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Equal Protection and Gender-Based Discrimination: Michael M. v. Superior Court

Drew Alan Campbel

EQUAL PROTECTION AND GENDER-BASED DISCRIMINATION: *MICHAEL M. V. SUPERIOR COURT*

MICHAEL M.,[1] a seventeen-year-old male, engaged in sexual intercourse with Sharon, a sixteen-year-old female, during a promiscuous interlude on a park bench in Rohnert Park, Sonoma County.[2] The State of California charged Michael with violating section 261.5 of the California Penal Code, which proscribes "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."[3] Michael sought dismissal of the complaint on the grounds that section 261.5 created a gender classification discriminatory to males and violative of state and federal equal protection laws.[4] The trial court denied Michael's motion to dismiss and the California Court of Appeal summarily denied his request for enjoinment from further prosecution.[5] The California Supreme Court, by a narrow majority,[6] denied Michael any relief and upheld the statutory classification as furthering a compelling state interest.[7] Michael M. appealed to the United States Supreme Court. *Held, affirmed*: the gender classification embodied in section 261.5 of the California Penal Code is sufficiently related to legitimate state objectives and, therefore, does not violate the equal protection clause. *Michael M. v. Superior Court*, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981).

I. GENDER BASED CLASSIFICATIONS AND THE EVOLUTION OF INTERMEDIATE SCRUTINY

The equal protection clause of the fourteenth amendment,[8] which Jus-

1. The name Michael M. is a pseudonym used in juvenile proceedings to retain anonymity pursuant to California appellate court policy. Brief for Petitioner at 2 n.1, Michael M. v. Superior Ct., 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981).

2. Although the petitioner admitted to the allegations in the complaint, some question existed as to whether the act of sexual intercourse was forced or consensual. Force is not a requisite element of unlawful intercourse under § 261.5 of the California Penal Code. CAL. PENAL CODE § 261.5 (West Supp. 1981).

3. *Id.*

4. Under California's statute only males can be held liable for unlawful sexual intercourse irrespective of which party is the aggressor. *Id.*

5. Michael M. v. Sonoma County, 25 Cal. 3d 608, 601 P.2d 572, 159 Cal. Rptr. 340 (1979).

6. 25 Cal. 3d at 613, 625, 601 P.2d at 576, 583, 159 Cal. Rptr. at 344, 351. The court split four to three in rejecting the equal protection challenge.

7. *Id.* at 610, 601 P.2d at 573, 159 Cal. Rptr. at 341.

8. U.S. CONST. amend. XVI, § 1 provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

tice Holmes referred to as "the last resort of constitutional arguments,"[9] became a major interventionist tool of the Warren Court in the late 1960s.[10] The Warren Court developed a two-tiered approach to the equal protection analysis, differentiating between those statutory classifications that require review under the rational basis or mere rationality test and those that necessitate application of strict judicial scrutiny.[11] The rational basis test requires a showing that the statutory classification bears some reasonable relation to a legitimate legislative purpose.[12] The second tier, or strict scrutiny test, operates when the Court determines that the legislative distinction constitutes a suspect classification[13] or infringes upon a fundamental right or interest.[14] The strict scrutiny test demands a showing that the legislative classification is necessary to further a compelling state

9. Buck v. Bell, 274 U.S. 200, 208 (1927). Justice Holmes's comment epitomizes the early Court's refusal to encroach upon the legislative domain historically associated with equal protection. Typically, the due process clause was used to invalidate state legislation while the equal protection clause only required a broadening of the statute's impact. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 670 (10th ed. 1980).

10. For an extensive review of the equal protection developments in the later years of the Warren Court, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

11. *See* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972): "The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact; in other contexts, the deferential 'old' equal protection reigned, with minimal scrutiny in theory and virtually none in fact."

12. The basic rationality standard of review was articulated in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911):

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

The Court restated the rational basis test more recently in New Orleans v. Duke, 427 U.S. 297, 303 (1976): "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."

For a thorough analysis of the requisite relationship between legislative classifications and objectives, see Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

13. The classic definition of suspect classification, first enunciated in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), describes the need to protect "discrete and insular minorities." *See* Korematsu v. United States, 323 U.S. 214 (1944), in which the Court explicitly referred to race as a suspect criterion yet upheld a post World War II statutory classification based upon race and ancestry. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1966), and Graham v. Richardson, 403 U.S. 365 (1971), in which statutory schemes based upon race and alienage, respectively, were held to be suspect classifications and subject to strict scrutiny. *But see* Foley v. Connelie, 435 U.S. 291 (1978), in which a New York statute based upon alienage was not subjected to strict scrutiny.

14. *See* Police Dep't v. Mosley, 408 U.S. 92 (1972) (free speech); Shapiro v. Thompson, 394 U.S. 618 (1969) (freedom of interstate travel); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

interest.[15]

Prior to 1971 the Court upheld gender-based classifications under the deferential treatment of the rational basis standard of review.[16] In *Reed v. Reed*,[17] however, the Court broke from its tradition of crediting gender-based clasifications with a presumption of validity. Under the guise of the deferential rationality standard,[18] the Court reviewed a state statutory scheme that favored males over females in the selection of administrators of intestate estates.[19] A unanimous Court required the gender-based classification to have some "fair and substantial relation to the object of the legislation"[20] and struck down the statute as an "arbitrary legislative choice."[21] While refusing to apply a strict scrutiny standard, the Court's decision gave rise to an unarticulated, heightened scrutiny of sex classifications.[22]

The Court reexamined the emerging "mid-level" scrutiny in *Frontiero v.*

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15. *See* Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting), for a critical evaluation of the compelling interest doctrine in the latter years of the Warren Court. Justice Harlan criticizes this doctrine as creating too great an exception to the equal protection rule by placing the Court in the role of a "super-legislature." *Id.* at 661.

16. Goesaert v. Cleary, 335 U.S. 464 (1948), provides a classic example of the Court's deference to gender-based classifications prompted by traditional beliefs in sex-defined roles. *See also* Hoyt v. Florida, 368 U.S. 57 (1961) (upholding statute exempting women from jury duty). *But see* United States v. Dege, 364 U.S. 51 (1960) (revealing some awareness of sexual equality in holding both husband and wife capable of conspiracy).

17. 404 U.S. 71 (1971).

18. The Court cited F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), as the applicable standard: "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 404 U.S. at 76.

19. Under the Oregon statute, eligible persons were grouped into eleven categories according to their relationship to the decedent; the categories were ranked in an order that would be determinative if selection between two competing applicants became necessary. If the applicants were of opposite sex, a mandatory preference for males applied without regard to individual qualifications. 404 U.S. at 73.

20. *Id.* at 76.

21. The Court recognized the legitimate objective of reducing the work load on probate courts and avoiding intra-family controversy, but held that the end product, sexual discrimination, was forbidden by the equal protection guarantee. *Id.* at 76-77.

22. Although the Court purported to apply the deferential equal protection standard, clearly a more vigorous scrutiny of gender classifications was evolving. *See* Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 983 (1975). Several commentators have analyzed this emerging form of middle level review. Professor Gunther suggests the implementation of an "intensified means" scrutiny, in which the Court should defer to legislative purpose while closely scrutinizing the relationship between the classification and the purpose. *See* Gunther, *supra* note 11, at 20-25. This approach would offer some protection from arbitrary classifications, but would avoid encroachment upon the government's power to choose legislative ends. *Id.* Professor Nowak advocates a demonstrable basis standard in which the Court reviews both the purported objective and the means used to achieve that goal. Under this test a classification is upheld "only upon a showing of a demonstrated rational means of advancing an interest capable of withstanding analysis." *See* Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1081 (1974). *See also* Simsom, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663, 678-82 (1977), for a test that balances the individual burden imposed by a statutory classification against the societal benefits to be realized.

Richardson.[23] Four members of the Court defined sex as a suspect classification[24] and applied the strict scrutiny test to a gender-based statute that allowed servicemen automatic benefits for their dependent wives, but denied servicewomen the same benefits without proof of their spouse's dependency.[25] The plurality refused to accept administrative convenience as a legitimate legislative rationale for a sex-based classification.[26] Justice Brennan, speaking for the plurality, found implicit support for such a classification in the unanimous *Reed* decision. Brennan recalled the long history of discrimination against women and determined the immutable characteristic of sex to be sufficient justification for the suspect criteria.[27] Four other Justices refused to characterize sex as a suspect classification; instead, they applied the heightened scrutiny in *Reed* to invalidate the statute.[28] Although the Court later retreated from the *Frontiero* plurality's characterization of sex as a suspect classification,[29] it continued to rely on the *Reed* rationale to proceed beyond a perfunctory examination of legislative choice.[30]

The already unclear standard of constitutional scrutiny became even more obscured when the Court confronted statutory discrimination against men.[31] In *Kahn v. Shevin*[32] a plurality of the Court upheld a statute that granted an annual property tax exemption to widows but not to widow-

23. 411 U.S. 677 (1973).

24. Justice Brennan, joined by Justices Douglas, White, and Marshall, aligned sex with the suspect criteria because, unlike the nonsuspect status attributed to intelligence and physical disability, sex is an immutable characteristic that seldom bears any relationship to one's ability to contribute to society. *Id.* at 686.

25. *Id.* at 680. Justice Brennan purported to employ a strict scrutiny analysis, but failed to mention any need for a compelling state interest. *See* Nowak, *supra* note 22, at 1078.

26. 411 U.S. at 690. The government conceded that the only reason for the classification was administrative convenience. The Court found this repugnant to the equal protection safeguard. *Id.* at 688.

27. *Id.* at 686-87.

28. Chief Justice Burger and Justices Powell, Stewart, and Blackmun refused to expand the rationale of *Reed* to include sex as a suspect class, reserving any such interpretation for future decisions. *Id.* at 691-92 (Powell, J., concurring). Justice Powell cited the movement in state legislatures for the adoption of the equal rights amendment as justification for such a deferral. Accordingly, he viewed a judicial decision as an unnecessary preemption of the legislative process. *Id.* at 692.

29. *See* Stanton v. Stanton, 421 U.S. 7 (1975), in which the Court invalidated a Utah child support law that prescribed different majority ages for males and females. The Court undercut its *Frontiero* holding, finding "it unnecessary . . . to decide whether a classification based on sex is inherently suspect." *Id.* at 13. Under the rational basis rule articulated in *Reed*, the Court struck down the statute as based upon archaic sexual stereotypes. *Id.* at 14-17.

30. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidating Social Security benefits provision under *Reed* test); Taylor v. Louisiana, 419 U.S. 522 (1975) (striking down statute providing women automatic exemption from jury duty); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (holding mandatory maternity leave violative of equal protection clause).

31. Statutory discrimination against males is often referred to as benign or reverse discrimination. It typically is exercised to correct a pattern of discrimination against a person or class or to assist selected groups shown to be disadvantaged. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

32. 416 U.S. 351 (1974).

ers.[33] While purporting to follow *Reed*, the plurality held that the legislature's intention to reduce the long history of economic disparity and job discrimination between men and women through a benign classification was an important governmental objective that justified the statute's discriminatory nature.[34] In *Schlesinger v. Ballard*[35] the court rejected a male naval officer's challenge to a military promotion system favoring females.[36] The majority noted the history of dissimilarity in career opportunities for male and female line officers and upheld the statute under the "fair and substantial relation" test of *Reed*.[37] Justice Brennan dissented, urging the adoption of sex as a suspect classification and the application of a strict scrutiny standard.[38] In *Weinberger v. Wiesenfeld*[39] the Court invalidated a provision of the Social Security Act that denied benefits to a widower upon the death of his covered wage earner, but provided benefits for widows in an analogous situation.[40] The Court skirted the issue of reverse discrimination, however, by finding an unjustifiable discrimination against the surviving children based solely upon the sex of the surviving parent.[41]

In the cases following *Reed v. Reed* the Supreme Court invalidated gender-based classifications that clearly would have survived under the deferential rational basis analysis.[42] The full Court, however, refused to

33. 1943 Fla. Laws, ch. 21742, §1(7) (repealed 1971) offered widows an annual $500 tax exemption, but afforded widowers no analogous benefit.

34. Justice Douglas, a member of the plurality in *Frontiero*, refused to declare sex a suspect classification when the applicable statute discriminated against men. He distinguished the statute in *Frontiero* by comparing its sole purpose of "administrative convenience" to Florida's legitimate objective of reducing economic disparity between the sexes. 416 U.S. at 355. Justices Brennan and Marshall, two other members of the *Frontiero* plurality, dissented and continued to push for the suspect classification of sex and the use of the strict scrutiny standard. They challenged the Florida statute as "plainly overinclusive" and called for a narrowing of the class of beneficiaries to those widows actually affected by the economic discrimination of the past. *Id.* at 360. Only Justice White's dissent plainly condemned the statute as discriminatory against men. *Id.* at 361.

35. 419 U.S. 498 (1975).

36. The system affords to women officers a 13-year tenure before mandatory discharge for want of promotion. 10 U.S.C. § 6401(a) (1976). Males are discharged after they have been passed over for promotion twice, even if they have less than 13 years of commissioned service. *Id.* § 6380(a).

37. 419 U.S. at 508.

38. Justice Brennan's dissent was skeptical of the validity of the statute under the rational basis standard as well: "I find nothing in the statutory scheme or the legislative history to support the supposition that Congress intended . . . to compensate women for other forms of disadvantage visited upon them by the Navy." *Id.* at 511.

39. 420 U.S. 636 (1975).

40. 42 U.S.C. § 402(g) (1976).

41. 420 U.S. at 651. The Court refused to accept the government's contention that the statute created a benign classification designed to compensate women for their past economic disadvantages. Justice Powell's concurring opinion suggested that such a scheme discriminated against women by affording them less protection for their survivors than for the survivors of male wage earners. *Id.* at 654.

For a critical analysis of this case as well as *Kahn* and *Ballard, see* Erickson, *Kahn, Ballard, and Wiesenfeld: A New Equal Protection Test in "Reverse" Sex Discrimination Cases?*, 42 BROOKLYN L. REV. 1 (1975).

42. *See* notes 16-41 *supra* and accompanying text. *See also* USDA v. Moreno, 413 U.S. 528 (1973) (invalidating restriction in Food Stamp Act); Eisenstadt v. Baird, 405 U.S. 438 (1972) (striking down state law prohibiting sale of contraceptives to single persons).

consider sex a suspect classification and to subject discriminatory statutory schemes to strict scrutiny.[43] In *Craig v. Boren*[44] the Court appeared to resolve the issue of choosing an applicable standard of review in sex discrimination cases by adopting an intermediate level of scrutiny.[45] The Court struck down an Oklahoma statute that discriminated against males by prohibiting the sale of 3.2% beer to males under the age of twenty-one and females under the age of eighteen.[46] The Court held that "[t]o withstand constitutional challenges . . . classifications by gender must serve *important governmental objectives* and must be *substantially related* to achievement of these objectives."[47] In *Craig* the Court placed the burden on the government to prove both the importance of its asserted objective and the substantial relation between the classification and that objective.[48] Justice Powell, in concurrence, hesitated to acknowledge the adoption of a middle tier approach but recognized that a more intense rational basis standard of review normally applies when examining a gender-based classification.[49]

In *Califano v. Goldfarb*[50] the Court reaffirmed its commitment to the new standard applicable in gender classification cases by invalidating a Social Security provision predicated on stereotypical notions of female spousal dependency.[51] In *Orr v. Orr*[52] the Court recognized concern for reverse discrimination against males and applied the intermediate scrutiny standard to invalidate a state law requiring husbands but not wives to pay alimony.[53] The Court also used what appeared to be a middle tier in three

43. *See* notes 28-41 *supra* and accompanying text.

44. 429 U.S. 190 (1976). For discussion of the significance of this decision, see Comment, *Gender-Based Discrimination and a Developing Standard of Equal Protection Analysis*, 46 U. CIN. L. REV. 572 (1977); Case Comment, *Gender-Based Discrimination and Equal Protection: The Emerging Intermediate Standard*, 29 U. FLA. L. REV. 582 (1977).

45. 429 U.S. at 197.

46. 37 OKLA. STAT. ANN. tit. 37, §§ 241, 245 (West Supp. 1980-1981) (amended 1976).

47. 429 U.S. at 197 (emphasis added). *Craig* restated in more emphatic terms the "fair and substantial relationship" standard articulated in *Reed*.

48. *Id.* at 204.

49. *Id.* at 210 n.* (Powell, J., concurring). Justice Powell refused to endorse the "middle-tier" characterization of the *Craig* holding and the attendant subdivision of the equal protection analysis, but he did acknowledge the need for an intensified review of gender-based classifications. *Id.* Justice Stevens strongly urged the Court to refrain from applying various standards to "one Equal Protection Clause" when in reality a single standard was being applied in "a reasonably consistent fashion." *Id.* at 211-12 (Stevens, J., concurring). Justice Rehnquist, in dissent, favored the traditional rational basis test as the applicable standard in gender-based classifications. He emphasized the absence of any prior disadvantage or discrimination towards males that might necessitate a stricter application of scrutiny. Rehnquist regarded the new standard's subjective terms "substantial" and "important" as inviting preferential treatment of certain types of legislation. *Id.* at 217-28.

50. 430 U.S. 199 (1977).

51. The statute provided survivor benefits to widows but denied them to widowers unless the deceased wife had provided at least half of the couple's support. *Id.* at 199-200. Justice Rehnquist, in dissent, again emphasized a deferential treatment of benign classifications. He found no invidious discrimination against males, but urged the court to apply a sharper scrutiny only when sex distinctions disadvantaged women, historically "the victims of unfair treatment." *Id.* at 239-42.

52. 440 U.S. 268 (1978).

53. Justice Brennan warned of the latent dangers of "benign" gender classifications that

cases involving gender and illegitimacy classifications.[54] The Court strictly adhered to the new mid-level standard in *Wengler v. Druggists Mutual Insurance Co.*[55] and struck down a statute that required widowers whose wives died in work related accidents to prove dependency as a condition to receipt of workmen's compensation benefits but imposed no such requirement on similarly situated widows.[56] More recently the Court applied the *Craig* test to a Louisiana statute that gave husbands unilateral control over the disposition of community property.[57] The statute failed to survive the criterion mandated by the new standard.[58]

In the line of decisions following *Craig*, a majority of the Justices ascribed to an accepted definition for an intermediate standard of review based on the substantial relation between gender-based legislative classifications and important governmental objectives. The recurrent application of the intermediate standard after the *Craig* decision suggested that the Court had adopted a consistent, though somewhat elusive standard of review for sex discrimination cases.

II. *MICHAEL M. V. SUPERIOR COURT*

In *Michael M. v. Superior Court* the Supreme Court again confronted an equal protection challenge to a gender-based classification. The Court re-

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"carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Id.* at 283. He asserted that a state cannot classify on the basis of sex when gender-neutral classifications serve the legislative intentions just as effectively. *Id.*

54. In Lalli v. Lalli, 439 U.S. 259 (1978), the Court upheld a statute requiring paternal acknowledgment of illegitimate children before they could qualify as heirs to their father's intestate estate. The Court, without expressly defining a level of scrutiny, employed a realistic form of review comparable to *Craig*'s middle level analysis. *Id.* at 266-76. The dissent also applied a degree of scrutiny greater than the rational basis test in evaluating the relationship between the classificaton and the legislative ends. They disagreed, however, with the majority's assessment of the significance of the purported state interest in orderly property disposition. *Id.* at 277 (Brennan, J., dissenting).

In Parham v. Hughes, 441 U.S. 347 (1979), the Court refused to invalidate a statute allowing the father to sue for the wrongful death of an illegitimate child only if the mother was deceased and the father had initiated legitimization proceedings prior to the child's death. The Court treated this classification as gender based and held that a state lacks the authority to make sweeping generalizations based on sex that do not reflect any differences between the sexes or degrade the ability or social status of the protected class. *Id.* at 354. The Court stated further: "[I]n cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity." *Id.* Justice Powell concurred in much of the analysis of the plurality, but advocated a direct application of the *Craig* intermediate standard of review. *Id.* at 359.

The Court in Caban v. Mohammed, 441 U.S. 380 (1979), struck down a New York law that required pre-adoption consent by the mother of an illegitimate but denied equal consent rights to the father. *Caban* represented the first gender-illegitimacy case in which a majority opinion was rendered applying the intermediate scrutiny test. *See* Comment, *Equal Protection and the Putative Father: An Analysis of Parham v. Hughes and Caban v. Mohammed*, 34 Sw. L.J. 717 (1980).

55. 446 U.S. 142 (1980).

56. *Id.* at 144-46.

57. Kirchberg v. Feenstra, 101 S. Ct. 1195, 67 L. Ed. 2d 428 (1981).

58. *Id.* at 1199, 67 L. Ed. 2d at 433-34.

treated from the sensitivity toward reverse discrimination exhibited in earlier cases[59] to uphold a California statutory rape law that punishes males only.[60] Justice Rehnquist, writing for the plurality,[61] held that the proposed governmental objective, prevention of illegitimate teenage pregnancies, was "sufficiently related to the State's objectives to pass constitutional muster."[62] The plurality examined empirical data that documented the increase in teenage pregnancies over the past two decades, and the attendant social, medical, and economic hardships borne by the mother, her child, and the state.[63] The Court concluded that "young men and women are not similarly situated with respect to the problems and the risks of sexual intercourse,"[64] and, thus, the state acts within its legislative authority when it punishes only the participant who suffers less severely the natural consequences of his conduct.[65]

The plurality began its analysis by recognizing the Court's previous difficulty in agreeing upon the proper standard of review for gender-based classifications.[66] Justice Rehnquist reiterated the *Craig* test of "a substantial relationship" to "important governmental objectives," but he appeared to qualify the application of that test by citing a series of cases that upheld gender classifications that realistically reflected the dissimilarity of the sexes in certain circumstances.[67] Granting substantial deference to the legislative motive behind the classification,[68] the plurality recognized a

59. *See* notes 52-54 *supra* and accompanying text.

60. See note 3 *supra* and accompanying text. The Court cited numerous cases in which lower federal courts and state courts have upheld statutory rape laws as constitutional. 101 S. Ct. at 1203 n.1, 67 L. Ed. 2d at 441 n.1.

61. Justice Rehnquist was joined by Chief Justice Burger and Justices Stewart and Powell.

62. 101 S. Ct. at 1203, 67 L. Ed. 2d at 441.

63. The Court noted that two-thirds of the one million pregnancies in the 15-19 age group in 1976 were illegitimate and that approximately one half of these pregnancies ended in abortion. The risk of maternal death was higher than normal and the economic future of these mothers was bleak. *Id.* at 1205 nn. 3-5, 67 L. Ed. 2d at 443 nn. 3-5.

64. *Id.* at 1205, 67 L. Ed. 2d at 444.

65. *Id.* at 1206, 67 L. Ed. 2d at 445. The Court found the exclusion of females from a statutory scheme that sought to protect only them logical. *Id.*

66. Unlike the California Supreme Court, the plurality refused to find sex a suspect classification and apply a strict scrutiny standard. Justice Rehnquist purported to apply the intermediate standard enunciated in *Craig*, but the dissenters voiced some concern over the accuracy of the plurality's application. *Id.* at 1204, 67 L. Ed. 2d at 442. *See* notes 83-96 *infra*.

67. The Court cited Parham v. Hughes, 441 U.S. 347 (1979), Califano v. Webster, 430 U.S. 313 (1977), Schlesinger v. Ballard, 419 U.S. 498 (1975), and Kahn v. Shevin, 416 U.S. 351 (1974), as recent cases in which the Court recognized situations where the sexes were dissimilar and a statutory classification discriminating against men therefore was not invidious. 101 S. Ct. at 1204, 67 L. Ed. 2d at 442-43. The Court quoted Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975), in holding that a legislature may provide for the special problems of women. 101 S. Ct. at 1204, 67 L. Ed. 2d at 442-43.

68. The petitioner argued that the true purpose of the California statute was to protect the virtue and chastity of young women: "California's pregnancy prevention argument is a hindsight catchall rationalization futilely used to justify a vestige of bygone attitudes about the proper roles of the sexes." Brief for Petitioner at 5, Michael M. v. Superior Ct., 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981). The Court responded with a deferential quote from United States v. O'Brien, 391 U.S. 367, 383 (1968): "[I]t is a familiar principle of constitu-

profound disparity between the risks that males and females incur by engaging in sexual intercourse.[69] The plurality reasoned that pregnancy serves as a natural deterrent for women, and "[a] criminal sanction imposed solely on males thus serves to roughly equalize the deterrents on the sexes."[70]

The plurality rejected the petitioner's contention that the statute was impermissibly underinclusive in failing to hold females criminally liable.[71] Instead, the Court accepted the state's argument that a gender-neutral statute would frustrate enforcement because of the female's reluctance to report a violation that would subject herself to a criminal prosecution.[72] The Court similarly discarded the petitioner's argument that the statute was impermissibly overbroad because it criminalized sexual intercourse with females who were incapable of impregnation. At the time of the violation the petitioner was under eighteen, and he argued that the statute was flawed because it created a presumption that as between two persons under eighteen years of age the male was the culpable aggressor.[73] The Court dispensed with this assertion, holding that the age of the male was irrelevant to the harm sought to be prevented.[74]

While the plurality in *Michael M.* recognized that the case involved reverse discrimination against males, it found no past discrimination or peculiar disadvantage deserving of the Court's benevolence.[75] The gender classification, according to the plurality, was not made merely for administrative convenience,[76] nor was it based upon archaic sexual stereotypes.[77] Rather, the statute "reasonably reflects the fact that the consequences of

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tional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." 101 S. Ct. at 1206 n.7, 67 L. Ed. 2d at 444 n.7.

69. *Id.* at 1205, 67 L. Ed. 2d at 444.

70. *Id.* at 1206, 67 L. Ed. 2d at 445.

71. *Id.* The petitioner argued that a gender-neutral statute would effectuate the legislative goals equally well. The Court, however, citing Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1974), held that statutory line-drawing need not be absolutely precise, but only within constitutional limitations. *Id.* at 1206, 67 L. Ed. 2d at 445.

72. *Id.* at 1206-07, 67 L. Ed. 2d at 445. The Court noted:

> The question whether a statute is *substantially* related to its asserted goals is at best an opaque one. It can be plausibly argued that a gender-neutral statute would produce fewer prosecutions than the statute at issue here . . . .
>
> Where such differing speculations as to the effect of a statute are plausible, we think it appropriate to defer to the decision of the California Supreme Court, "armed as it was with the knowledge of the facts and the circumstances concerning the passage and potential impact of [the statute], and familiar with the milieu in which that provision would operate."

Id. at 1207 n.10, 67 L. Ed. 2d at 445 n.10 (quoting Reitman v. Mulkey, 387 U.S. 369, 378-79 (1967)) (emphasis in original).

73. Brief for Petitioner at 18, Michael M. v. Superior Ct., 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981).

74. 101 S. Ct. at 1207, 67 L. Ed. 2d at 446. Justice Rehnquist asserted that the statute did not rest upon the assumption that males are generally the aggressors, but rather reflected a legislative attempt to provide an additional deterrent for men. *Id.*

75. The Court alluded to the rationale used in earlier decisions to uphold several statutory classifications that favored females. *See* notes 29-33 *supra* and accompanying text.

76. *See* Frontiero v. Richardson, 411 U.S. 677, 690 (1973).

77. *See* Orr v. Orr, 440 U.S. 268, 283 (1979).

sexual intercourse and pregnancy fall more heavily on the female than the male."[78]

Justice Stewart's concurring opinion echoes the sentiments of the plurality decision. He contends that the state's sanction against males realistically reflects the physiological differences in the sexes.[79] According to Justice Stewart, the Constitution recognizes this disparity, and no violation of the equal protection clause occurs providing these differences are not used to disguise invidious discrimination.[80] Justice Blackmun, also concurring, purported to uphold the statute under the mid-level scrutiny test of *Craig* and its progeny.[81] Without explanation, however, Justice Blackmun declared the state's attempt at controlling the sexual activities of young people "a sufficiently reasoned and constitutional effort to control the problem at its inception."[82]

Justice Brennan, in a dissenting opinion joined by Justices White and Marshall, voiced his concern over the majority's failure to apply accurately the equal protection analysis "so carefully developed since *Craig v. Boren*."[83] The dissenters expressed fears that the plurality was overemphasizing the desirability of achieving the statutory objective of preventing teenage pregnancy and underemphasizing the fundamental question of whether the gender-based discrimination in the California statute was *substantially* related to the achievement of that objective.[84] The dissent argued that the government had failed to prove both the importance of its asserted objective and the substantial relationship between the classification and that objective.[85] Justice Brennan further asserted that the State of California had failed to show that a gender-neutral statutory rape law would be less effective in deterring teenage pregnancies than the existing gender-based law.[86] The Brennan dissent found unpersuasive the state's assertion that significant enforcement problems would accompany a gender-neutral statute[87] and declared that the state's inability to produce

78. 101 S. Ct. at 1208, 67 L. Ed. 2d at 447.

79. *Id.* at 1210-11, 67 L. Ed. 2d at 450.

80. *Id.* at 1209-10, 67 L. Ed. 2d at 449-50.

81. *Id.* at 1211, 67 L. Ed. 2d at 451. Blackmun cites *Schlesinger, Weinberger*, and *Kahn* as exemplifying this test. *Id. See* notes 32-41 *supra* and accompanying text, however, suggesting that these cases may have applied less than the mid-level scrutiny implicit in *Reed*.

82. 101 S. Ct. at 1211, 67 L. Ed. 2d at 451.

83. *Id.* at 1214 n.2, 67 L. Ed. 2d at 454 n.2; *see* notes 44-58 *supra* and accompanying text.

84. *Id.* at 1214, 67 L. Ed. 2d at 454. Justice Brennan enumerated all the cases in which the *Craig* analysis was developed and noted that the test applied whether the classification discriminated against males or females. *Id.* at 1214-15, 67 L. Ed. 2d at 455.

85. *Id.* at 1214 n.2, 67 L. Ed. 2d at 454 n.2.

86. The Brennan dissent quoted Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980), in which the Court emphasized this governmental prerequisite to survival of a constitutional challenge to a gender-based classification. 101 S. Ct. at 1215, 67 L. Ed. 2d at 455.

87. *Id.* at 1216, 67 L. Ed. 2d at 456. The dissent found two serious flaws in the plurality's acceptance of the state's assertion that a gender-neutral statute would be less effective because of enforcement problems. First, Justice Brennan noted that the plurality's argument is less convincing when juxtaposed with the experience of the majority of other jurisdictions. At least thirty-seven states have enacted gender-neutral statutory rape laws. The laws of

sufficient evidence was a failure to meet its burden under the *Craig* test.[88] Justice Brennan also looked closely at the historical development of California's statutory rape law and found that the state objective of pregnancy prevention was of recent origin,[89] suggesting that the statute was founded upon outmoded sexual stereotypes rather than the reduction of teenage pregnancies.[90] Thus, Justice Brennan argued, the state was unable to show a substantial relation to an important governmental objective.[91]

Justice Stevens's dissent sounded a pessimistic note, asserting the futility of the notion that a statutory prohibition would have a significant effect on the prevalence of teenage sexual activity.[92] Justice Stevens refuted the plurality's acceptance of the risk of pregnancy as an effective deterrent to females and regarded the exemption of the more victimized class of females as totally irrational.[93] In applying a standard of review, he noted that when the natural differences between men and women are relevant perhaps these situations deserve a stricter form of scrutiny than in other sex discrimination cases.[94] Ultimately, he was unable to justify the disparate treatment of the two participants without a legislative determination that one was more guilty than the other.[95] Furthermore, Justice Stevens found such a statutory authorization of punishment of only one of two equally guilty parties offensive to the constitutional notion of impartial sovereign rule.[96]

Arizona, Florida, and Illinois in particular permit prosecution for minors of either sex who engage in consensual sexual conduct. *See* ARIZ. REV. STAT. ANN. § 13-1405 (1978); FLA. STAT. ANN. § 794.05 (West 1976); ILL. ANN. STAT. ch. 38, § 11-5 (Smith-Hurd 1979). In addition, California has revised other sections of its Penal Code to make them gender-neutral. 101 S. Ct. at 1216, 67 L. Ed. 2d at 456-57. Secondly, Justice Brennan believed that common sense suggested a gender-neutral statute was a more powerful deterrent of sexual activity because it subjected twice as many persons to arrest and had a deterrent effect on twice as many potential violators. *Id.* at 1216-17, 67 L. Ed. 2d at 457.

88. *Id.* at 1216, 67 L. Ed. 2d at 457-58.

89. The Brennan dissent noted that "[i]t was only in deciding Michael M. that the California Supreme Court decided, for the first time in the 130-year history of the statute, that pregnancy prevention had become one of the purposes of the statute." *Id.* at 1217-18 n.10, 67 L. Ed. 2d at 458 n.10.

90. *Id.* In People v. Verdegreen, 106 Cal. 211, 214, 39 P. 607, 608-09 (1895), the California Supreme Court first articulted the statute's objective:

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

91. 101 S. Ct. at 1218, 67 L. Ed. 2d at 459.

92. *Id.* (Stevens, J., dissenting). "Local custom and belief—rather than statutory laws of venerable but doubtful ancestry—will determine the volume of sexual activity among unmarried teenagers." *Id.*

93. *Id.* at 1219, 67 L. Ed. 2d at 461.

94. Justice Stevens adhered, however, to the single standard of review articulated in his *Craig* concurrence. *Id.* at 1219 n.4, 67 L. Ed. 2d at 460 n.4. *See* note 49 *supra*.

95. *Id.* at 1220, 67 L. Ed. 2d at 461.

96. Stevens refuted the state's argument that the statute could survive if commonly invoked only in forcible rape cases, rather than when sexual activity was consensual. Stevens suggested that the exempt class be defined by reference to "relative innocence" rather than by reference to sex. 101 S. Ct. at 1220-21, 67 L. Ed. 2d at 462-63.

The plurality decision and dissenting opinions in *Michael M.* represent a departure from any consistent application of intermediate scrutiny that has developed since *Craig*.[97] Both the plurality and dissent purport to apply the mid-level scrutiny of *Craig*, yet they arrive at antithetical results. The plurality readily defers to the proposed legislative objective of preventing teenage pregnancy and upholds a statute clearly discriminatory to males. Justice Rehnquist recognizes the physiological differences of the sexes as a legitimate basis for the statutory classification. As urged in his *Craig* dissent,[98] Justice Rehnquist finds no archaic stereotypes or past discrimination against males requiring the Court's reconciliation and a stricter application of scrutiny. As a result, the plurality, while paying lip-service to the *Craig* standard, appears to apply a more deferential analysis of the mid-level test than is typically employed in female discrimination cases.[99]

The dissent, however, asserts another element of the equal protection analysis. Justice Brennan finds implicit in the mid-level scrutiny test a burden upon the legislature to prove that a gender-neutral statute is less effective than the existing gender-specific statute. According to Justice Brennan, the inability to satisfy this essential prerequisite is a failure under the "substantial relation" criterion of the *Craig* analysis. The dissent rests upon the state's failure to meet this burden and the plurality's superficial inquiry into this area of the equal protection test. These differing opinions reflect the Court's indecision in settling on a consistent reading of the *Craig* standard of review. Such varied interpretations of the requirements of the *Craig* test for gender-based classifications serve only to obfuscate the uniform application of a mid-level analysis.

III. CONCLUSION

Since the *Craig* decision, the Court has not hesitated to apply intermediate scrutiny and invalidate gender-based classifications that discriminate against archaic female stereotypes. The plurality in *Michael M. v. Superior Court*, however, appears to have renewed its previous ambivalence toward gender-based classifications that discriminate against males. If the Court is ever to adopt a consistent standard of review for gender-based classifications, it will have to overcome this reluctance and refuse to perpetuate male as well as female stereotypes.

Drew Alan Campbell

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97. *See* notes 44-57 *supra* and accompanying text.

98. *See* note 49 *supra* and accompanying text.

99. Justice Rehnquist, however, in asserting that the government has a "strong" interest in preventing pregnancy, appears at least to recognize the *Craig* standard, and his opinion suggests a compromise of his previous view that only a rational basis is necessary to justify a gender-based classification. 101 S. Ct. at 1205, 67 L. Ed. 2d at 478. *See also* Rostker v. Goldberg, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981), in which Justice Rehnquist, writing for the majority, upheld Congress's decision to authorize only males for draft registration as reasonably reflecting the dissimilarity of the sexes. *Id.* at 2658-59, 67 L. Ed. 2d at 495.