage males concluded that many were mentally unprepared to understand the nature and conse-

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riding value the court placed on the protection of female chastity when female choice conflicted with the preservation of social mores. By labeling the decision to engage in sexual activity unwise, the court also cast a negative reflection on the ability of young women to make meaningful choices about their sexuality.

123. For example, in *Hernandez*, the supreme court held that males would be conclusively presumed criminally responsible for the occurrence, even if they were young and naive and only responding to the female's advances. *Id.* The inequitable consequences of this presumption are graphically illustrated in State v. Snow, 252 S.W. 629 (Mo. 1923), where the record indicated that "[a] number of callow youths, of otherwise blameless lives" were seduced by a sexually active minor female. The court found that "[t]he boys were immature and doubtless more sinned against than sinning"; questioned the soundness of Missouri's statutory rape law in that it criminalized male behavior under any circumstances; but held that "courts must construe the statute as they find it." *Id.* at 632.

124. L. KANOWITZ, WOMEN AND THE LAW 19 (1969).

125. "Universally, the young female, but not the male, has been considered to be incapable of consenting to sexual relations, though for all other purposes—contracts, property ownership, capacity to sue and be sued—she might reach the age of majority years before the male." *Id.* at 9. For example, in Jacobson v. Lenhard, 30 Ill. 2d 225, 228, 195 N.E.2d 638, 640 (1964), the Illinois Supreme Court upheld a state law permitting females to bring legal actions at an earlier age than males, concluding that the sexual disparity was reasonable in light of "legislative and judicial recognition that females mature physically, emotionally and mentally before male[s]"; and in Stanton v. Stanton, 30 Utah 2d 315, 319, 517 P.2d 1010, 1012 (1974), *rev'd*, 421 U.S. 7 (1975), the Utah Supreme Court upheld a state statute that set the age of majority for males at 21 and for females at 18, reiterating the common assumption that "girls tend generally to mature physically, emotionally and mentally before boys."

The California Legislature also recognized a disparity between the chronological ages of males and females and the ages at which they reached maturity. "As originally enacted in 1872, former § 56 of the California Civil Code read: 'Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years or upwards, . . . are capable of consenting to and consummating marriage.' " Historical Note to CAL. CIV. CODE § 4101 (West 1970) (quoting former CAL. CIV. CODE § 56 (1872)). In 1921, the ages were changed to 21 and 18 respectively. 1921 Cal. Stat. 333, ch. 233, § 1. It was not until 1971 that the ages for both sexes were equalized at 18. 1971 Cal. Stat. 3747, ch. 1748, § 26 (current version at CAL. CIV. CODE § 4101 (West Supp. 1982)).

quences of their sexual activities.[126] In light of these factors, it could also be argued that teenage boys are incapable of giving meaningful consent to sexual intercourse. Moreover, California law has long recognized the capacity of both minor males and females to give informed consent in situations where the potential impact on their lives was as great as or greater than decisions involving sexual intercourse.[127] Thus, the class of individuals to which the consent standard applied was both over and underinclusive: It included females who did not need protection and excluded males incapable of giving meaningful consent. If the purpose of the consent standard was to protect the immature and the unsophisticated, the means chosen to effectuate that purpose was, therefore, seriously flawed. Conversely, if the consent standard is viewed as a means of preserving female chastity as a social good, it reflects a rationally based method of effectuating that purpose, however illegitimate that purpose may be.

By the time *Michael M.* reached the California Supreme Court in 1979, it was clear that the substitution of another and legitimate purpose was crucial to the continued viability of section 261.5 because the United States Supreme Court had declared that "[a] gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny."[128] The United States Supreme Court implied as much in *Michael M.* when it stated that so long as pregnancy prevention was deemed to be one of the purposes of section 261.5, the statute could then be upheld "[e]ven if the preservation of female chastity were one of the motives of the statute and even if that motive be impermissible."[129]

2. Pregnancy prevention — the modern rationale

Had the California Supreme Court followed the precedent it es-

126. Finkel, *Sexual and Contraceptive Knowledge, Attitudes, and Behavior of Male Adolescents*, 7 FAMILY PLANNING PERSPECTIVES 256 (1975).

127. *See, e.g.*, CAL. CIV. CODE §§ 34.5 (West Supp. 1981) (unmarried minors may consent to medical treatment regarding prevention, treatment, or termination of pregnancy, and such consent not subject to disaffirmance because of minority) (originally enacted in 1953: *See* 1953 Cal. Stat. 3383, ch. 1654, § 1); 34.6 (West Supp. 1981) (all minors 15 years of age or older living apart from parents or guardians may consent to medical treatment) (originally enacted in 1968: *See* 1968 Cal. Stat. 785, ch. 371, § 1); CAL. PENAL CODE § 26 (West Supp. 1981) (all minors over 14 are responsible for their criminal conduct) (originally enacted in 1872); CAL. PROB. CODE § 1406 (West 1956) (all minors over 14 may appoint guardians ad litem) (originally enacted in 1931: *See* 1931 Cal. Stat. 670, repealed 1979).

128. Orr v. Orr, 440 U.S. 268, 282-83 (1979).

129. 450 U.S. at 472 n.7.

tablished in *Arp v. Workers' Compensation Appeals Board,*[130] it is apparent that the court would not have found pregnancy prevention to be the purpose underlying section 261.5 in *Michael M.* The *Arp* court considered a challenge to a statute containing a conclusive presumption that all widows were dependent on their husband's earnings but which required widowers affirmatively to prove their dependency in order to establish entitlement to workers compensation death benefits. The Workers' Compensation Appeals Board had asserted that men and women were not similarly situated with respect to economic factors, and that the legislature had designed the statute to redress the effects of past economic discrimination against females. The court found the argument speculative, reviewed the legislative history of the statute, and determined that the statute was the product of archaic and overbroad sexual stereotypes that clearly underlay later, similar legislation. The court cited *Weinberger v. Wiesenfeld*[131] and *Craig v. Boren,*[132] and held that it was not "compelled to accept without inquiry 'the mere recitation of a benign, compensatory purpose,' particularly when that purpose [was] 'not at all self-evident' and in fact seem[ed] historically improbable."[133]

In sharp contrast to its holding in *Arp,* the same court in *Michael M.* upheld, without further inquiry, the State's unsupported assertion that pregnancy prevention is the purpose underlying section 261.5.[134] In finding that the legislature could reasonably have concluded that by penalizing only males the statute would redress the increased risks and adverse consequences faced by the minor female,[135] the court ignored the language and legislative history of the statute. The court also disregarded its own earlier rulings in *People v. Hernandez*[136] and *People v. Verdegreen*[137] that section 261.5 was enacted to protect female chastity.

In its review of *Michael M.,* the United States Supreme Court expressed doubts regarding its ability to ascertain the actual purpose of a statute and stated that any search was likely to prove "hazardous" and "elusive."[138] The Court began its inquiry into the purpose of section

130. 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977).

131. 420 U.S. 636 (1975). *See also supra* notes 67-70 and accompanying text.

132. 429 U.S. 190 (1976). *See also supra* notes 54-55 & 61-64 and accompanying text.

133. *Arp*, 19 Cal. 3d at 404, 563 P.2d at 854, 138 Cal. Rptr. at 298.

134. 25 Cal. 3d at 612, 601 P.2d at 575-76, 159 Cal. Rptr. at 343-44.

135. *Id.* at 613, 601 P.2d at 575-76, 159 Cal. Rptr. at 343-44.

136. 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964). *See also supra* text accompanying notes 121-22.

137. 106 Cal. 211, 39 P. 607 (1895). *See also supra* text accompanying notes 116-17.

138. 450 U.S. at 469-70.

261.5 by noting that when the California Legislature criminalized sexual intercourse with minor females, it intended to discourage that conduct. The Court found the actual legislative motivation underlying the enactment of the statute unclear and suggested several hypotheses to explain why individual legislators might have desired such a result: the prevention of teenage pregnancies; the protection of young females from physical injury or from the loss of chastity; and the promotion of various religious and moral attitudes toward premarital sex.[139] The Court noted that the pregnancy prevention rationale offered by the State had been accepted by the California Supreme Court and cited *Reitman v. Mulkey*[140] for the proposition that such a finding was entitled to great deference. The Court was satisfied that the prevention of illegitimate teenage pregnancy was at least one of the purposes of the statute. It concluded that although *Wiesenfeld* established that a state's asserted reason for the enactment of a statute could be rejected if it could not have been a goal of the legislature, *Michael M.* was not such a case.[141]

The Court's reliance on *Reitman* is misplaced. There, the Court deferred to the California Supreme Court's finding that an amendment to the California Constitution had a racially discriminatory motive. In that case, the amendment had been subjected to an exhaustive review by the California Supreme Court. Because the challenge had been made within months of the amendment's passage, the *Reitman* Court was unable to compare prior and possibly conflicting holdings by the state court regarding the scope and effect of the amendment. Furthermore, the *Reitman* Court indicated that it might have rejected the state court's finding had the party defending the statute offered a persuasive reason for its rejection.[142] In contrast, the *Michael M.* Court had the opportunity to compare decisions spanning the 130-year history of the statute. Such a comparison would have illustrated the abrupt break *Michael M.* represented with respect to prior California Supreme Court determinations as to the purpose of section 261.5. Unlike *Reitman,* in *Michael M.* the state court's finding was grounded in judicial speculation and the State's unfounded assertion of a compensatory purpose.[143] Moreover, the petitioner raised several convincing arguments

139. *Id.*

140. 387 U.S. 369 (1967).

141. 450 U.S. at 470.

142. 387 U.S. at 374-76, 381, and *see supra* note 73 and accompanying text.

143. The California Supreme Court found that the injurious effects of pregnancy on unwed minors were "substantial" and "far-reaching" and might well include severe mental and physical trauma. The court cited state statutes that provided all minors with protection

to refute the State's contention that pregnancy prevention was the actual purpose of section 261.5. He noted that such a rationale was unsupported by the language, effect, or prior judicial interpretation of the statute, and he warned that such a rationale was susceptible to use as a justification for a law enacted for impermissible reasons.[144]

As Justices Brennan and Mosk pointed out, the pregnancy prevention rationale seems historically improbable.[145] At its inception, the statute protected only females under age ten who were incapable of conception.[146] The drafters' notes to the first reenactment in 1872 contain no mention of such a rationale. Instead, in recognition that a girl under age ten was incapable of legal consent, the legislature reenacted the statute to protect her from sexual exploitation.[147] Before the statutory age was fixed at eighteen in 1913, amendments that raised the age of consent to fourteen, and then sixteen, still excluded the majority of unwed fertile teenage females.[148]

The historical evidence suggests a more plausible explanation for these amendments. Significantly, the formulation of the pregnancy prevention rationale coincided with an increase of epidemic proportions in the rate of illegitimate births to underage mothers.[149] There have been, however, no substantive changes in section 261.5 since 1913.[150] Accordingly, one is led to the inference that this rationale did

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from sexual abuse and concluded that "[s]ection 261.5 merely provides additional protection for minor females in recognition of the demonstrably greater injury, physical and emotional, which they may suffer." 25 Cal. 3d at 612-13, 601 P.2d at 575-76, 159 Cal. Rptr. at 343-44.

144. Brief of the Petitioner at 24-27, Michael M. v. Superior Court, 450 U.S. 464 (1981).

145. *Michael M.*, 450 U.S. at 494-96 (Brennan, J., dissenting); *Michael M.*, 25 Cal. 3d at 617-21, 601 P.2d at 578-80, 159 Cal. Rptr. at 346-48 (Mosk, J., dissenting).

146. 1850 Cal. Stat. 234, ch. 99, § 47 (current statutory rape provision at CAL. PENAL CODE § 261.5 (West Supp. 1981)).

147. Code Commissioners' Note (following CAL. PENAL CODE § 261.1 (1872)).

148. *See supra* note 118 and accompanying text. In Meloon v. Helgemoe, 564 F.2d 602 (1st Cir.), *cert. denied*, 436 U.S. 950 (1977), the First Circuit questioned the rationale underlying similar amendments to New Hampshire's statutory rape law and held that "[w]ithout some concrete indication from the state as to the reasons behind these changes we cannot believe that such disregard for whether or not some or any of the class of females protected are of child bearing age is reconcilable with a pregnancy prevention rationale." *Id.* at 607.

149. *See* 450 U.S. at 470 n.3; 25 Cal. 3d at 611, 601 P.2d at 574, 159 Cal. Rptr. at 342. The epidemic rise in the pregnancy rate, however, has been confined largely to a *white* population while the rate for blacks has remained relatively stable. Phipps-Yonas, *Teenage Pregnancy and Motherhood*, 50 AM. J. ORTHOPSYCHIATRY 403, 403-04, 424 (1980). "Thus, although the present-day problems of teenage childbearing are but a recurrent chapter in a long history for black Americans, we now have a 'crisis' because so many white families are involved." *Id.* at 424. If this "crisis" was an impetus for the assertion of pregnancy prevention as the purpose underlying § 261.5, it follows that the substitution of such a rationale was, in part, racially motivated.

150. *See supra* note 2 and *infra* note 159.

not motivate the enactment in the first instance but, instead, was supplied by attorneys for the State as a timely hindsight rationalization for a law enacted by the legislature for an entirely different and constitutionally impermissible purpose.[151]

In his dissenting opinion, Justice Mosk pointed to the rise in the age of marital consent: "[T]he age defining this offense was undoubtedly increased because popular views changed both with regard to the suitable age of women for marriage and the age until which they were deemed appropriately subject to protective legislation."[152] Even after the age defining the offense was raised to include all minor females capable of conception, the California Supreme Court continued to assert that the statute was designed to prevent "sexual indulgence on the part of a young woman" so as to protect her from "an unwise disposition of her sexual favor."[153] Thus, case law is inconsistent with a pregnancy prevention rationale and, instead, supports the view that the legislative goal was to protect the virtue of minor females.[154]

Any other legislative purpose seems to be precluded by the language of the statute itself. Logically if the purpose of section 261.5 were pregnancy prevention, the statute would provide for a defense based on the use of birth control or the inability to conceive or impregnate.[155] Male culpability, however, is not defined in terms of risk-tak-

151. *See* Meloon v. Helgemoe, 564 F.2d 602, 607 (1st Cir.), *cert. denied*, 436 U.S. 950 (1977). Moreover, facts which invited the assertion of a pregnancy prevention rationale were conspicuous in three statutory rape cases spanning a period of 67 years, but California prosecutors failed to invoke such a rationale: People v. Fritz, 72 Cal. App. 3d 319, 140 Cal. Rptr. 94 (1977) (prosecutrix testified she missed menstrual period and thought she was pregnant); People v. Fremont, 47 Cal. App. 2d 341, 117 P.2d 891 (1941) (defendant testified to use of contraceptive); People v. Currie, 14 Cal. App. 67, 111 P. 108 (1910) (prosecutrix impregnated by defendant).

A final reason can be advanced for the substitution of the pregnancy prevention rationale: It is no longer fashionable to speak openly of female chastity as "such a precious jewel in the crown of maidenly graces that it cannot be stolen or removed therefrom even with the consent of the wearer, without offending the majesty of the law." Watson v. Tyler, 35 Okla. 768, 774, 131 P. 922, 925 (1913) (consent no defense to civil action for damages for assault to commit statutory rape). Thus, today, the use of the traditional consent standard to justify the legislative enactment of § 261.5 might prove too embarrassing for all but the most insular sexist. *See* L. TRIBE, *supra* note 45, § 16-30, at 1085.

152. *Michael M.*, 25 Cal. 3d at 619, 601 P.2d at 579, 159 Cal. Rptr. at 347 (Mosk, J., dissenting). "Thus, section 56 of the Civil Code of 1872 fixed 15 as the age at which a female could marry without parental consent, but in 1921 the age was raised to 18." *Id.* (citations and footnote omitted).

153. *People v. Hernandez*, 61 Cal. 2d at 531, 393 P.2d at 674, 39 Cal. Rptr. at 362.

154. *See supra* text accompanying notes 116-17 & 121-22.

155. The California Supreme Court suggested that these defenses were omitted because the legislature may not have wanted the prosecutrix to be subjected on cross-examination to such "additionally embarrassing details," even where she has already testified to the "em-

ing activity. Furthermore, the statute does not subject females to criminal sanctions; the exclusion of half of all potential violators seriously undermines the pregnancy prevention rationale.[156]

After *Michael M.* was decided by the California Supreme Court, proposals to change section 261.5 to gender-neutral status were introduced for legislative consideration but died in committee before they could be put to a vote.[157] From this fact, the United States Supreme Court concluded that the California Legislature considered and rejected these proposals, and, in so doing, ratified the state court's finding that pregnancy prevention was the actual purpose of the statute.[158]

At least two difficulties with this conclusion are apparent. First, it could be argued that the recodification of section 261.5 after the California Supreme Court's decision in *Hernandez*[159] ratified the *Hernandez* court's finding that it was "in the public interest to protect the sexually naive female from exploitation."[160] Second, when a proposed bill dies in committee, it seems inappropriate to infer that the modification it embodied was considered and rejected on the merits so as to ratify a prior judicial finding of statutory purpose, especially when the Court has previously spoken to this issue and found the inference without merit.[161] The only explicit support for a pregnancy prevention rationale cited by the Court was the preamble to the Pregnancy Freedom

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barrassing details" of sexual intercourse. 25 Cal. 3d at 613, 601 P.2d at 575, 159 Cal. Rptr. at 343.

The court further speculated that the legislature may have believed that the efficacy of contraceptives was doubtful and that the legislature may have been reluctant to rely on the truth of the claim of non-emission. *Id.* This argument, however, ignores the demonstrated efficacy of certain birth control devices and their availability to the teenage population. *Id.* at 620 n.3, 601 P.2d at 580 n.3, 159 Cal. Rptr. at 348 n.3 (Mosk, J., dissenting).

156. The California Supreme Court hypothesized that the legislature may have concluded that because the female might suffer the problems of pregnancy, it might be reasonable to consider her a victim. *Id.* at 613, 601 P.2d at 575, 159 Cal. Rptr. at 343.

157. Cal. A.B. 1588, 1979-80, Cal. Reg. Legis. Sess. (1980); Cal. S. 2045, 1979-80, Cal. Reg. Legis. Sess. (1980).

158. *Michael M.*, 450 U.S. at 471 n.6.

159. *Hernandez* was decided in 1964. In 1970 the prohibition against statutory rape was separated from the forcible rape provisions of § 261 and recodified as § 261.5. The recodification in no way changed the definition of the offense.

160. 61 Cal. 2d at 535, 393 P.2d at 677, 39 Cal. Rptr. at 365. The A.C.L.U. advanced this proposition in its amicus brief. Brief of the A.C.L.U. and the A.C.L.U. of Northern California in Support of Petitioner, Michael M. v. Superior Court, 450 U.S. 464 (1981). It noted that the prevention of pregnancy was not mentioned in *Hernandez*; instead the statute was held to promote "abstinence from sexual indulgence" on the part of young women. The A.C.L.U. concluded that "[i]nasmuch as there is no evidence that the California legislature repudiated this reading of the statutory purpose when it re-enacted the provision in 1970, it may properly be deemed to have adopted it." *Id.* at 18-19.

161. Girouard v. United States, 328 U.S. 61, 69-70 (1946) (when a bill dies in committee it

of Choice Act. This legislation, however, was enacted long after the legislature considered the purpose underlying section 261.5 and enacted or amended that statute.[162]

In summary, the State was unable satisfactorily to link legislative amendments to section 261.5 to a pregnancy prevention rationale, history and legal precedent do not support this rationale, and it seems to have been supplied as an afterthought to justify the validity of section 261.5. As previously noted, under the intermediate scrutiny test, when a statute can be justified only by rationales that did not, in fact, contribute to its enactment, the statute should be invalidated.[163] Thus, by according great deference to the state court's finding, without further inquiry into the actual purpose of section 261.5, the United States Supreme Court compounded the state court's failure to apply a critical element of the intermediate scrutiny test as articulated in *Wiesenfeld* and its progeny.

B. The Connection between the Gender Classification and the Pregnancy Prevention Rationale

Under the intermediate scrutiny test, once the party challenging a statute establishes that the law discriminates on the basis of gender, the burden of proving that the classification is substantially related to an important state objective shifts to the State.[164] Section 261.5 is discriminatory on its face: Only females can be victims and only males can be violators.[165] Because the purported goal of the statute is to reduce the incidence of teenage pregnancy, the discriminatory provisions of section 261.5 can be justified only by a showing that they are a more effective means of achieving that goal than a comparable, but gender-

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is treacherous to find consent in legislative silence where no affirmative recognition of judicial interpretation exists).

162. *Michael M.*, 450 U.S. at 471 n.6. The preamble reads: "The legislature recognizes that pregnancy among unmarried persons under 21 years of age constitutes an increasing social problem in California." CAL. WELF. & INST. CODE § 16145 (West 1980) (enacted as the Pregnancy Freedom of Choice Act, ch. 1190, § 2, 1977 Cal. Stat. 3919).

163. *See supra* notes 66-70 and accompanying text.

164. Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980); *Craig v. Boren*, 429 U.S. at 197. *See also supra* note 77 and accompanying text. In *Michael M.*, the State met its burden of proving that California has an important if not compelling interest in preventing pregnancy in unwed minor females. Extensive evidence demonstrated the severity of the problem and the repercussions for such females and the state itself. 450 U.S. at 470-71 & nn.3-5; 25 Cal. 3d at 611-12, 601 P.2d at 574-75, 159 Cal. Rptr. at 342-43.

165. Both courts recognized that the statute discriminates on the basis of sex. *Michael M.*, 450 U.S. at 466; *Michael M.*, 25 Cal. 3d at 611, 601 P.2d at 574, 159 Cal. Rptr. at 342.

neutral, statute.[166] It should not be sufficient for the State merely to assert that by penalizing only males, section 261.5 serves as a more effective deterrent to teenage pregnancy than a gender-neutral statute; the State's demonstration should be persuasive.[167] If the State is unable to make such a showing, the Court would be expected to invalidate the statute on the grounds that its classification is not substantially related to the statute's purpose or that pregnancy prevention could not be the actual purpose of the statute and that, therefore, no sufficiently important purpose is advanced by the discriminatory classification.[168]

1. Deterrent effect and underinclusiveness

Had the Court applied these requirements, the State's admission of uncertainty would have been fatal to its case: "[T]he question of deterrence is one that is very difficult to answer; we don't know how many people have or have not been deterred by the existence of the statute . . . ."[169] The Court, however, did not examine the efficacy of the challenged statute as a deterrent to teenage pregnancy but determined, without further analysis, that the statute was "sufficiently related to the State's objectives to pass constitutional muster."[170]

This omission from the Court's analysis stands in dramatic contrast to the Court's analysis in *Craig*.[171] There, the Court dismissed abundant data amassed by the State in its attempt to demonstrate a connection between male drinking and traffic accidents with the caveat that "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative phi-

166. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 393 (1979); Orr v. Orr, 440 U.S. 268, 281 (1979) (gender-based statutes invalid where less discriminatory means of protecting states' interests available).

167. "[T]he burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an 'exceedingly persuasive justification' for the challenged classification." Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) (citations omitted); *accord* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151-52 (1980); *see also supra* note 77 and accompanying text.

168. The *Craig* Court chose to accept for purposes of discussion the district court's identification of the statutory objective as the enhancement of traffic safety. 429 U.S. at 199. When further analysis indicated that the State's statistical showing did not support the alleged objective, it was concluded that the relationship between the discriminatory classification and the purported objective was "unduly tenuous," *id.* at 202, that the gender-based classification did "not bear a fair and substantial relation to the object of the legislation," *id.* at 211 (Powell, J., concurring), and that it was "difficult to believe that the statute was actually intended to cope with the problem of traffic safety." *Id.* at 213 (Stevens, J., concurring).

169. Transcript of Oral Argument at 35, Michael M. v. Superior Court, 450 U.S. 464 (1981).

170. 450 U.S. at 473.

171. 429 U.S. 190 (1976); *see also supra* notes 61-64 and accompanying text.

losophy that underlies the Equal Protection Clause."[172] In *Michael M.*, the Court did not even require the State to *offer* data of any kind, but accepted at face value the State's assertion that section 261.5's discriminatory classification directly attacks the problem of teenage pregnancy.[173]

A gender-based statutory rape law seems a singularly ineffective deterrent to the proscribed conduct. Many who violate section 261.5 are unaware of its existence, and the offense, normally committed in private between consenting parties, is ordinarily not subject to detection or report.[174] Statistics introduced by the State, indicating innumerable violations but few arrests, support this conclusion.[175] Peer influence, not legislative enactments, plays the greatest role in the encouragement or deterrence of illicit intercourse,[176] and if "adolescent males disregard the possibility of pregnancy far more than do adolescent females,"[177] it is further proof of the ineffectiveness of the statutory proscription.

a. justification for exclusion of females from criminal penalty

If the California Legislature did, in fact, enact section 261.5 to deter teenage pregnancy, the exclusion of females from criminal penalty seems a curious omission. The *Michael M.* Court, however, refused to find the statute impermissibly underinclusive.[178] The Court reasoned that even if a female were to play an active role in the prohibited activity, her exclusion from criminal sanctions would be justified because

172. 429 U.S. at 204.

173. *Michael M.*, 450 U.S. at 472.

174. *See, e.g.*, Brief of the Petitioner at 5, Michael M. v. Superior Court, 450 U.S. 464 (1981); Brief for the United States as Amicus Curiae at 25, Michael M. v. Superior Court, 450 U.S. 464 (1981); Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 78 (1952).

175. *Michael M.*, 450 U.S. at 493 n.8 (Brennan, J., dissenting). Between 1975-1978, 61 juvenile males and 352 adult males were arrested for statutory rape. In 1976, there were an estimated 50,000 pregnancies among 13 to 17-year-olds. By roughly extrapolating the incidence of illicit intercourse and comparing it with arrest statistics for the same period, it is apparent that § 261.5 does not act as a significant deterrent. *Id.*

176. *See, e.g., People v. Hernandez*, 61 Cal. 2d at 531, 393 P.2d at 674, 39 Cal. Rptr. at 362; Phipps-Yonas, *supra* note 149, at 413; M. PLOSCOWE, SEX AND THE LAW 169 (1962).

As Justice Stevens recognized, the belief that the risk of pregnancy constitutes a substantial deterrent to the young female is a "rather fanciful notion." *Michael M.*, 450 U.S. at 498 (Stevens, J., dissenting). He observed that "[l]ocal custom and belief—rather than statutory laws of venerable but doubtful ancestry—will determine the volume of sexual activity among unmarried teenagers." *Id.* at 496 & n.1.

177. *Michael M.*, 450 U.S. at 480 (Stewart, J., concurring).

178. *Id.* at 473.

the statute was designed for her protection,[179] and the risk of pregnancy itself provides a substantial deterrent factor.[180] The Court justified penalizing males alone on the ground that the deterrent effect of a criminal penalty roughly equalizes the natural sanction that deters females.[181]

However, "[i]n our system of justice, offenders are not deemed less culpable merely because they may suffer additional punishment from sources outside the legal system."[182] Any disproportionate impact suffered by the female is a consequence, not a cause, of her act.[183] While pregnancy might "constitute a legitimate mitigating factor in deciding what, if any, punishment might be appropriate," increased risk has no relevance to culpability.[184]

Moreover, as noted by Justice Stevens, the fact that a minor female is subject to greater risk of the consequences of intercourse is a logical justification for her inclusion in the classification, not her exclusion.[185] Her exemption is unreasonable in terms of the burdens on the state that result from teenage pregnancy.[186] Additionally, if the state asserts an interest in protecting her from harm her exclusion suggests that the discrimination is "actually perverse." Justice Stevens asks: "Would a rational parent making rules for the conduct of twin children of opposite sex simultaneously forbid the son and authorize the daughter to engage in conduct that is especially harmful to the daughter? That is the effect of this statutory classification."[187]

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179. *Id. Accord Michael M.*, 25 Cal. 3d at 614, 601 P.2d at 576, 159 Cal. Rptr. at 344.

180. *Michael M.*, 450 U.S. at 473.

181. *Id.* Justice Stewart also justified the discriminatory provisions of § 261.5 on the ground that the statute was part of a wider nondiscriminatory statutory scheme enacted to regulate the sexual behavior of minors with minors and adults with minors. He cited several California statutes that protect and punish victims and offenders of both sexes and noted that § 261.5 only provides an "additional measure of punishment for males who engage in sexual intercourse with [minor females]." *Id.* at 476-77 & nn.2-6 (Stewart, J., concurring) (citations omitted). But, as Justice Mosk stated, "the fact that [these] statutes are gender-neutral does not somehow give the Legislature the right to enact an 'additional' law on the topic that invidiously discriminates on sexual grounds." *Michael M.*, 25 Cal. 3d at 622, 601 P.2d at 581, 159 Cal. Rptr. at 349 (Mosk, J., dissenting).

182. *Michael M.*, 25 Cal. 3d at 622, 601 P.2d at 581, 159 Cal. Rptr. at 349 (Mosk, J., dissenting).

183. *Id.*

184. *Michael M.*, 450 U.S. at 499 (Stevens, J., dissenting).

185. *Id.*

186. The Court noted that half of all teenage pregnancies end in abortion and suggested that children who were born to unwed teenagers were likely to become wards of the state. *Id.* at 471 & n.5.

187. *Id.* at 499 (Stevens, J., dissenting).

Ironically, the stereotypes perpetuated by § 261.5 may serve to increase the incidence of

b. enforcement

A second ground for the *Michael M.* Court's refusal to find section 261.5 impermissibly underinclusive was the belief that if females were subject to prosecution, they would be unlikely to complain, rendering the statute incapable of enforcement.[188] As the dissenting opinions noted, however, this reasoning is unpersuasive. Female testimony is not the only available evidence of the violation; when it is, the prosecutor has the option of offering immunity in exchange for it.[189] Moreover, a gender-neutral law would subject twice as many potential violators to arrest and, therefore, seems the more effective deterrent even if fewer numbers would actually be prosecuted.[190]

Other California statutes govern sexual activity with minors in gender-neutral language.[191] Furthermore, at the time *Michael M.* was decided most jurisdictions had enacted gender-neutral statutory rape laws.[192] These enactments refute the conclusion that the substitution of

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pregnancy in unwed adolescents. The studies introduced by the State and cited by both courts as evidence of the severity of the problem of illegitimate teenage pregnancy suggest that many sexually active teenage females who do not use contraceptives report that they participate in intercourse because the male expects them to do so. C. CHILMAN, ADOLESCENT SEXUALITY IN A CHANGING AMERICAN SOCIETY 137 (1978). Such females often espouse traditional attitudes toward the female role including a passive and dependent approach to male-female relationships, *id.* at 164, and the belief that "nice girls" do not plan to engage in intercourse. Phipps-Yonas, *supra* note 149, at 410. Female adolescents who hold such beliefs may view pregnancy as a beneficial condition which may serve to resolve a sense of dependency and as a source of self-esteem. *Id.*

188. *Michael M.*, 450 U.S. at 473-74.

189. *Michael M.*, 25 Cal. 3d at 622, 601 P.2d at 581, 159 Cal. Rptr. at 349 (Mosk, J., dissenting).

190. *Michael M.*, 450 U.S. at 493-94 (Brennan, J., dissenting).

191. *See* CAL. PENAL CODE §§ 261 (West Supp. 1982) (forcible rape), 272 (West Supp. 1982) (contributing to the delinquency of a minor), 286 (West Supp. 1982) (sodomy), 288 (West Supp. 1982) (lewd and lascivious conduct upon the body of a child under 14), 288a (West Supp. 1982) (oral copulation), 311.2(b) (West Supp. 1982) (distribution of obscene matter depicting minors engaging in sexual acts), 311.4 (West Supp. 1982) (employment of minor to perform prohibited sexual acts), 647a (West Supp. 1982) (molesting child under 18).

192. Alaska, ALASKA STAT. §§ 11.41.410(a)(3), (4)(A), (B), .440(a)(1) (Supp. 1981); Arizona, ARIZ. REV. STAT. ANN. § 13-1405(A) (West 1978); Arkansas, ARK. STAT. ANN. §§ 41-1803(1)(c), 1804(1), 1806(1) (1977) (Commentary: "[The] elimination of references to the gender of offender and victim . . . is . . . fundamental . . . since it is difficult to justify treating the 18-year-old male who seduces a 13-year-old female any differently from the 18-year-old female who seduces the 13-year-old male."); Colorado, COLO. REV. STAT. § 18-3-403(1)(e), (f) (1978); Connecticut, CONN. GEN. STAT. ANN. § 53a-71(a)(1) (West Supp. 1981); Florida, FLA. STAT. ANN. § 794.05 (West 1976); Hawaii, HAWAII REV. STAT. § 707-731(1)(b) (Supp. 1979) ("[A]mended . . . to remove sexually discriminatory language."); Illinois, ILL. ANN. STAT. ch. 38, § 11-4(a)(1) (Smith-Hurd 1979); Indiana, IND. CODE ANN. § 35-42-4-3(a), (c) (Burns 1981); Iowa, IOWA CODE ANN. § 709.3, .4 (West 1979); Kansas,

non-discriminatory terminology would undermine the enforcement of section 261.5.[193] In his dissenting opinion, Justice Brennan pointed out that the State had offered no evidence that jurisdictions with gender-neutral laws "have been handicapped by the enforcement problems the plurality [found] so persuasive." He suggested that if such evidence existed, the State surely would have introduced it.[194] He concluded that "[t]he State's failure to prove that a gender-neutral law would be a less effective deterrent than a gender-based law, like the State's failure to prove that a gender-neutral law would be difficult to enforce, should have led [the] Court to invalidate § 261.5."[195]

The Court discounted these arguments and relied, instead, on the prior decision of the California Supreme Court in *Michael M.* The Court again cited *Reitman* for the proposition that, when various speculations as to the effect of a law are plausible, it is appropriate to defer to the judgment of the state court where, as here, it is more familiar

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KAN STAT. ANN. § 21-3503(1)(a) (Supp. 1981); Kentucky, KY. REV. STAT. §§ 510.040(1)(b)(2), .050(1), .060(1)(b) (1975); Louisiana, LA. REV. STAT. ANN. § 14:42(4) (West Supp. 1981); Maine, ME. REV. STAT. ANN. tit. 17-A, §§ 252(1)(A), 254(1) (Supp. 1981); Maryland, MD. ANN. CODE art. 27, §§ 463(a)(3), B(a)(3), C(a)(2), (3) (Supp. 1981); Massachusetts, MASS. GEN. LAWS ANN. ch. 265, § 23 (West Supp. 1981); Michigan, MICH. COMP. LAWS §§ 750.520b(1)(a), (b), .520d(1)(a) (Supp. 1981); Minnesota, MINN. STAT. ANN. §§ 609.342(a), (b), .344(a), (b), (West Supp. 1981); Missouri, MO. ANN. STAT. §§ 566.030(3), .050(1) (Vernon 1979 & Supp. 1981); Montana, MONT. CODE ANN. § 45-5-503(3) (1981); Nebraska, NEB. REV. STAT. § 28-319(1)(c) (1979); Nevada, NEV. REV. STAT. § 200.368 (1981); New Hampshire, N.H. REV. STAT. ANN. § 632-A:2 X, XI, :3 (Supp. 1981); New Jersey, N.J. STAT. ANN. § 2C:14-2(a) (West Supp. 1981); New Mexico, N.M. STAT. ANN. § 30-9-11(A)(1), (B)(1) (1978); North Carolina, N.C. GEN. STAT. § 14-27.2(a)(1) (Supp. 1981); North Dakota, N.D. CENT. CODE §§ 12.1-20-03(1)(d), (2)(a), -05(1) (Supp. 1981); Ohio, OHIO REV. CODE ANN. §§ 2907.02(A)(3), .04(A) (Page 1975 & Supp. 1980); Pennsylvania, 18 PA. CONS. STAT. ANN. § 3122 (Purdon Supp. 1981); Rhode Island, R.I. GEN. LAWS § 11-37-2(A) (Supp. 1981); South Carolina, S.C. CODE ANN. § 16-3-655 (Law Co-op. Supp. 1980); South Dakota, S.D. CODIFIED LAWS ANN. § 22-22-1(4), (5) (Supp. 1981); Tennessee, TENN. CODE ANN. § 39-3703(a)(4), -3711(a) (Supp. 1981); Utah, UTAH CODE ANN. § 76-5-401, -402(2) (Supp. 1979); Vermont, VT. STAT. ANN. tit. 13 § 3252(3) (Supp. 1981); Washington, WASH. REV. CODE ANN. §§ 9A.44.070, .090 (Supp. 1981); West Virginia, W. VA. CODE § 61-8B-3(a)(3) (1977); Wisconsin, WIS. STAT. ANN. § 940.225(1)(d), (2)(e) (West Supp. 1981); Wyoming, WYO. STAT. § 6-4-303(a)(v), -305 (1977).

193. Justice Mosk considered this legislative reform significant:

> [I]t refutes the majority's argument that it is necessary to exclude minor females from the statutory proscription in order to insure its enforcement: in every jurisdiction in which statutory rape is now defined as sexual intercourse by a "person" with a "person" who is under age . . ., the minor female in a case such as the one before us would be equally punishable with the minor male. . . . [T]he reform [also] demonstrates the widespread belief of our sister states that the purposes of gender-based statutory rape laws . . . can be just as effectively served by gender-neutral statutes on the same subject.

Michael M., 25 Cal. 3d at 623, 601 P.2d at 582, 159 Cal. Rptr. at 350 (Mosk, J., dissenting).

194. *Michael M.*, 450 U.S. 492-93 (Brennan, J., dissenting).

195. *Id.* at 494.

with the factual and legal milieu of the challenged statute.[196] This reliance on *Reitman* is once again misplaced.[197] The California court conducted no meaningful inquiry into the effect of section 261.5. Its holding on this issue was based on the unproven assertions offered by the State. Thus, *Michael M.* is closer to *Eisenstadt v. Baird,*[198] where the Supreme Court overturned the Massachusetts high court's uncritical acceptance of asserted statutory purposes after de novo inquiry indicated that the announced goals could not reasonably be regarded as actual legislative aims.[199]

2. Overinclusiveness

The contention that section 261.5 is impermissibly overinclusive was treated by the Court in a conclusory fashion. Although the statute encompasses all prepubescent females, and therefore covers a far larger class than the pregnancy prevention rationale warrants, the Court rejected as "ludicrous" the suggestion that the statute should be limited in scope to older teenagers.[200] Accordingly, it avoided the reasoned conclusion that section 261.5 is as overinclusive as the statute overturned in *Meloon v. Helgemoe*.[201] The Court also ignored the class of fertile adolescents who take affirmative steps to prevent contraception. If pregnancy prevention is, as the State asserted, the actual purpose underlying section 261.5, it is puzzling that the legislature would bar proof of the use of birth control or absence of fertility as a defense.

3. Irrebuttable presumption

Ironically, the Court had both to employ and ignore sexual stereotypes to uphold section 261.5. The Court concluded that because males inflicted pregnancy on young women,[202] males were the logical class to penalize. Furthermore, the Court reasoned that the age of the male was irrelevant "since young men are as capable as older men of inflicting the harm sought to be prevented."[203] The Court embraced the

196. *Id.* at 474 n.10.

197. *See supra* text accompanying note 142.

198. 405 U.S. 438 (1972).

199. *Id.* at 443; and *see supra* note 73 and accompanying text.

200. *Michael M.*, 450 U.S. at 475.

201. 564 F.2d 602 (1st Cir.), *cert. denied*, 436 U.S. 950 (1977). *See supra* text accompanying notes 84-86 & 91.

202. *Michael M.*, 450 U.S. at 475.

203. *Id.* Justice Stewart also considered the age of the male irrelevant, but his conclusion was grounded in the belief that males of any age and females under 18 were not similarly situated with respect to the consequences of sexual intercourse. *Id.* at 480 (Stewart, J., concurring).

reasoning of the California Supreme Court that because only females can become pregnant, and because males "are the *only* persons who may physiologically cause the result which the law properly seeks to avoid," "it inevitably follows that sex is the only possible and therefore *necessary* classification which can be adopted in identifying offender and victim."[204]

This reasoning is seriously flawed. Pregnancy is not a disease carried by males who, "like 'Typhoid Mary,' infect others while never contracting the disease themselves."[205] Where the sexual act is consensual, both parties must be presumed responsible if pregnancy occurs.[206] Section 261.5, however, does not require proof that the male is the aggressor or somehow the more responsible party. Because only the male is punished, the statute reflects a legislative presumption that the male alone is culpable, regardless of the circumstances.[207] As Justice Stevens observed in his dissenting opinion: "[T]he possibility that such a habitual attitude may reflect nothing more than an irrational prejudice makes it an insufficient justification for discriminatory treatment that is otherwise blatantly unfair."[208]

4. Prosecutorial use

The State argued in *Michael M.* that the classification was justified because it "is commonly employed in situations involving force, prostitution, pornography or coercion due to status relationships,"[209] and

204. *Michael M.*, 25 Cal. 3d at 612, 601 P.2d at 575, 159 Cal. Rptr. at 343 (emphasis in original). Justice Brennan referred to this statement as "a remarkable display of sexual stereotyping." *Michael M.*, 450 U.S. at 490 n.4 (Brennan, J., dissenting).

205. Petitioner's Brief for Certiorari at 7, Michael M. v. Superior Court, 450 U.S. 464 (1981).

206. *Michael M.*, 25 Cal. 3d at 621, 601 P.2d at 580, 159 Cal. Rptr. at 348 (Mosk, J., dissenting). Justice Rehnquist's holding on this issue conflicts with the dissenting opinion in Caban v. Mohammed, 441 U.S. 380 (1979), in which he joined: "Both parents are [to be presumed] equally responsible for the conception of a child out of wedlock." *Id.* at 404 & n.8 (Stevens, J., dissenting).

207. *See, e.g., People v. Hernandez*, 61 Cal. 2d at 531, 393 P.2d at 674, 39 Cal. Rptr. at 362: "[E]ven in circumstances where a girl's actual comprehension contradicts the law's presumption [of her incapacity to consent], the male is deemed criminally responsible for the act, although himself young and naive and responding to advances which may have been made to him."

208. *Michael M.*, 450 U.S. at 501 (Stevens, J., dissenting).

209. Brief of Respondent at 3, 24-25, Michael M. v. Superior Court, 450 U.S. 464 (1981) (citing People v. Dunn, 107 Cal. App. 3d 138, 165 Cal. Rptr. 574 (1980) (acts of intercourse by pimp with 15-year-old prostitutes); People v. Rocca, 106 Cal. App. 3d 685, 165 Cal. Rptr. 226 (1980) (youth facility supervisor engaged in intercourse with minor trustee); People v. Lewis, 113 Cal. App. 2d 468, 248 P.2d 461 (1952) and People v. Zeihm, 40 Cal. App. 3d 1085, 115 Cal. Rptr. 528 (1974) (acts of intercourse with minor females during filming of

that it was "being employed in the instant case in the context of forcible conduct."[210] The practice of charging defendants with violations of statutory rape laws in situations where forcible rape cannot be proven beyond a reasonable doubt appears to be common in other jurisdictions. It is reflected in the majority of statutory rape cases cited with approval by the *Michael M.* Court.[211] Although these cases were expressly tried on the theory that consent was neither an issue nor a defense, it is clear that the focus was on culpability and not on gender.[212]

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pornographic movies); People v. Alva, 90 Cal. App. 3d 418, 153 Cal. Rptr. 644 (1979) and People v. Fritts, 72 Cal. App. 3d 319, 140 Cal. Rptr. 94 (1977) (males exercised dominance over minor females based on father-daughter, stepfather-daughter relationships, respectively).

210. Brief of Respondent at 23, Michael M. v. Superior Court, 450 U.S. 464 (1981). In oral arguments before the Court, the State noted:

> [T]he victim clearly testified, under oath at the preliminary hearing, that she submitted to the act of intercourse only after being slugged in the face 2 to 3 times with sufficient force to leave bruises. We believe that this case, while it is not perhaps sufficient to constitute a forcible rape, or at least the prosecutor who filed the charges did not feel so, certainly approached that. . . .
>
> Certainly the use of force, I feel, was the crucial factor in the prosecutor's decision to file this case as a felony.

Transcript of Oral Arguments at 28, Michael M. v. Superior Court, 450 U.S. 464 (1981).

The testimony introduced at the preliminary hearing does indicate that the prosecutor would have had difficulty proving a charge of forcible rape beyond a reasonable doubt. Sharon and Michael engaged in sexual activity off and on for approximately three hours. Although Sharon was aware of Michael's persistence in the face of any resistance on her part, she chose to remain with him rather than go home with her sister. She initiated sexual contact with a third boy and fully encouraged and consented to Michael's advances to the point of intercourse. *See supra* text accompanying notes 14-15.

Justice Blackmun believed the facts of the case made it an unattractive one to prosecute even as a *misdemeanor* violation of § 261.5. *Michael M.*, 450 U.S. at 485-86 (Blackmun, J., concurring) (emphasis added).

211. *See Michael M.*, 450 U.S. at 467-68 n.1.

212. The use of force or coercion is explicitly noted in 14 of the 25 cases cited by the Court: Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979) (first act of intercourse between defendant and junior high school teacher forced; victim subsequently intimidated by defendant's age and status as teacher); Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976) (defendant over 21 engaged in intercourse with virgin of 13); Hall v. State, 365 So. 2d 1249 (Ala. Crim. App. 1978) (10-year-old victim abducted, beaten, and forcibly and repeatedly raped by two adults), *cert. denied*, 365 So. 2d 1253 (1979); People v. Salinas, 191 Colo. 171, 551 P.2d 703 (1976) (12-year-old victim forcibly gang-raped by older youths; initial complaint delayed because victim threatened with reprisal); State v. Brothers, 384 A.2d 402 (Del. Super. Ct. 1978) (15-year-old victim forcibly raped by 27-year-old defendant); *In re* W.E.P., 318 A.2d 286 (D.C. 1974) (13-year-old victim abducted and forcibly raped by three older youths); Barnes v. State, 244 Ga. 302, 260 S.E.2d 40 (1979) (step-parent forcibly raped 11-year-old stepchild); State v. Drake, 219 N.W.2d 492 (Iowa 1974) (29-year-old adult forced 16-year-old victim to submit at gunpoint to two acts of intercourse); *In re* J.D.G., 498 S.W.2d 786 (Mo. 1973) (teenage victim gang-raped); State v. Thompson, 162 N.J. Super. 302, 392 A.2d 678 (N.J. Super. Ct. Law Div. 1978) (20-year-old defendant engaged in intercourse with 11-year-old victim); State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979) (forcible rape of 9-year-old victim); State v. Elmore, 24 Or. App. 651, 546 P.2d 1117 (1976) (adult

These cases, and *Michael M.* itself, illustrate that the need for a discriminatory law is illusory. If the State commonly invokes section 261.5 in situations where the guilt of one party is apparent, it seems that the substitution of a gender-neutral law would serve the state's interest as effectively as one that discriminates on the basis of gender.

5. Conclusion

Had the Court been initially unwilling to disregard the State's contention that pregnancy prevention was the actual goal of section 261.5, the Court, as it did in *Craig,* could have tentatively accepted the State's assertion for purposes of discussion. Then, after examining the petitioner's showing as to the over and underinclusiveness of the classification and its meager deterrent effect on the incidence of teenage pregnancy, the Court might have found that pregnancy prevention could not have been the actual goal underlying section 261.5. The Court, however, reached an unsupportable result "by placing too much emphasis on the desirability of achieving the State's asserted statutory goal . . . and not enough emphasis on the fundamental question of whether the sex-based discrimination in the California statute is *substantially* related to the achievement of that goal."[213] By not requiring the State to offer proof that section 261.5 is to any degree a deterrent to the proscribed behavior, much less that it serves as a more effective deterrent than a gender-neutral statute, the Court avoided the proper application of the intermediate scrutiny test.

C. *Rationales for the Application of Intermediate Scrutiny to Statutes that Discriminate Against Males*

Although males as a class have not suffered the historic prejudice that has been proffered as a justification for the application of heightened scrutiny to classifications based on race or female gender, discrimination against males is objectionable because, like racial discrimination, it is grounded on an "accident of birth."[214] Thus, all classifications based on gender "deserve careful constitutional exami-

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engaged in intercourse with 12-year-old victim who, frightened by defendant's size and age, did not resist); State v. Ware, 418 A.2d 1 (R.I. 1980) (teenage victim kidnapped and raped by adult defendant); Moore v. McKenzie, 236 S.E.2d 342 (W. Va. 1977) (55-year-old defendant engaged in intercourse with victim under 10 years of age).

213. *Michael M.*, 450 U.S. at 488-89 (Brennan, J., dissenting) (emphasis in original).

214. *Craig v. Boren*, 429 U.S. at 212 (Stevens, J., concurring); *accord* Frontiero v. Richardson, 411 U.S. 677, 686 (1973): "[S]ince sex . . . is an immutable characteristic . . . the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some

nation" because of the danger that they may reflect assumptions about the sexes that are not related to any inherent differences between men and women.[215]

The *Michael M.* Court ignored the sexual victimization of young boys[216] and the fact that section 261.5 withholds from boys the protection it affords to girls.[217] Although the Court realized that the law places a burden on males which is not shared by their female partners, the Court did not recognize a corresponding need to redress the discrimination against boys that gender-based statutory rape laws have perpetuated.[218] *Michael M.* thus stands in sharp contrast to prior opinions where the Court employed the same standard to review gender discrimination aimed at males as that aimed at females.[219] This is ironic because *Craig,* the first case to set forth the standards of intermediate scrutiny, was a case in which the challenged statute expressly discriminated against males.

Furthermore, laws that apparently discriminate only against males on closer look often discriminate against females as well, and inquiry into actual purposes and the means chosen to effectuate legislative goals may uncover a more subtle form of discrimination against fe-

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relationship to individual responsibility.' " (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972)).

215. Caban v. Mohammed, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting); *see* Orr v. Orr, 440 U.S. 268, 283 (1979): "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection. . . . Thus, even statutes purportedly designed to compensate for . . . the effects of past discrimination must be carefully tailored." (citation omitted).

216. In his concurring opinion Justice Stewart cited studies that found 88% of sexually abused minors to be female and concluded that female sexual abuse was the more serious issue. *Michael M.*, 450 U.S. at 479 n.8 (Stewart, J., concurring) (citations omitted). However, another study, not cited by the Court, reported that almost half as many boys as girls are the victims of sexual abuse. D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN (1979). The author concluded that "[a]s a result of our cultural stereotype, which casts men as sexually active and women as sexually passive, it has been possible to read more consent and less exploitation into the adult-child liaisons of young boys than in the comparable experiences of young girls." *Id.* at 68-69. This indicates that the very stereotypes perpetuated by laws such as § 261.5 mask the extent of sexual abuse perpetrated on young males.

217. *See also* People v. Mackey, 46 Cal. App. 3d 755, 120 Cal. Rptr. 157 (1975) (§ 261.5 constitutional even though it does not protect males under 18). "It would be unrealistic to base a conclusion as to the reasonableness of the statute's classification of the protected class upon a belief that girls of the age of the victim in this case [14] are no more likely than boys of the same age to be the objects of the desires and designs of older people . . . who are on the prowl." *Id.* at 760, 120 Cal. Rptr. at 160.

218. *Michael M.*, 450 U.S. at 476.

219. *See* Orr v. Orr, 440 U.S. 268 (1979). Caban v. Mohammed, 441 U.S. 380 (1979); Craig v. Boren, 429 U.S. 190 (1976).

males.[220] Such inquiry led Justice Stevens to conclude that the statutory discrimination against males challenged in *Califano v. Goldfarb*[221] was "merely the accidental by-product of a traditional way of thinking about females."[222]

Finally, classifications that purport to protect females "carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection."[223] In *Craig,* Justice Rehnquist recognized the argument that "all discriminations between the sexes ultimately redound to the detriment of females, because they tend to reinforce 'old notions' restricting the roles and opportunities of women."[224]

By foregoing a careful analysis of statutory purpose and failing to subject the relationship between the statute's purpose and its classification to heightened scrutiny, the Court did not recognize that section 261.5 discriminates against females by perpetrating outmoded sexual stereotypes.[225] As Justice Mosk noted in his dissenting opinion, although section 261.5 presumes that a female is able to consent to sexual intercourse, it "impugns [her] capacity . . . to make such decisions *intelligently.*"[226]

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220. *See, e.g.*, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 147 (1980); Califano v. Goldfarb, 430 U.S. 199, 208-09 (1977) (challenged statutes initially appeared to favor women and discriminate against men: widows received survivors' benefits regardless of dependence on spouses while widowers had burden of proving such status; on closer examination it apparent that respective statutes also discriminated against female wage earners, because their beneficiaries received less); *Arp v. Workers' Comp. Appeals Bd.*, 19 Cal. 3d at 406, 563 P.2d at 855, 138 Cal. Rptr. at 299: "[I]t is noteworthy that the conclusive presumption in favor of widows discriminates not only against the widower but against the employed *female* as well." (emphasis in original). Also, in *Craig*, the challenged statute was concerned with male drinking, but the law did not reflect the same concern about or extend the same protection to females.

221. 430 U.S. 199 (1977).

222. *Id.* at 223 (Stevens, J., concurring).

223. Orr v. Orr, 440 U.S. 268, 283 (1979). "Such classifications . . . have frequently been revealed on analysis to rest only upon . . . 'archaic and overbroad' generalizations . . . ." *Califano v. Goldfarb*, 430 U.S. at 211 (citations omitted).

224. 429 U.S. at 220 n.2 (Rehnquist, J., dissenting).

225. The Court stated, without further analysis, that this was not a case where the gender classification rested on "the baggage of sexual stereotypes." *Michael M.*, 450 U.S. at 476 (quoting Orr v. Orr, 440 U.S. 268, 283 (1979)). In contrast, one commentator has noted that "[t]he stereotype of females as victims [has been] especially pervasive and damaging. By legitimating [this stereotype], traditional statutory rape laws may [have aggravated] the danger that young females [would] acquiesce to sexual exploitation." Comment, *The Constitutionality of Statutory Rape Laws*, 27 U.C.L.A. L. REV. 757, 770 (1980).

226. *Michael M.*, 25 Cal. 3d at 624, 601 P.2d at 582, 159 Cal. Rptr. at 350 (Mosk, J., dissenting) (emphasis in original).

> *Because she is a woman* she is deemed inherently less capable of knowing the facts, of controlling her emotions, of weighing the risks and benefits, and of making in-

VII. RAMIFICATIONS OF *MICHAEL M. V. SUPERIOR COURT*

Although retention of section 261.5 may seem anachronistic in view of the overwhelming national trend toward enactment of gender-neutral statutory rape and sexual abuse laws, it is unlikely that any modification of the gender-based status of section 261.5 will originate with the judiciary.[227] One situation that offers the possibility of a different result is a case involving the prosecution of a statutory rape violation presenting facts unlike those in *Michael M.: e.g.,* a sexual act between mature, consenting adolescents that occurred in the context of a longstanding relationship, or an act of intercourse between a young male and an older, sexually agressive, minor female.[228] However, the prosecution of a case presenting these hypothetical facts in an unequivocal manner is unlikely to occur.[229] But, if a defendant who initially appeared to be the more culpable party were convicted despite contrary facts adduced at trial, his petition for a writ of habeas corpus challenging the constitutionality of section 261.5 might be sustained.[230] Alternatively, the pas-

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telligent choices—in short, she is less responsible for her actions—than her male counterpart. As it presently reads, the California statutory rape law thus reflects a belief that the minor female is in need of special protection not only against the male but also against herself, against her "voluntary" but presumptively imprudent decisions in matters of sex.

Such notions are obviously vestiges of a bygone era, remnants of the exploded myth of intrinsic male superiority. They are the product of conventional sex-stereotypical thinking, and revive an outmoded patriarchial [sic] view of "the woman's role."

Id. (emphasis in original); *accord* Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973); "[S]tatutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."

227. The California court noted that "in all of those states which . . . have adopted a neutral role, the change was effected in every instance by *legislative* action. Not a single state has adopted such a rule by *judicial* decree." *Michael M.*, 25 Cal. 3d at 614-15, 601 P.2d at 576, 159 Cal. Rptr. at 344 (emphasis in original).

Since the United States Supreme Court's decision in *Michael M.*, the Ninth Circuit Court of Appeals has likewise upheld gender-based statutory rape laws similar to § 261.5. Gray v. Raines, 662 F.2d 569, 570 (9th Cir. 1981) (Arizona statute, modeled on § 261.5, does not violate equal protection); United States v. Hicks, 657 F.2d 244, 244-45 (9th Cir. 1981) (reversing United States v. Hicks, 625 F.2d 216 (9th Cir. 1980), in light of United States v. Sangrey, 648 F.2d 597 (9th Cir. 1981), and Michael M. v. Superior Court, 450 U.S. 464 (1981)); United States v. Sangrey, 648 F.2d 597, 598 (9th Cir. 1981) (federal statutory rape law not significantly different from § 261.5, thus, constitutional).

228. The State implied that such facts might compel a different result but noted that petitioner lacked standing to challenge § 261.5 in view of the factual setting in the instant case. Brief of Respondent at 24, Michael M. v. Superior Court, 450 U.S. 464 (1981).

229. *Id.*: "If and when a prosecutor in California commences a prosecution upon . . . [such an] improbable factual pattern . . . the constitutionality of the statute as so applied can then be considered."

230. In Navedo v. Preisser, 630 F.2d 636 (8th Cir. 1980); United States v. Hicks, 625 F.2d

sage of an equal rights amendment would authorize strict judicial scrutiny of section 261.5 although the possibility remains that a future court would continue to focus on the unique but irrelevant differences between the sexes presented in *Michael M.*[231] In the absence of any of these factors, the most probable avenue for a change in the gender-based provisions of section 261.5 lies in its revision by the California Legislature. The decision in *Michael M.* may generate sufficient controversy to promote such legislative reconsideration.

VIII. CONCLUSION

In *Michael M. v. Superior Court,*[232] the United States Supreme Court ignored crucial components of the intermediate scrutiny test established to review challenges to gender-based statutes. First, the Court accorded unwarranted deference to the California Supreme Court's finding that pregnancy prevention is the purpose of the challenged statute. Because historical evidence, legal precedent, and the language of the statute itself do not support the state court's finding, precedent required the Court to conduct its own independent inquiry into the actual purpose of section 261.5. Had it done so, the Court would have found that the goal of the California Legislature in enacting section 261.5 was to protect the virtue of adolescent females. The Court would then have been expected to invalidate the statute on the ground that its purpose is constitutionally impermissible.

Second, had the Court accepted, for purposes of discussion, the state court's identification of pregnancy prevention as the purpose underlying section 261.5, precedent would have required a persuasive demonstration that this gender-based law is a more effective deterrent to illegitimate teenage pregnancy than a comparable but gender-neu-

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216 (9th Cir. 1980), *vacated and remanded*, 450 U.S. 1036 (1981) (in light of Michael M. v. Superior Court, 450 U.S. 464 (1981)), *rev'd*, 657 F.2d 244 (9th Cir. 1981) (in light of United States v. Sangrey, 657 F.2d 244 (9th Cir. 1981)); Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979); and Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978), defendants sought habeas corpus relief on the ground that the gender-based statutes under which they were convicted violated equal protection.

231. Even though the imposition of criminal sanctions on the basis of gender ignores the issue of responsibility for the prohibited act, both courts found males and females not similarly situated with respect to the risks of intercourse. The possibility remains that the unique physical differences rationale could be successfully invoked to justify the discriminatory provisions of § 261.5 even after passage of an equal rights amendment. *See supra* note 13. Although such an amendment would authorize a court to employ a stringent standard of review, the decision of the California Supreme Court in *Michael M. v. Superior Court* illustrates the result that occurs when a court frames the language of a case in terms of strict scrutiny but actually applies a less rigorous standard of review.

232. 450 U.S. 464 (1981).

tral statute. Because the State was unable to make such a showing, the Court should have invalidated the statute on the ground that its classification is not substantially related to its purpose.

Although the language of the case is framed in intermediate scrutiny terms, the Court's analysis is much closer to that employed under the rational relationship test. It is apparent that *Michael M.* signals a retreat from the test the Court has established to ascertain the constitutionality of gender-based classifications ostensibly aimed at males.

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* The author wishes to thank Professor Christopher N. May for his assistance in the preparation of this casenote.