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Fourteenth Amendment--Statutory Rape: Protection of Minor Female and Prosecution of Minor Male

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FOURTEENTH AMENDMENT—STATUTORY RAPE: PROTECTION OF MINOR FEMALE AND PROSECUTION OF MINOR MALE

Michael M. v. Superior Court of Sonoma County, 101 S. Ct. 1200 (1981).

The United States Supreme Court recently considered the constitutionality of a gender-based statutory rape law. In *Michael M. v. Superior Court of Sonoma County*,[1] the Court held, in a split decision,[2] that California's statutory rape law[3] does not violate the equal protection clause of the fourteenth amendment[4] even though it subjects only males to criminal liability.

In deciding *Michael M.*, the Supreme Court participated in a denial of fourteenth amendment rights and opened the way for future circumvention of the constitutional guarantee of equal protection of the laws. This Note critically examines the opinions filed by the Supreme Court in *Michael M.* and suggests an alternative resolution for the issue of whether gender-based statutory rape laws are consistent with the demands of the equal protection clause.

I. FACTS AND CASE HISTORY

On the evening of June 3, 1978, Sharon, a 16½-year-old female, and her 21-year-old sister purchased a half pint of whiskey and began drinking. At approximately midnight, Sharon and her sister were wait-

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[1] 101 S. Ct. 1200 (1981).

[2] Five justices concluded that the statute did not violate the Equal Protection Clause of the fourteenth amendment. Justice Rehnquist announced the judgment of the Court in an opinion in which Chief Justice Burger and Justices Stewart and Powell joined. Justice Stewart also filed a concurring opinion. Justice Blackmun filed an opinion concurring in the judgment. Justice Brennan wrote a dissent which was joined by Justices White and Marshall. A separate dissenting opinion was filed by Justice Stevens.

[3] CAL. PENAL CODE § 261.5 (West Supp. 1981) states that "[u]nlawful 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] U.S. CONST. amend. XIV, § 1: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

ing at a bus stop when they were approached by Michael, age 17½, and two other male youths who offered the girls some wine. The five youths drank together and walked to nearby railroad tracks.[5]

At the railroad tracks, Sharon and Michael moved away from the others, went into the bushes, laid down together, and kissed and hugged. After about thirty minutes, Sharon's sister approached them and asked Sharon if she was ready to go home. Sharon declined the invitation to leave, so her sister left with one of the other boys. At this time, Sharon began kissing the third boy until he left by himself a few minutes later. After the others had departed, Sharon and Michael walked to a park.[6]

At the park, Sharon and Michael lay down on a bench and resumed kissing and hugging. Michael told Sharon to remove her pants, but she refused. After Michael struck her with his fist, Sharon then said to herself, "[f]orget it," and offered no further resistance to Michael's advances. He removed her pants, and the couple had intercourse.[7]

Michael was charged by information with a felony violation of section 261.5 of the California Penal Code which makes an act of sexual intercourse unlawful if accomplished with a female under the age of eighteen.[8] He sought to set aside the information on both federal and state constitutional grounds, claiming that the California statute unlawfully discriminated against males. Both the trial court and the California Court of Appeals rejected his arguments.[9] Michael then sought a writ of prohibition from the California Supreme Court to compel the trial court "to dismiss the information on the ground that section 261.5 violates the equal protection clauses of both the United States and California Constitutions, because only females are protected by the statute and only males may be prosecuted under it."[10]

The Supreme Court of California denied Michael's petition for a writ of prohibition in a 4 to 3 decision.[11] Justice Richardson, writing for the majority, acknowledged that the statute discriminates on the basis of sex.[12] He then applied a standard of strict scrutiny to the statute, purportedly requiring the state to demonstrate both a compelling interest to

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5 Michael M. v. Superior Court of Sonoma County, 25 Cal. 3d 608, 615-16, 601 P.2d 572, 577, 159 Cal. Rptr. 340, 345 (1979) (Mosk, J., dissenting).

6 *Id.*

7 *Id. See also* 101 S. Ct. at 1212-13 (Blackmun, J., concurring) (partial text of Sharon's preliminary hearing testimony).

8 Michael M. v. Superior Court of Sonoma County, 25 Cal. 3d at 610, 601 P. 2d at 574, 159 Cal. Rptr. at 342. *See* note 3 *supra*.

9 *See* Michael M. v. Superior Court of Sonoma County, 101 S. Ct. at 1203.

10 Michael M. v. Superior Court of Sonoma County, 25 Cal. 3d at 610, 601 P. 2d at 574, 159 Cal. Rptr. at 342.

11 Michael M. v. Superior Court of Sonoma County, 25 Cal. 3d 608, 601 P.2d 572, 159 Cal. Rptr. 340.

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

justify the law and the necessity of the gender-based classification to achieve the statute's purpose.[13] According to the majority, the state established a compelling interest in preventing pregnancies among unwed teenage girls.[14] Justice Richardson stated that the "[l]egislature is well within its power in imposing criminal sanctions against males, alone, because they are the *only* persons who may physiologically cause the result which the law properly seeks to avoid."[15]

In challenging the statute, Michael argued that the statute is (1) overbroad because it includes those who practice birth control or are incapable of procreation and (2) underinclusive because it does not hold females equally culpable with males.[16] The majority of the California Court rejected both of these contentions as well as Michael's assertion that the statute reflects negatively upon the capacity of minor females to make intelligent decisions concerning sexual relations. Accordingly, the majority concluded that the constitutional mandate of equal protection of the laws does not require the adoption of a gender-neutral statutory

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[13] *Id.* at 610-11, 601 P.2d at 574, 159 Cal. Rptr. at 342 (citing Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971)). *See* Comment, *The Constitutionality of Statutory Rape Laws*, 27 U.C.L.A. L. REV. 757, 784-87 (1980) for the view that the California Supreme Court failed to apply the standard of strict scrutiny properly in *Michael M.*

[14] Michael M. v. Superior Court of Sonoma County, 25 Cal. 3d at 612, 601 P.2d at 575, 159 Cal. Rptr. at 343.

[15] *Id.* at 612, 601 P.2d at 575, 159 Cal. Rptr. at 343 (emphasis in original).

[16] Statutes challenged under the equal protection clause of the fourteenth amendment are subject to a three-step inquiry. The first step is to identify the purpose of the challenged law. The second step is to examine the relationship between the statutory classification and the statutory purpose. The third step is to determine whether the statutory classification is underinclusive or overinclusive, or both, in relation to the achievement of the statutory purpose. P. POLYVIOU, THE EQUAL PROTECTION OF THE LAWS 57 (1980).

In discussing this approach to equal protection, Polyviou notes that courts often do not distinguish between the second and third steps. Courts generally incorporate these two steps into a single inquiry of whether the statutory classification "can be justified in terms of the achievement of the State's permissible objectives." *Id.* Yet, Polyviou cites Rinaldi v. Yeager, 384 U.S. 305 (1966), in making a distinction between the requirement of "rationality in the nature of the class singled out" and the "requirement of an adequate relationship between trait and objective." P. POLYVIOU, *supra* at 57. He concluded that the "[c]omposition as well as nexus must therefore be rational." *Id.*

If a court finds a statute to be overbroad because it includes individuals in its classification which are not "tainted with the mischief at which the law apparently aims," the court will require the state to justify the overinclusion. *Id.* at 78. Overinclusion will be allowed in only exceptional cases such as emergency situations where there is a threat to national security. *Id.* at 78-80 (citing Korematsu v. United States, 323 U.S. 214 (1944)).

An underinclusive statute is one which leaves out individuals who are similar, with regard to the purpose of the statute, to those individuals who are included within the statutory classification. Courts will generally not tolerate underinclusiveness unless the state can show that differences actually do exist between the statutory class and those left out or that administrative factors justify the underinclusion. P. POLYVIOU, *supra* at 71-78.

rape law.[17]

Justice Mosk of the California Supreme Court filed a vigorous dissent. Pointing out that the Attorney General and the majority both failed to offer any support for their contention that the purpose of the statute is the prevention of teenage pregnancies, Justice Mosk offered his own analysis of the history behind the California statutory rape law.[18] He found that the statutory rape laws were originally meant "to prohibit sexual intercourse with the underage female because she was believed to be 'too young to understand the nature and quality of her act' . . . and hence incapable of intelligently consenting thereto."[19] Moreover, he found no support in either the legislative history or earlier court interpretations for the argument that prevention of teenage pregnancy was the purpose of the statute. Justice Mosk concluded that the true purpose behind the statute was the protection of the virtue of underage females who are presumed to be incapable of giving informed consent to sexual intercourse.[20] He was troubled to find that the statute reflects and perpetuates the sexual stereotypes of underage females being incapable of making informed decisions regarding sexual relations and being less responsible for their actions than their male counterparts.[21]

Justice Mosk expressed additional disagreement with the majority by finding that the statute would still be unconstitutional even if pregnancy prevention was the actual purpose of the statute. He reasoned that, since both the male and female are equally responsible if a pregnancy results, they should be treated equally. The state has no compelling reason for excusing only the female from criminal responsibility. Hence, he determined that the law was impermissibly underinclusive.[22]

The Supreme Court of the United States granted certiorari to consider the constitutionality of California's statutory rape law under the equal protection clause of the fourteenth amendment.[23]

II. SUPREME COURT DECISION

There was no majority opinion for the Court. Justice Rehnquist announced the judgment of the Court, and Chief Justice Burger and Justices Stewart and Powell joined in his opinion. Justice Stewart also

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17 Michael M. v. Superior Court of Sonoma County, 25 Cal. 3d at 614, 601 P.2d at 576, 159 Cal. Rptr. at 344.

18 *Id.* at 617-21, 601 P.2d at 578-80, 159 Cal. Rptr. at 346-48 (Mosk, J., dissenting).

19 *Id.* at 617, 601 P.2d at 578, 159 Cal. Rptr. at 346 (citing Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 110 (1965)).

20 *Id.* at 618, 601 P.2d at 578-79, 159 Cal. Rptr. at 346-47.

21 *Id.* at 624-25, 601 P.2d at 582-83, 159 Cal. Rptr. at 350-51 (Mosk, J., dissenting).

22 *Id.* at 621, 601 P.2d at 580, 150 Cal. Rptr. at 348 (Mosk, J., dissenting). *See also* note 16 *supra* on the impermissibility of underinclusive classifications.

23 100 S. Ct. 2984 (1980).

filed a concurring opinion. Justice Blackmun filed an opinion concurring in the judgment. Justices White and Marshall joined in the dissenting opinion of Justice Brennan. Justice Stevens filed a separate dissenting opinion.

In the plurality opinion, Justice Rehnquist set out the appropriate standard for judicial review of gender-based statutory classifications. The California statute treats males and females under the age of eighteen differently and thereby establishes a gender-based classification. Relying upon *Stanton v. Stanton*,[24] *Craig v. Boren*,[25] and *Reed v. Reed*,[26] Justice Rehnquist explained that a gender-based statutory classification will survive an equal protection challenge if it bears a substantial relationship to an important state objective.[27] Under this intermediate level of scrutiny, gender-based classifications which realistically reflect "the fact that the sexes are not similarly situated in certain circumstances"[28] will survive the Court's scrutiny.

In examining California's purpose for its statutory rape law, Justice Rehnquist prefaced his findings by noting that individual legislators most likely voted for the statute for a variety of reasons and that the actual purpose of the statute was "likely to be elusive."[29] Justice Rehnquist then accepted the State's assertion and the California Supreme Court's conclusion that the prevention of illegitimate teenage pregnancies was one of the purposes of the statute. Finding this to be a permissible purpose for the statute, Justice Rehnquist declined to consider the allegation that the actual legislative purpose of the statute was, impermissibly, "to protect the virtue and chastity of young women."[30]

Applying the intermediate level of scrutiny, Justice Rehnquist found that the California gender-based classification does not violate the equal protection clause since the classification bears a substantial relationship to the achievement of an important state interest. In reaching

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[24] 421 U.S. 7 (1975) (Utah child support statute setting age of majority at 21 for males and at 18 for females violated the equal protection clause because the classifications were not adequately related to the statutory objective).

[25] 429 U.S. 190 (1976) (Oklahoma statute prohibiting the sale of 3.2% beer to males under 21 and to females under 18 violated the equal protection clause because the classifications were not substantially related to the asserted purpose of enhancing traffic safety).

[26] 404 U.S. 71 (1971) (Idaho statute giving a preference to a man over a woman for appointment as an administrator of a decedent's estate when both persons were of the same entitlement class violated the equal protection clause because the state's interest in administrative convenience could not justify such discriminatory treatment).

[27] Michael M. v. Superior Court of Sonoma County, 101 S. Ct. at 1204. This intermediate level of scrutiny is less demanding than the strict scrutiny standard applied by the Supreme Court of California. *See* text accompanying note 13 *supra*.

[28] Michael M. v. Superior Court of Sonoma County, 101 S. Ct. at 1204.

[29] *Id.*

[30] *Id.* at 1205-06 n.7.

his decision, Justice Rehnquist initially recognized that the prevention of teenage pregnancies is a matter in which the State has an important interest.[31] Moreover, he found that the punishment of males who engage in sexual intercourse with females under the age of eighteen years is substantially related to achieving the State's objective of preventing teenage pregnancies.[32] According to Justice Rehnquist, the exclusion of minor females, but not minor males, from such punishment is reasonable because the criminal sanction imposed only upon the males "serves to roughly 'equalize' the deterrents on the sexes."[33] Without factual support or a discussion of the effects of birth control on teenage sexuality, Justice Rehnquist concluded that minor females are substantially deterred from engaging in sexual intercourse by the risk of pregnancy.[34] He also justified the unequal treatment of minor females and males by accepting the State's contention that the gender-based classification enhances effective enforcement of the statute. The state reasoned that females would be less likely to report violations under a gender-neutral statute for fear of being subjected to criminal prosecution.[35]

Justice Rehnquist rejected the argument that the statute is overbroad because it prohibits intercourse with prepubescent females who are incapable of becoming pregnant. After noting that the statute could be justified on the grounds that prepubescent females are susceptible to injury from intercourse, Justice Rehnquist summarily rejected the overbreadth argument as "ludicrous."[36]

As a final point, Justice Rehnquist noted that the statute burdens males and not females. Since men have not traditionally been discriminated against, Justice Rehnquist determined that males are not "in need of the special solicitude of the courts."[37] He concluded that the discrimination of section 261.5 is not invidious, is not solely for administrative convenience, and does not stem from sexual stereotypes. "[T]he statute instead reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male."[38]

In his concurring opinion, Justice Stewart chose a simplistic reasoning process to uphold the statute against the equal protection challenge.

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31 *Id.* at 1205.

32 *Id.* at 1206.

33 *Id.*

34 *Id.*

35 *Id.* at 1206-07.

36 *Id.* at 1207. With regard to prepubescent children, Justice Stewart also found that the discrimination was justified because female children faced greater physical risks than male children. *Id.* at 1210 (Stewart, J., concurring).

37 *Id.* at 1208. Justice Rehnquist did not explain the significance of this fact.

38 *Id.*

Of significance to Justice Stewart was the fact that section 261.5 is only one part of California's statutory scheme to protect minors from the dangers of adolescent sexual activity.[39] Without commenting upon the legislative purpose, Justice Stewart summarily concluded that "[y]oung women and men are not similarly situated with respect to the problems and risks associated with intercourse and pregnancy, and the statute is realistically related to the legitimate state purpose of reducing those problems and risks."[40] He assumed that risk of pregnancy is a significant deterrent for unmarried minor females but not for unmarried males. Therefore, Justice Stewart concluded that, since males are not situated in a position similar to minor females, the state can limit criminal punishment to males.[41] While Justice Stewart acknowledged that California might have been able to draft the statute to more precisely achieve the objective of preventing teenage pregnancies, he found that the gender classifications of section 261.5 are permissible.[42]

Justice Blackmun voted to affirm on the basis of the intermediate level of scrutiny which was the same test used by Justices Rehnquist and Stewart.[43] The major portion of Justice Blackmun's opinion, however, was devoted to what he considered to be important distinctions between the State's power to control the sexual activities of minors and the State's power over individuals after conception has occurred, especially as related to abortion decisions.[44] Justice Blackmun expressed concern over the problem of teenage pregnancies while recognizing that minors have "substantial privacy rights in intimate affairs connected with procreation."[45] Justice Blackmun would allow greater State interference with these rights prior to conception than he would once a pregnancy occurred.[46]

In his dissenting opinion, Justice Brennan concluded that the State failed to show that the gender-based classification bears a substantial

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39 *Id.* (Stewart, J. concurring). Also included in California's statutory scheme are CAL. PENAL CODE §§ 272, 647(a) (West Supp. 1981) which prohibit any person of either sex from molesting, annoying, or contributing to the delinquency of anyone under eighteen years of age, and CAL. PENAL CODE § 288 (West Supp. 1981) which prohibits all persons from committing "any lewd or lascivious act," including sexual intercourse, with a minor under fourteen years of age.

40 101 S. Ct. at 1209 (Stewart, J., concurring). Apparently, Justice Stewart's realistic relation is similar to the equalizer argument of Justice Rehnquist. *See* note 33 and accompanying text *supra*.

41 *Id.* at 1210.

42 *Id.*

43 *Id.* at 1211 (Blackmun, J., concurring).

44 *Id.* Justice Blackmun refers specifically to Carey v. Population Services International, 431 U.S. 678 (1977) and Griswold v. Connecticut, 381 U.S. 479 (1965).

45 101 S. Ct. at 1211 (Blackmun, J., concurring).

46 *Id.*

relationship to the prevention of teenage pregnancies.[47] Justice Brennan initially noted that the State has the burden of proving both the importance of its objective and the substantiality of the relationship between the classification and the objective. He pointed out that, in order to meet this burden, the State must show that a gender-neutral statute would be less effective than a gender-based law in achieving the State's objective.[48] Justice Brennan cited two flaws in the State's assertion that a gender-neutral statute would be less effective. First, he noted that at least thirty-seven states have gender-neutral statutory rape laws and that California offered no evidence that any of those states faced enforcement or effectiveness problems. In addition, Justice Brennan referred to sodomy and oral copulation statutes in California that apply in a gender-neutral manner and are enforced without increased difficulty.[49] Second, even if a gender-neutral statute were more difficult to enforce, the State failed to show that such a statute would be less effective in deterring minor females from sexual intercourse.[50] As a consequence, Justice Brennan argued that the State's failure to show 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," required the invalidation of section 261.5.[51] Justice Brennan commented that the State's inability to produce evidence of a substantial relationship between the gender classification and the prevention of teenage pregnancies was possibly due to the fact that the gender classification of the statutory rape law stemmed from "outmoded sexual stereotypes."[52] He concluded that section 261.5

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47 *Id.* at 1215-16 (Brennan, J., dissenting).

48 *Id.* at 1215. Justice Brennan relied upon the prior Supreme Court decisions in Kirchberg v. Feenstra, 101 S. Ct. 1195 (1981); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980); Caban v. Mohammed, 441 U.S. 380 (1979); Orr v. Orr, 440 U.S. 268 (1979); Craig v. Boren, 429 U.S. 190 (1976). His formulation on what the state must show illustrates how a state can meet its burden of proving a substantial relationship between a gender-based classification and a statutory objective. A state will not be permitted to classify on the basis of sex if the state's purpose could be served as well by a gender-neutral classification that does not carry with it sexual stereotypes. Orr v. Orr, 440 U.S. at 283.

49 101 S. Ct. at 1216 (Brennan, J., dissenting); CAL. PENAL CODE §§ 286(b)(1), 288a(b)(1) (West Supp. 1981).

50 101 S. Ct. at 1216.

51 *Id.* at 1217.

52 *Id.* at 1218. He also noted that pregnancy prevention was first named as a purpose of § 261.5 in the California Supreme Court's decision in *Michael M.* despite the fact that the statute has been in force for 130 years. Historically, § 261.5 was based on the stereotypical premise that the chastity of young women was in need of special protection because young women were considered legally incapable of consenting to sexual intercourse, whereas young men were presumed to be legally capable of giving such consent. For this contention, Justice Brennan cited the Statutes of Westminster (3 Edw. 1, ch. 13 (1275), 13 Edw. 1, ch. 34 (1285)), the draftsmen's notes to the Penal Code of 1872 (Code Commissioners' note, subd. 1, foll. Pen. Code 261 (1st ed. 1872, p.111)), and Note, *Forcible and Statutory Rape: An Explanation of the*

violates the equal protection clause and that the California Supreme Court should be reversed.

In his dissent, Justice Stevens expressed surprise over the plurality's belief that the risk of pregnancy is an effective deterrent to prevent minor females from engaging in sexual intercourse. He acknowledged that minor females may need special protection in order to prevent unwanted and illegitimate teenage pregnancies. Yet, he argued that this need for protection warrants making minor females subject to the statute rather than exempting them from it.[53] In making this argument, Justice Stevens recognized that the State has an interest in preventing teenage pregnancies and could effectuate this interest by prohibiting and punishing sexual intercourse involving minor females.[54] He contended that both participants in "risk-creating conduct" should receive equal treatment under the law unless one party is more guilty than the other.[55] He concluded that the imposition of criminal sanctions only upon the male seemed to arbitrarily assume that the male is somehow more guilty than the female for engaging in forbidden sexual activity.[56] On these grounds, he dissented.

III. ANALYSIS

In recent years, a number of state and lower federal courts have considered, with divergent outcomes, the constitutionality of gender-based statutory rape laws.[57] Hence, the Supreme Court's decision to consider this question is not surprising. The outcome of *Michael M.* is

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Operation and Objectives of the Consent Standard, 62 YALE L. J. 55 (1952). Under the Statutes of Westminster, the age of consent for engaging in sexual intercourse was twelve years old and therefore the proscription on statutory rape was unrelated to pregnancy prevention. The draftsmen's notes to the California Penal Code of 1872 did not mention pregnancy prevention as a purpose behind the statutory rape law but rather referred to the inability of a girl under ten years old to give consent to an act of intercourse. The *Yale Law Journal* Note provides a general discussion of the historical purpose of statutory rape laws.

53 101 S. Ct. at 1219 (Stevens, J., dissenting).

54 *Id.* at 1218. Justice Stevens referred to such activity as "risk-creating conduct."

55 *Id.* at 1220.

56 *Id.* at 1220-21. ("A rule that authorizes punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially.")

57 Cases in which the constitutionality of gender-based "statutory rape" laws has been upheld: Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979); Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976); State v. Gray, 122 Ariz. 445, 595 P.2d 990 (1979); State v. Drake, 219 N.W.2d 492 (Iowa 1974); *In Re* Interest of J.D.G., 498 S.W.2d 786 (Mo. 1973); Olson v. State, 95 Nev. 1, 588 P.2d 1018 (1979); State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979); State v. Elmore, 24 Or. App. 651, 546 P.2d 1117 (1976).

Cases in which gender-based "statutory rape" laws were held to violate equal protection include: United States v. Hicks, 625 F.2d 216 (9th Cir. 1980), *vacated*, 101 S. Ct. 1752 (1981); Navedo v. Preisser, 630 F.2d 636 (8th Cir. 1980); Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978).

unfortunate, however, because it opens the way for state circumvention of the Equal Protection Clause. Furthermore, the Supreme Court's decision in *Michael M.* suffers from three major flaws. First, the Supreme Court should not have accepted the pregnancy prevention rationale without questioning it. Second, the gender-based classification cannot bear a substantial relation to the prevention of teenage pregnancies because the statute is impermissibly overbroad. Finally, the statute also fails to satisfy the substantial relation test since the classification is underinclusive.

A. ACCEPTANCE OF THE PREGNANCY PREVENTION RATIONALE

The United States Supreme Court should have rejected the California Supreme Court's determination that the prevention of teenage pregnancies was the purpose of section 261.5. As explained by Justice Mosk, the true purpose behind the statute was the protection of the chastity of minor females who were presumed to be incapable of giving informed consent to sexual intercourse.[58] An examination of the history of statutory rape laws, the language of section 261.5, and prior decisions of California courts all suggest that prevention of teenage pregnancies was not one of the purposes of the statute.[59] The California Supreme Court's eagerness to embrace pregnancy prevention as the purpose of section 261.5 without any evidence to support the finding suggests an attempt to circumvent the requirements of equal protection. Certainly, nothing in the 130-year history of the statute justified the conclusion that pregnancy prevention was a purpose behind the statute. Rather, determination that pregnancy prevention is the objective of section 261.5 was first made by the California Supreme Court in *Michael M.*

Other courts have refused to accept the assertion by government

[58] 25 Cal. 3d at 617-21, 601 P.2d at 578-80, 159 Cal. Rptr. at 346-48 (Mosk, J., dissenting).

[59] Comment, *The Constitutionality of Statutory Rape Laws*, *supra* note 13, at 786-87 ("[B]oth the history of statutory rape laws and the language of the statute suggest that pregnancy prevention was *not* among the purposes of California's statutory rape law."); Michael M. v. Superior Court of Sonoma County, 25 Cal. 3d at 617-21, 601 P.2d at 577-80, 159 Cal. Rptr. at 346-48 (Mosk, J., dissenting) ("[R]educing illicit pregnancies among teenage girls may well be a laudable governmental objective, but it is wishful thinking to believe that the California statutory rape law was actually enacted or reenacted for that purpose."); Michael M. v. Superior Court of Sonoma County, 101 S. Ct. at 1217 (Brennan, J., dissenting) ("Until very recently, no California court or commentator had suggested that the purpose of California's statutory rape law was to protect young women from the risk of pregnancy. Indeed, the historical development of § 261.5 demonstrates that the law was initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse."); People v. Hernandez, 61 Cal.2d 529, 393 P.2d 673, 39 Cal. Rptr. 316 (1964) (describing the purpose of California's statutory rape law to be the protection of young females presumed to be too innocent and naive to give informed consent to sexual intercourse).

attorneys that gender-based statutory rape laws were intended to prevent teenage pregnancies. In *Meloon v. Helgemoe*,[60] the First Circuit examined an asserted pregnancy prevention rationale "with special wariness."[61] Because the ability to become pregnant is unique to women, the *Meloon* court was alert to the fact that "the very uniqueness of this characteristic makes it an available hindsight catchall rationalization for laws that were promulgated with totally different purposes in mind."[62] Since the State failed to produce evidence supporting its assertion that pregnancy prevention was a purpose of that particular statute, the *Meloon* court refused to accept the pregnancy prevention rationale.[63]

Similarly, the pregnancy prevention rationale was rejected in another challenge to a statutory rape law in *Navedo v. Preisser*.[64] In *Navedo*, the State of Iowa offered neither legislative history nor other evidence to support its contention that a purpose of the statute was the prevention of pregnancy. The Iowa Supreme Court, however, had determined in an earlier case[65] that the state legislature had enacted the statute for the purpose of preventing teenage pregnancy and its attendant problems.[66] Despite this earlier finding, the *Navedo* court concluded that pregnancy prevention could not justify the gender-based statute. This conclusion was based on a finding that the statute was underinclusive since it excluded a class of males, those under twenty-five, which could have intercourse with and cause pregnancy in minor females. Accordingly, the *Navedo* court found the pregnancy prevention justification implausible and proceeded to inquire into the statute's actual purpose.[67]

The United States Supreme Court should have reached the same conclusion as the *Navedo* court and thereby rejected the asserted purpose for the California statutory rape statute. In light of history and prior decisions of the California courts, the rationale of prevention of teenage

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[60] 564 F.2d 602 (1st Cir. 1977). The statute at issue was N.H. REV. STAT. ANN. § 632:1 subd. I(c) (1973) (repealed, superseded by § 632-A:2 (XI) (1975) which changed the age to 13) which made it a felony for a male to have sexual intercourse with a female under the age of 15.

[61] *Id.* at 607.

[62] *Id.*

[63] *Id.* at 608.

[64] 630 F.2d 636 (8th Cir. 1980). The statute at issue was IOWA CODE § 698.1 (1975) (repealed 1978) which made it a felony for a male over 25 to have sexual intercourse with a female under 16.

[65] State v. Drake, 219 N.W.2d 492 (Iowa 1974).

[66] 630 F.2d at 640.

[67] *Id.* (citing Caban v. Mohammed, 441 U.S. 380, 389 (1979); Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977); Craig v. Boren, 429 U.S. 199, 209 n.8 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975) for the proposition that "[a]lthough a court should accept the purpose of a statute offered 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.")

pregnancies appears to be nothing more that a "hindsight catchall rationalization"[68] that is "not plausible."[69] By accepting the pregnancy prevention rationale without question, the United States Supreme Court participated in this rationalization process and thus denied equal protection to the defendant. Moreover, with its *Michael M.* decision, the Supreme Court has sent a message to state courts and legislatures that the equal protection clause can be circumvented by asserting for gender-based statutes a sham purpose which hinges upon physical differences between the sexes. Presumably, as long as they are adopted by the highest court of the state, statutory objectives will not be questioned by the United States Supreme Court even if they are implausible, hindsight rationalizations that circumvent the guarantee of equal protection of the laws. This result directly contravenes the notion of the Supreme Court as the ultimate protector of constitutional rights. It is also contrary to the *Navedo* court's conclusion, based upon four United States Supreme Court cases, that a federal court could reject a state supreme court's determination as to the purpose of a state law.[70] Hence, the Supreme Court should have rejected the pregnancy prevention rationale.

The Supreme Court's reluctance to inquire into the actual purpose of the statute was not totally unreasonable. The Court will usually defer to the highest state court on a matter considered to be a question of state law.[71] Furthermore, an examination of the four cases relied upon in *Navedo* reveals that the *Navedo* court did not have unquestioned authority to inquire beyond the statutory purpose adopted by the supreme court of that state. In *Craig v. Boren*,[72] the Supreme Court was concerned with possible false, post hoc rationalizations asserted by a state as a litigant but never adopted by that state's supreme court. In *Califano v. Goldfarb*[73] and *Weinberger v. Wiesenfeld*,[74] the Supreme Court was dealing with the actual purposes behind federal statutes, not state laws. Finally, in *Caban v. Mohammed*,[75] the Supreme Court rejected one statutory justi-

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68 Meloon v. Helgemoe, 564 F.2d at 607.

69 Navedo v. Preisser, 630 F.2d at 640.

70 *See* note 67 *supra*.

71 Kingsley Internat'l Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684, 688 (1959); United States v. Burnison, 339 U.S. 87, 89 (1950).

72 429 U.S. at 199 n.7. ("For this appeal we find adequate the appellee's representation of legislative purpose, leaving for another day consideration of whether the statement of the State's Assistant Attorney General should suffice to inform this Court of the legislature's objectives, or whether the Court must determine if the litigant simply is selecting a convenient, but false, *post hoc* rationalization.")

73 430 U.S. at 209 n.8 (dealing with 42 U.S.C. § 402(f)(1)(D) (1970 ed. & Supp. V)).

74 420 U.S. at 648 (dealing with 42 U.S.C. § 402(g). "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.").

75 441 U.S. at 389-92. (New York statute in question allowed unwed mothers but not unwed fathers to block adoption of the child by withholding consent. The Court rejected the

fication, offered by a litigant in the case, which had never been adopted by a state court. While the *Navedo* court's interpretation of these cases was broad, it was consistent with their basic proposition that subsequent rationalizations, unsupported by historical analysis, should not be accepted by courts in order to uphold otherwise unconstitutional statutes. Therefore, in *Michael M.*, where the pregnancy prevention rationale was obviously a hindsight rationalization, the Supreme Court should have rejected the asserted rationale and inquired into the actual purpose of the statute to ensure that the constitutional guarantee of equal protection would be served.

B. OVERBREADTH AND UNDERINCLUSIVENESS

Even if the United States Supreme Court acted properly in accepting the justification of pregnancy prevention, it still should have held the statutory rape statute to be violative of equal protection. Under the equal protection test for gender-based statutes, a classification based upon sex must bear a substantial relationship to an important state interest.[76] The importance and legitimacy of the prevention of teenage pregnancies as a state interest is not questioned.[77] However, section 261.5 creates a sex classification that is not substantially related to the objective of preventing teenage pregnancies since the statute is both overbroad and underinclusive.[78]

The effectiveness of a statutory rape law as a means of preventing teenage pregnancies is open to question. Members of the Court noted that the statute appears to be an ineffective deterrent of such sexual activity.[79] Nevertheless, California is attempting to deal with the teenage pregnancy problem by prohibiting intercourse rather than by focus-

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proffered justification that the classification was proper because of fundamental differences between maternal and paternal relations. The Court accepted the assertion that the purpose of the statute was to promote the adoption of illegitimate children but found that the statute was not substantially related to the achievement of that purpose.)

[76] Craig v. Boren, 429 U.S. at 197; Reed v. Reed, 404 U.S. 71 (1971).

[77] One commentator has suggested that states may not have a legitimate interest in preventing or regulating private consensual intercourse by minors. Hence, statutory rape laws may be subject to attack on substantive due process grounds as impermissibly burdening the fundamental right of personal privacy. The commentator relied most heavily upon the decision in Carey v. Population Services International, 431 U.S. 678 (1977) in which the Court held that the right of privacy in matters of procreation extends to minors. However, the commentator concluded that such a substantive due process challenge would probably fail since *Carey* also recognized that the state has greater latitude in regulating the conduct of minors than it does with regard to adults. Comment, *The Constitutionality of Statutory Rape Laws*, *supra* note 13, at 800-03.

[78] *See* note 16 *supra*.

[79] 101 S. Ct. at 1216 n.8 (Brennan, J., dissenting); 101 S. Ct. at 1218 n.2 (Stevens, J., dissenting). *See also* Di Gennaro, *Statutory Rape Law in California: Unequal Protection of the Minor Male*, 2 CRIM. JUSTICE J. 239, 243 (1979).

ing its energies on encouraging the responsible use of birth control methods. If California is serious about the prevention of teenage pregnancies, a better approach to the problem would arguably be to redirect its energies and funds from the prosecution of acts of consensual intercourse to programs educating youths concerning birth control methods and to clinics providing contraceptives and birth control information.

Even if the California statutory rape law is effective in preventing teenage pregnancies, section 261.5 is impermissibly overbroad.[80] Sexual intercourse involving pre-pubescent females, those who use effective birth control, and those who are sterile is prohibited by the California law. Yet, the prohibition of such activity cannot be substantially related to the objective of preventing pregnancy because there is no threat of pregnancy in these situations. If the prevention of teenage pregnancies is to be accomplished through a statutory rape law prohibiting consensual intercourse, the state of California should be required to exempt from the operation of the statute acts of intercourse which cannot result in pregnancy. If individuals engaging in consensual intercourse without risk of pregnancy are not exempt from prosecution under the statute, some other purpose must be used to justify the prohibitions of the statutory rape law as applied to them. Finally, if pregnancy prevention is the only purpose of the statute and if it includes within its prohibitions sexual intercourse with individuals who are not yet of child-bearing age or who are sterile or exercise birth control, the statute must fail as being overinclusive in violation of equal protection.

Of the justices voting to uphold the statute, only Justice Rehnquist attempted to address this question of overbreadth. He summarily rejected the argument by stating that "it is ludicrous to suggest" that equal protection requires the exclusion of pre-pubescent females from the scope of a statutory rape law.[81] Indeed, such a suggestion is ludicrous. However, the suggestion is inane only because it cuts so sharply against the historical purpose of statutory rape laws, the protection of the virtue of young females who are presumed incapable of consent.[82] Use of this historical purpose would defeat the overbreadth challenge raised above. Yet, protecting only minor females on the basis of such an asserted state interest would be constitutionally impermissible. The presumption that young females are incapable of consent while young males are capable of giving such consent is a stereotype that state laws are forbidden from perpetuating.[83]

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80 *See* note 16 *supra*.

81 101 S. Ct. at 1207.

82 *See* Di Gennaro, note 79 *supra*. *See also* Note, *Forcible and Statutory Rape*, note 52 *supra*.

83 *See* Orr v. Orr, 440 U.S. at 283. ("Legislative classifications which distribute benefits

A second possible justification for applying the statutory rape law to sexual intercourse with pre-pubescent females would be that young females are in special need of protection from physical and psychological injuries resulting from consensual sexual intercourse.[84] If protection from physical or psychological injury is the purpose for including pre-pubescent females within the scope of the statute, the State would have to show that pre-pubescent females are not similarly situated with regard to the possibility of such injury as are males of the same age.[85] Clearly, in *Michael M.*, no such showing was made. As a consequence, the gender-based prohibitions of California's statutory rape law cannot be justified by the assertion of a secondary purpose such as the protection of young females from injury or the presumption of incapability of consent. The validity of the statute's prohibitions must therefore depend upon the substantiality of the relationship between the statutory classifications and the objective of teenage pregnancy prevention.

California's pregnancy prevention rationale does not justify the application of the statute to acts of intercourse involving those who exercise effective means of birth control or who are sterile or too young to bear children. Since these individuals do not create a risk of pregnancy by engaging in sexual intercourse, the prohibition on their sexual activity adds further support to the argument that the true purpose of the statute was the protection of the chastity of young females presumed incapable of giving consent, rather than the prevention of teenage pregnancies. The prohibition on sexual intercourse involving individuals who create no risk of pregnancy is not substantially related to pregnancy prevention. Therefore, the gender-based statute must fail for overbreadth under the intermediate level of equal protection scrutiny.

The California statute is also constitutionally defective because it is underinclusive.[86] The petitioner in *Michael M.* argued that, in order to pass judicial scrutiny the statute must be made gender-neutral by holding the females as criminally liable as the males.[87] Justice Rehnquist rejected this argument of underinclusiveness by finding that the gender-based distinction was justified because criminal sanctions imposed only upon males served to equalize the deterrents on the sexes and aided the

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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.") The *Orr* Court added that a state cannot be allowed to classify on the basis of sex where the state's purpose could be served as well by a gender-neutral classification as by a gender-based classification which carries with it sexual stereotypes.

84 Di Gennaro, note 79 *supra*.

85 Craig v. Boren, 429 U.S. at 200-04.

86 *See* note 16 *supra*.

87 101 S. Ct. at 1206.

state in the effective enforcement of the statute.[88] Yet neither of these arguments justifies California's unequal treatment of males and females.

The position that the gender-based statute is justified because it serves to equalize the deterrents for engaging in sexual intercourse as between males and females is untenable. First, neither Justice Rehnquist nor Justice Stewart cited any authority for the proposition that females are deterred from engaging in sexual intercourse more often than males by the risk of pregnancy. To the contrary, Justice Stevens concluded that the risk of pregnancy is not an effective deterrent to females engaging in sexual intercourse.[89] Even if females are more often deterred because of possible pregnancy, these natural sanctions do not justify unequal treatment under the laws.[90] The equal protection clause guarantees that individuals will receive equal treatment under the laws. Unequal treatment by nature does not justify unequal treatment by the state.[91]

The argument that the gender-based classification is substantially related to effective enforcement of the law also fails, since the state did not show that a gender-neutral statute would be a less effective means of enforcing the law and thereby of preventing teenage pregnancies.[92] Justice Brennan set forth evidence that would indicate that effective enforcement and deterrence are possible under a gender-neutral statutory rape law. He cited the existence of gender-neutral laws in at least thirty-seven states and gender-neutral sodomy and oral copulation statutes in California.[93] He even asserted that a gender-neutral statute could serve as a greater deterrent to the conduct which the state was seeking to prevent.[94] Since effective enforcement and deterrence could be achieved through a gender-neutral law as well as the present California scheme, the gender-based classification is not substantially related to the achievement of the state's asserted purpose.[95] The State's failure to meet its

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88 *Id.* Justice Stewart also accepted the equalizer theory as a basis for upholding the law. *See also* text accompanying note 33 *supra*.

89 *Id.* at 1219 (Stevens, J., dissenting).

90 *Id.* at 1219-20. ("But from the standpoint of fashioning a general preventive rule—or, indeed, in determining appropriate punishment when neither party in fact has suffered any special harm—I regard a total exemption for the members of the more endangered class as utterly irrational. In my opinion, the only acceptable justification for a general rule requiring disparate treatment of the two participants in a joint act must be a legislative judgment that one is more guilty than the other.")

91 The fourteenth amendment guarantees "equal protection of the laws." U.S. CONST. amend. XIV, § 1. *See also* note 90 *supra*.

92 *See* Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142; Orr v. Orr, 440 U.S. at 281, 283. *See* note 49 *supra*.

93 101 S. Ct. at 1216 (Brennan, J., dissenting).

94 *Id.* at 1216-17. (A gender-neutral statute would arguably serve as a greater deterrent since it would have "a deterrent effect on twice as many potential violators.")

95 *See* note 48 & accompanying text *supra*.

burden of establishing a substantial relation between pregnancy prevention and the sex classification of the statute should have resulted in the declaration of the unconstitutionality of the statute based upon underinclusiveness as well as overbreadth.

C. EQUAL PROTECTION AND STATUTORY RAPE LAWS AFTER MICHAEL M.

The decision in *Michael M.* is unfortunate because it opens the door for states to justify gender-based statutes with "hindsight catchall rationalizations."[96] In the interest of equal protection, states should not be given free rein to develop sham purposes for their gender-based legislation. This freedom would allow the states to rely on the possibility of pregnancy as proof that males and females are not similarly situated for purposes of justifying other gender-based statutes.

Michael M. is also disturbing since it perpetuates the stereotype of the female as less knowledgeable than the male, incapable of giving informed consent to sexual intercourse, and therefore less responsible for her actions with regard to sexual activities than her male counterpart.[97] At the same time, it preserves the stereotype of the male as an aggressor from whom the female must be protected even in consensual relations. In discussing the case, Justice Rehnquist relies on such stereotypes when he refers to the legislature's purpose of protecting minor females.[98] His rejection of the overbreadth argument as "ludicrous" also suggests that he subconsciously views the purpose of the statutory rape law to be the protection of young females regardless of their capacity to become pregnant.[99]

The time has come to recognize that statutory rape laws can legitimately be based only upon a state interest in protecting minors, both male and female, from the physical and psychological injuries that can result from engaging in sexual intercourse. Personal privacy rights demand that sexual intercourse be prohibited only for those who are incapable of giving informed consent. Hence, the age of eighteen set by California seems too high in light of the understanding of today's youth. Once an age of consent is determined by a legislature, statutory rape laws should apply equally to males and females below that age unless the state can prove that the sexes are not similarly situated with regard to the risk of injuries, both physical and psychological, that can result from engaging in sexual intercourse. Some have suggested that the pre-

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96 Meloon v. Helgemoe, 564 F.2d at 607. *See* notes 61-63 & accompanying text *supra*.

97 *See* Michael M. v. Superior Court of Sonoma County, 25 Cal. 3d at 624-25, 601 P.2d at 582-83, 159 Cal. Rptr. at 350-51 (Mosk, J., dissenting).

98 101 S. Ct. at 1206.

99 *Id.* at 1207.

sumption of incapacity to consent under a certain age should be rebuttable.[100] While this approach would afford greater due process to a defendant and protect the privacy rights of minors, it would create proof problems and significant uncertainty. A gender-neutral statute with a conclusive presumption of incapacity coinciding approximately with the onset on puberty would be a good alternative since it would reflect the probable average age at which minors could give informed consent without substantially burdening privacy rights.[101] To afford additional protection, a rebuttable presumption of incapacity to consent could be established for minors between the age of puberty and age sixteen or eighteen.[102]

The punishment for violation of such statutory rape laws should fall only upon the adult partner. Minors who are incapable of consent should not be subjected to criminal sanctions by these statutes since the laws are designed to protect the minors from the harmful consequences of acts for which they are presumed not responsible because of their youth. Therefore, in *Michael M.*, the seventeen-year-old petitioner should have been afforded the same protections as the sixteen-year-old "victim."

IV. CONCLUSION

Michael M. was wrongly decided by both the California Supreme Court and the United States Supreme Court. Although the State failed to prove that teenage pregnancy prevention was the purpose of the statute, the Courts accepted this rationale as the statutory objective. By allowing California to maintain a gender-based statute without an inquiry into its actual purpose, the Supreme Court participated in a denial of equal protection of the laws. Legislatures and courts need to recognize that the historical purpose of statutory rape laws was to protect those who are incapable of consenting to sexual intercourse. While only females were protected in the past, many states have now realized the need for protecting both young males and young females from the possible adverse consequences of engaging in acts to which the youths are incapable of giving informed consent. As a consequence, these states have enacted gender-neutral statutory rape laws.[103]

Moreover, the gender-based classification of section 261.5 is not substantially related to the purported purpose of preventing teenage pregnancies. The statute is impermissibly overbroad and defectively

100 Note, *Forcible and Statutory Rape*, *supra* note 52, at 78; Comment, *The Constitutionality of Statutory Rape Laws*, *supra* note 13 at 813.

101 Comment, *The Constitutionality of Statutory Rape Laws*, *supra* note 13, at 813.

102 *Id.*

103 101 S. Ct. at 1216 (Brennan, J., dissenting).

underinclusive. As suggested above, the state could use more effective means for preventing teenage pregnancies which would not infringe upon privacy interests and would not violate equal protection. With regard to statutory rape laws, these should be gender-neutral and tailored to achieve their true purpose of protecting those who are incapable of giving informed consent to sexual intercourse. In this manner, states can effectuate their important interests without perpetuating sexual stereotypes and without infringing upon the fourteenth amendment guarantee of equal protection.

REBECCA J. LAUER