10-1980

Michael M. v. Superior Court of Sonoma County

Lewis F. Powell Jr.

D

PRELIMINARY MEMORANDUM

May 29
~~April 18~~, 1980 Conference
List 1, Sheet 3,

No. 79-1344

MICHAEL M.

v.

SUPERIOR COURT OF SONOMA COUNTY, et al.

Cert to Cal. Supreme Ct.
(Bird, Richardson, Clark, Manuel; Mosk, Tobriner, & Newman, dissenting)

State/Civil

Timely

1. SUMMARY: Petr challenges the constitutionality of California's statutory-rape statute, which punishes as a felon any male who has sexual intercourse with a female under 18 years of age.

2. FACTS: At the time of the alleged sexual liaison, petr Michael M. was 17 years old and his partner, Sharon, was 16 years old. Petr was charged as an adult with violating California Penal Code § 261.5, which defines the offense of "unlawful sexual intercourse" as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator,

I don't think this is worth the Court's time - Ellen

where the female is under the age of 18 years." Petr sought a writ of prohibition from the California CA and, subsequently, from the California Supreme Ct., arguing that the statute's failure to apply to men and women equally violated his right to equal protection under the law.

A majority of the California S. Ct. rejected petr's constitutional challenge. It conceded that, under its prior decisions, it was obligated to apply "strict scrutiny" to the classification established by § 261.5, and that the state bore the burden of establishing "not only that the state has a compelling interest which justifies the law but that those distinctions drawn by the law are necessary to further the statute's purposes." Citing Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1, 16-17 (1971) (emphasis in original). According to the majority, however, § 261.5 was legitimately directed at the need to discourage and prevent pregnancies among unwed teenage girls. The majority pointed out that only the female participant in a sexual act can become pregnant and that the severe consequences of extramarital teenage pregnancies fell more heavily upon females than upon males. It rejected petr's contention that § 261.5 failed to serve the suggested purpose because it applied even to those sexual acts where pregnancy had been rendered impossible through use of contraceptives. According to the majority, the legislature was entitled to reject a distinction that turned upon "'the doubtful efficacy of contraceptives and the truth of the inevitable claim of nonemission by a male charged with statutory rape.'" Quoting State v. Rundlett, 391 A.2d 815, 821 n. 18 (Me. 1978). The majority also concluded that § 261.5 was not unconstitutionally underinclusive because it failed to hold women equally culpable for sexual acts with males under the age of 18. The court pointed out that all minors, male and female, were protected by California law from sexual abuse under statutes covering contributing to

the delinquency of minors and lewd and lascivious conduct with minors. This fact allegedly distinguished the California statute from that struck down in Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977), cert. denied, 436 U.S. 950 (1978), where New Hampshire failed to make it a crime of any kind for a woman to have consentual sexual relations with a male under the statutory age of consent. According to the majority, § 261.5 "merely provides additional protection for minor females in recognition of the demonstrably greater injury, physical and emotional, which they may suffer.

Judge Mosk, writing for the dissenters, disputed the majority's conclusion that § 261.5 was intended to discourage or prevent extramarital teenage pregnancies. According to the dissent, the evidence was overwhelming that the statute in question was originally intended to protect "the virtue of young and unsophisticated girls." Given such a purpose, the dissenters believed that § 261.5 represented an unconstitutional stereotype. Even if the statute were enacted for the purpose of preventing teenage pregnancies, the dissenters believed that it was both overinclusive in proscribing those sexual acts where pregnancy was an impossibility and underinclusive in failing to recognize that both participants in the sexual act could be equally culpable.

3. CONTENTIONS: Petr contends that the statute in question violates this Court's pronouncements on gender-based discrimination. In particular, he cites Orr v. Orr, 440 U.S. 268, 282-283 (1979), where this Court stated that "a gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny." He also points out the frequency with which challenges to similar statutes have arisen in the lower courts. See Rundlett v. Oliver, 607 F.2d 492

(CA 1 1979); Meloon v. Helgemoe, supra; Olson v. Nevada, 588 P.2d 1018 (1979); State v. Drake, 219 N.W.2d 492 (Iowa 1974); People v. Fauntleroy, 405 N.Y.S.2d 931 (1978); Ex Parte Groves, 571 S.W.2d 888 (Texas 1978); State v. Rundlett, supra; State v. Thompson, 392 A.2d 678 (N.J. 1978); State v. Meloon, 366 A.2d 1176 (N.H. 1976); In re Interest of J. D. G., 498 S.W.2d 786 (Mo. 1973).

4. DISCUSSION: Of all the cases cited above, only Meloon v. Helgemoe, supra, resulted in the invalidation of a statutory rape statute. Helgemoe, moreover, would seem to have been severely limited by Rundlett v. Oliver, supra, where the CA 1 upheld Maine's statutory rape provision because, unlike New Hampshire, that state had enacted its statutory rape provision for the right reasons.

Perhaps the Court should call for a response.

4/7/80 McGough Op in petn.
CMS

May 29, 1980

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 79-1344

MICHAEL M.

vs.

SUPERIOR COURT OF SONOMA CO.

JPS says CA 9 has decided 9 the other way.

Granted but selected for BRW to take second look

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.		✓											
Stewart, J.			✓										
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.			✓										
Powell, J.			✓										
Rehnquist, J.			✓										
Stevens, J.		✓											

June 5, 1980

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on ....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 79-134

M., MICHAEL

vs.

SUPERIOR CT. OF SONOMA CTY.

Relisted for Mr. Justice White.

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

all votes same as 5/29

Reviewed 10/31

Greg thinks Calif's statutory rape law ("unlawful sexual intercourse") violates E/P. Greg accepts the purpose found by Calif S/Ct (prevent unmarried pregnancies) but thinks there is no rational relationship between the classifications & this purpose.

GM 10/29/80

Altho I will want further enlightenment, I would have thought - as Calif. S/Ct held - that since only women become pregnant they may be classified differently from men. Of course, only men can impregnate them (naturally). But the experience of mankind strongly suggests that men tend to be the aggressor in the sex act, & lack the inhibitions vs pregnancy that usually - certainly before the "pill" - most women possess.

BENCH MEMORANDUM

To: Mr. Justice Powell October 29, 1980

From: Greg Morgan

No. 79-1344: Michael M. v. Superior Court of Sonoma County

Question Presented

Does California Penal Code § 261.5, which holds only males criminally culpable for "unlawful sexual intercourse," violate the Equal Protection Clause by discriminating on the basis of sex?

Background

Petitioner Michael M. is charged by information with violating California Penal Code § 261.5, which reads:

> Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.1/

Evidence adduced at petitioner's arraignment shows that

petitioner and the prosecutrix, Sharon, engaged in sexual intercourse sometime after midnight on June 3, 1978. Petitioner was 17 years old; Sharon was 16 years old. They had met each other for the first time at approximately midnight as Michael and two male friends rode bicycles past a bus stop at which Sharon and her older sister were sitting and drinking whiskey. At the boy's invitation, the girls joined them in drinking wine. After the others had departed, petitioner and Sharon proceeded to a park and engaged in hugging and kissing which eventually led to Michael's request that Sharon remove her pants. Sharon initially refused, and Michael struck her in the face. Sharon then acquiesced to sexual intercourse.

Petitioner moved at his arraignment to set aside the information on the ground that § 261.5 violates the Equal Protection Clause by holding only males criminally culpable for unlawful sexual intercourse. After the trial court denied the motion, petitioner sought a writ of prohibition in the California Court of Appeals. After that court denied the writ, petitioner appealed to the California Supreme Court.

By a 4-3 vote, the Supreme Court affirmed the denial of the writ. The majority (Richardson, J., with The Chief Justice and Justice Clark and Manuel joining) conceded that § 261.5 discriminates on the basis of sex because only females may be victims and only males may be offenders. Accordingly, the majority considered itself bound by Sail'er Inn, Inc. v. Kirby,

5 Cal.3d 1 (1971), to invalidate § 261.5 unless the State showed "not only that the state has a compelling interest which justifies the law but that those distinctions drawn by the law are necessary to further the statute's purposes." Petition for Writ of Certiorari (hereinafter "Petn"), at A-2 (emphasis original). The majority found the classification by sex "readily justified," however, by the state interest "in minimizing both the number of [teenage] pregnancies and their disastrous consequences." Petn, at A-3. Given this state interest, the majority continued, "[t]he Legislature is well within its power in imposing criminal sanctions against males, alone, because they are the only persons who may physiologically cause the result which the law properly seeks to avoid." Petn, at A-5 (emphasis original).

Compelling state interest (we do not require in sex cases - See Orr v Orr)

The majority also found that the distinction drawn by the statute is sufficiently related to the legislative purpose of preventing teenage pregnancies and their personal and social costs. Thus, in response to petitioner's argument that § 261.5 is over-inclusive because it applies to males who use contraceptives or who for some reason are incapable of impregnating, the majority adopted the reasoning of the Supreme Judicial Council of Maine, State v. Rundlett, 391 A.2d 815 (1978), that legislators reasonably could decide not to rely upon contraceptives or the likelihood of their use by teenagers to effectuate the goal of preventing teenage pregnancies. The

majority also noted that legislators reasonably could seek to avoid the evidentiary problems which inevitably arise if alleged offenders can assert as a defense that they had used a contraceptive. In response to petitioner's argument that § 261.5 is under-inclusive because only males are offenders even though females in some instances may be the more sexually aggressive party, the majority made two observations. First, the majority held that the Legislature may "recognize degrees of culpability." Petn, at A-6. From this, the majority held that the Legislature reasonably could conclude that males require the deterence which the law provides, whereas females are deterred naturally by the risk of pregnancy and its consequences. Second, the majority held that the Legislature reasonably could decide that, as a practical matter, prosecution under § 261.5 would be impossible if the prosecutrix herself were prosecutable. In sum, the majority concluded that an important state interest supports § 261.5 and that the distinction drawn in § 261.5 substantially relates to the achievement of that interest.

The dissent (Mosk, J., with Justices Tobriner and Newman joining) disputed the majority's conclusion both as to legislative purpose and as to relationship of means to purpose. First, the dissent noted that the majority cited no authority for its holding that the prevention of teenage pregnancies is the legislative purpose behind § 261.5. Thus, after reviewing

the history of statutory rape laws, the language of § 261.5, and that court's own prior statements of the purpose of the predecessor statutes to § 261.5, the dissent concluded that "it is wishful thinking to believe that the California statutory rape law was actually enacted or reenacted for the purpose" of preventing teenage pregnancies. Petn, at A-17. The dissent concluded, rather, that the legislative purpose was to protect minor females' virtue from their presumed inability to protect themselves from sexual advances or to consent intelligently to sexual relations. In the dissent's view, that purpose cannot support § 261.5 because it rests on anachronistic and stereotypic assumptions about women. Assuming arguendo that prevention of pregnancy is the legislative purpose, the dissent concluded that § 261.5 is both under- and over-inclusive for the reasons petitioner advanced.

Contentions

Petitioner and respondent agree that § 261.5 establishes a classification expressly discriminating against men and, therefore, that the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." Orr v. Orr, 440 U.S. 268, 279 (1979); Califano v. Webster 430 U.S. 313, 316-17 (1977). Petitioner and respondent disagree on the governmental objective that § 261.5 is meant to serve. If respondent prevails on this issue, petitioner additionally contends that §

261.5 is not substantially related the objective of preventing teenage pregnancies and their costs.

(1) The Objective Behind § 261.5.

Petitioner contends that "'inquiry into the actual purposes' of the discrimination," Califano v. Goldfarb, 430 U.S. 199, 212-13 (1977)(quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975), will reveal that the prevention of teenage pregnancies is not the legislative purpose behind § 261.5. Rather, petitioner contends, the history of statutory-rape laws and the prior statements of the California Supreme Court show that § 261.5 is meant to protect young females from their own presumed naivety and inability to decide intelligently about sexual relations. Petitioner urges the Court to recognize that this presumption perpetuates a stereotype about women which the Court's precedent render insufficient to warrant the discrimination. See, e.g., Orr v. Orr, 440 U.S. 268, 283 (1979), Stanton v. Stanton, 421 U.S. 7, 10 (1975), Schlesinger v. Ballard, 419 U.S. 498 (1975). In sum, petitioner contends that the California Supreme Court seized upon prevention of pregnancy as "an available hindsight catchall rationalization for laws that were promulgated with totally different purposes in mind." Meloon v. Helgemoe, 564 F.2d 602, 607 (1st Cir. 1977)(invalidating New Hampshire's statutory-rape law as violative of equal protection).

Respondent contends that this Court should recognize

as dispositive the California Supreme Court's conclusion that prevention of teenage pregnancies and the attendant social and personal costs is the legislative purpose behind § 261.5. Respondent relies on Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975), for the proposition that this Court should defer to the highest state court's explanation of legislative purpose unless "an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation" (emphasis added). Respondent then suggests four reasons why such an examination does not show that prevention of teenage pregnancies could not have been the legislative purpose. First, respondent asserts that no weight should be given to the prior statements of the California Supreme Court about the purpose of the statutory rape law because none of those statements are supported by citation to actual legislative history. Second, respondent asserts that the Legislature might have been concerned about teenage pregnancy when in 1970 it recodified the statutory rape law into § 261.5's offense of "unlawful sexual intercourse. Third, respondent asserts that the Legislature ratified the California Supreme Court's decision as to § 261.5's purpose by failing, after that decision, to pass two proposed bills to render § 261.5 gender-neutral. Fourth, respondent asserts that the California Therapeutic Abortion law, which allows abortions of pregnancies resulting from statutory rape, evinces a general legislative

concern about teenage pregnancies and their consequences.

Acting as amicus, the Solicitor General supports respondent's contention that the prevention of teenage pregnancies is the legislative purpose behind § 261.5. In addition to the arguments made by respondent, the Solicitor General contends that the language of § 261.5 is inconsistent with petitioner's argument that preservation of female chastity and protection of female naivety were the legislative purposes behind that section. If these were the purposes, the Solicitor argues, then § 261.5 would allow the male to assert in defense that the female was neither chaste nor naive.

[The Solicitor also suggests that additional legislative purposes behind § 261.5 were to provide special protection to young girls from sexual risks and to aid the prosecution of forcible-rape charges involving young female victims. Although these are plausible purposes behind a statute like § 261.5, they were not identified by the California Supreme Court as purposes actually behind § 261.5. Therefore, these purposes do not avail respondent in light of this Court's intimation that it insists upon knowing the actual legislative purpose when reviewing gender-based statutes. Craig v. Boren, 429 U.S. 190, 200 n.7 (1976).]

(2) Relation to Legislative Purpose

Petitioner contends that § 261.5 is not substantially related to the objective of preventing teenage pregnancies

because it is both under- and over-inclusive. First, the statute is under-inclusive in petitioner's view because it holds only males culpable for pregnancies despite the fact that in some instances the female will have been the more sexually aggressive. Sex, petitioner contends, is an inaccurate proxy for blame, and § 261.5 therefore is unconstitutionally arbitrary. Petitioner relies on Reed v. Reed, 404 U.S. 71 (1971), for the proposition that such an arbitrary use of sex violates the Equal Protection Clause. Second, the statute is over-inclusive in petitioner's view because it holds the male culpable even if pregnancy is unlikely because of contraceptive use or impossible because of sterility.

Respondent and the Solicitor General concede that the relation between statutory objective and means is imperfect, but they contend that the under- and over-inclusiveness of § 261.5 is permissible. The statute is not impermissibly under-inclusive, in their view, because the Legislature reasonably could decide that it needed to deter only males, who lack the natural deterence that the risk of pregnancy poses to females. The statute is not impermissibly over-inclusive, in their view, because the Legislature reasonably could decide that defenses based upon purported sterility or contraceptive use present evidentiary problems which would hinder enforcement of the statute. They also contend that holding females culpable would impair enforcement by inhibiting females from complaining.

Furthermore, both respondent and the Solicitor General contend that petitioner lacks standing to raise claims of under- and over-inclusiveness. They contend that petitioner cannot complain of under-inclusiveness because his use of force against Sharon suggests that he in fact was more culpable. They contend that petitioner cannot complain of over-inclusiveness because he has never asserted that he in fact used a contraceptive.

Analysis

I am inclined to conclude that § 261.5 violates the Equal Protection Clause. Because I reach that conclusion even after accepting arguendo the California Supreme Court's conclusion that the legislative purpose behind § 261.5 is to prevent pregnancy and its consequences, I proceed immediately to the question whether the gender classification in § 261.5 is substantially related to achieving that purpose. I believe that this question is controlled by the Court's prior decisions involving gender-based statutes. Specifically, I rely on Craig v. Boren, 429 U.S. 190 (1976), and Orr v. Orr, 440 U.S. 268 (1979).

Craig raised the question whether the Equal Protection Clause barred an Oklahoma statute prohibiting the sale of 3.2% beer to males under 21 years and to females under 18 years violated. The Court stated:

> Reed v. Reed [404 U.S. 71 (1971)] has also provided the underpinning for decisions that have invalidated statutes employing

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

In the case now before the Court, gender is an inaccurate proxy for a more germane basis of classification, which is culpability in engaging in sexual intercourse and causing pregnancy. Gender is inaccurate because females are as capable of causing the sexual intercourse as males. Doubtless in some instances, the female will be more responsible than the male for intercourse having occurred. [That gender is an incorrect proxy does not mean, however, that the State cannot bar sexual intercourse between a person over the age of majority and a person under the age of majority, for nothing bars the use of age as a proxy for culpability, even though in some cases the result will seem arbitrary.]

Orr raised the question whether the Equal Protection Clause barred an Alabama statute under which ex-husbands but not ex-wives may be required to pay alimony. In response to the State's assertion that its purpose was to provid financial help to needy spouses, the Court noted that the gender-based classification was "gratuitous," because [p]rogress toward fullfiling such a purpose would not be hampered ... if [the State] were to treat men and women equally by making alimony

burdens independent of sex." 440 U.S. at 282. Additionally, the Court held:

> Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection. ... Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classificaiton as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.

In the case now before the Court, the gender classification similarly is gratuitous. The State can serve its purpose of preventing teenage pregnancies and their consequences as well, or perhaps better, though a statute that does not classify offender and victim by gender.

Is this realistic

Respondent makes two arguments to rebut Craig and Orr. First, respondent argues that, as a general matter, young males are less likely than young females to take seriously the risk of pregnancy. Therefore, respondent contends, gender is an accurate proxy for culpability in causing sexual intercourse and pregnancy. I might be persuaded by this argument if this case were the first gender-discrimination case to reach this Court, for commonsense about the way of the teenage world suggests that respondent's generalization is accurate. But the Court's precedents have held this type of generalization is insufficient to support a classification by gender. See Craig v. Boren, 429 U.S. at 198-99; Weinberger v. Wiesenfeld 420 U.S. at 642;

True

Stanton v. Stanton, 421 U.S. 7, 13 (1975). In sum, there is only a "weak congruence" between being male and being culpable for engaging in sexual intercourse and causing pregnancy.

Second, respondent argues that petitioner lacks standing to complain that § 261.5 presumptively holds the male culpable when in some instances the female will be more culpable. Petitioner lacks standing, in respondent's view, because the evidence suggests that in this case petitioner is the more culpable because he physically obtained Sharon's acquiesence. This argument is unpersuasive, for force is not an element of the offense. Accordingly, petitioner would be in the same position if Sharon had acquiesced voluntarily. Petitioner's use of force is beside the point, and it does not deprive him of standing to attack § 261.5 on its face and as applied. [Petitioner's standing to attack the under-inclusiveness of § 261.5 is established by Craig v. Boren, 429 U.S. at 196.]

Conclusion

In light of the precedents of this Court, I conclude that § 261.5 violates the Equal Protection Clause and, accordingly, that the judgment of the California Supreme Court should be reversed.

FOOTNOTE

1/ Section 264 makes unlawful sexual intercourse punishable by imprisonment of up to eight years.

79-1344 MICHAEL M. v. SUPERIOR COURT Argued 11/4/80

(Calif statutory Rape Law)

Jilka (for Petr.)

~~It is unclear~~

As P.S. compelled counsel to concede, as far as facial attack is concerned the presence or absence of force & age of partner (so long as under 18) are irrelevant.

Case is here prior to trial. No facts — but see the Information (A7) & Petr's petition for Writ of Prohibition (A2)

J.P.S. asked why this doesn't destroy Petr's case. Counsel gave no satisfactory answer

Women can be guilty as aider & abettor under this statute. (Penalty is same as for the principal Δ)

v v v

H.A.B. asked if we are not bound by finding of Calif S/Ct as to purpose of this statute. ~~Ques~~ (counsel gave no satisfactory answer). Sz

Agreed that a statute is presumed to be valid, but argued that burden shifts to State to demonstrate a leg. state interest.

CA9 case invalidating Fed statute is being held (Cert. has been filed) pending outcome of this case

?? P. S. asked what real difference does it make to speculate as to purpose of statute. ~~PS~~ (What about what we said ~~about~~ in Craig v Boren - must serve an imp. state interest)

~~Jablonski~~

Kreeglet (Dept AG of Calif)

Compared this case with Craig v. Boren.

J.P.S. noted that if statute punished both, the deterrence would be greater.

Minor females ~~x~~ may be thought to need greated protectwg than ~~no~~ minor males.

60% end up on welfare

80% never ~~end~~ finish ~~no~~ high school

Jump point

Enforcement problems would be severe indeed if both were guilty. Neither would report the crime

In most cases, minor males are rarely prosecuted. Most prosecutions are of adult males. Statute's purpose is to protect the victim — the male rarely suffers ~~a~~ compensable harm.

Read what I said in Bellotti

79-1344 Michael M

Mem. Note.

1. Calif has statute proscribing sexual abuse of all minors.

2. Women alone suffer the physical & psychological problems of pregnancy

3. Classification is based on neutral biological differences in preventing teen preg.

4. State interests are substantial:

~~(a)~~ (a) Many state laws protect minors – & only females suffer the severe consequences of unwed pregnancies

(b) ~~Teen~~ Abortions more frequent.

(c) Welfare

(d) Interest in families

5. There is rational relation between the classification & State interest.

6. Clamping makes differently in rationally related to state's purpose:

(a) Makes more likely to be aggressive - especially with young women.

(b) Either have this type statute or none at all.

Never enforce a statute making both parties subject to prosecution.

79-1344 Michael M v. Superior Court Conf. 11/7/80

The Chief Justice Affirm

State interest in preventing unwed pregnancy of minors is substantial.

Gender classifications are not suspect.

There is a rational basis.

Statute applies to 12 yr. olds as well as 17 5.

Mr. Justice Brennan Reverse

Craig v Boren analysis controls

Mr. Justice Stewart Affirm

Males & females are different

(thank goodness!)

E/P clause is not applicable.

Mr. Justice White Reverse

Agree with WJB

Mr. Justice Marshall Reverse

Woman was equally guilty.

Mr. Justice Blackmun Affirm

Craig supports appearance

Mr. Justice Powell *Affirm*

- Thin statute meets standards of *Craig v Boren*. State interest is substantial, and classification is substantially related to purpose

Mr. Justice Rehnquist *Affirm*

? Not a sterotically classification

Easy case

Mr. Justice Stevens *Reverse*

Must accept purpose as stated by Calif Ct - but this doesn't answer Const. Q

whatever standard is applied, this law is irrational.

Enforcement rational reasoned

BP 3+4

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: DEC 10 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79–1344

Michael M., Petitioner, *v.* Superior Court of Sonoma County (California, Real Party in Interest). | On Writ of Certiorari to the Supreme Court of California.

[January —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented in this case is whether California's "statutory rape" law, § 261.5 of the California Penal Code, violates the Equal Protection Clause of the Fourteenth Amendment. Section 261.5 defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." The statute thus makes men alone criminally liable for the act of sexual intercourse.

In July 1978, a complaint was filed in the Municipal Court of Sonoma County, Cal., alleging that petitioner, then a 17½ year old male, had had unlawful sexual intercourse with a female under the age of 18, in violation of § 261.5. The evidence adduced at a preliminary hearing showed that at approximately midnight on June 3, 1978, petitioner and two friends approached Sharon, a 16½ year old female, and her sister as they waited at a bus stop. Petitioner and Sharon, who had already been drinking, moved away from the others and began to kiss. After being struck in the face for rebuffing petitioner's initial advances, Sharon submitted to sexual intercourse with petitioner. Prior to trial, petitioner sought to set aside the information on both state and federal constitutional grounds, asserting that § 261.5 unlawfully dis-

Renewed although I am not enthusiastic about some of the language, I can live with this - I think. The change on pp 3 & 4 removes the language that troubled me most.

LFP
12/1/14

criminated on the basis of gender. The trial court and the California Court of Appeal denied petitioner's request for relief and petitioner sought review in the Supreme Court of California.

The Supreme Court held that "Section 261.5 discriminates on the basis of sex because only females may be victims, and only males may violate the section." The court then subjected the classification to "strict scrutiny," stating that it must be justified by a compelling state interest. It found that the classification was "supported not by mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant." Canvassing "the tragic human cost of illegitimate teenage pregnancies," including the large number of teenage abortions, the increased medical risk associated with teenage pregnancies, and the social consequences of teenage child bearing, the court concluded that the state has a compelling interest in preventing such pregnancies. Because males alone can "physiologically cause the result which the law properly seeks to avoid" the court further held that the gender classification was readily justified as a means of identifying offender and victim. For the reasons stated below, we affirm the judgment of the California Supreme Court.[1]

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[1] The lower federal courts and state courts have almost uniformly concluded that statutory rape laws are constitutional. See, *e. g.*, *Rundlett* v. *Oliver*, 607 F. 2d 495 (CA1 1979); *Hall* v. *McKenzie*, 537 F. 2d 1232 (CA4 1976); *Hall* v. *State*, 365 So. 2d 1249, 1252–1253 (Ala. Crim App. 1978), cert. denied, 365 So. 2d 1253 (1979); *State* v. *Gray*, 122 Ariz. 445, 595 P. 2d 990, 991–992 (1979); *People* v. *Mackey*, 46 Cal. App. 3d 755, 760–761, 120 Cal. Rptr. 157, 160, cert. denied, 423 U. S. 951 (1975); *People* v. *Salinas*, 191 Colo. 171, 551 P. 2d 703 (1976); *State* v. *Brothers*, 384 A. 2d 402 (Del. Super. Ct. 1978); *In re W. E. P.*, 318 A. 2d 286, 289–290 (DC 1974); *Barnes* v. *State*, 244 Ga. 302, 303–304, 260 S. E. 2d 40, 41–42 (1979); *State* v. *Drake*, 219 N. W. 2d 492, 495–496 (Iowa 1974); *State* v. *Bell*, 377 So. 2d 303 (La. 1979); *State* v. *Rundlett*, 391 A. 2d 815 (Me. 1978); *Green* v. *State*, 270 So. 2d 695 (Miss. 1972); *In re J. D. G.*, 498 S. W. 2d 786, 792–793 (Mo. 1973); *State* v. *Meloon*, 116

As is evident from our opinions, the Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications. The issues posed by such challenges range from issues of standing, see *Orr* v. *Orr,* 440 U. S. 268 (1979), to the appropriate standard of judicial review for the substantive classification. Unlike the California Supreme Court, we have not held that gender-based classifications are "inherently suspect" and thus we do not apply so-called "scrict scrutiny" to those classifications. See *Stanton* v. *Stanton,* 421 U. S. 7 (1975). Our cases have held, however, that the traditional minimum rationality test takes on a somewhat "sharper focus" when gender-based classifications are challenged. See *Craig* v. *Boren,* 429 U. S. 190, 210 n.* (1976) (POWELL, J., concurring). In *Reed* v. *Reed,* 404 U. S. 71 (1971), for example, the Court stated that a gender-based classification will be upheld if it bears a "fair and substantial relationship" to legitimate state ends, while in *Craig* v. *Boren, supra,* at 197, the Court restated the test to require the classification to bear a "substantial relationship" to important governmental objectives."

Underlying these decisions is the principle that a legislature may not "make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of

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N. H. 669, 366 A. 2d 1176 (1976); *State* v. *Thompson,* 162 N. J. Super. 302, 392 A. 2d 678 (1978); *People* v. *Mndange-Pfupfu,* 411 N. Y. S. 2d 1000, 97 Misc. 2d 496 (1978); *State* v. *Wilson,* 296 N. C. 298, 311–313, 250 S. E. 2d 621, 629–630 (1979); *Olson* v. *State,* 588 P. 2d 1018 (Nev. 1979); *State* v. *Elmore,* 24 Ore. App. 651, 546 P. 2d 1117 (1976); *Roe* v. *State,* 584 S. W. 2d 257, 259 (Tenn. Crim. App. 1979); *Ex parte Groves,* 571 S. W. 2d 888, 892–893 (Tex. Crim. App. 1978); *Moore* v. *McKenzie,* 236 S. E. 2d 342–343 (W. Va. 1977); *Flores* v. *State,* 69 Wis. 2d 509, 510–511, 230 N. W. 2d 637, 638 (1975). Contra, *United States* v. *Hicks,* 625 F. 2d 216 (CA9 1980), *Meloon* v. *Helgemoe,* 564 F. 2d 602 (CA1 1977), cert. denied, 436 U. S. 950 (1978) (limited in *Rundlett* v. *Oliver, supra*).

the affected class." *Parham* v. *Hughes,* 441 U. S. 347, 354 (1979) (STEWART, J. plurality). But because the Equal Protection Clause does not "demand that a statute apply equally to all persons" or require "things which are different in fact . . . to be treated in law as though they were the same," *Rinaldi* v. *Yeager,* 384 U. S. 305, 309 (1966), this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. *Parham* v. *Hughes, supra; Califano* v. *Webster,* 430 U. S. 313 (1977); *Schlesinger* v. *Ballard,* 419 U. S. 498 (1975); *Kahn* v. *Shevin,* 416 U. S. 351 (1974). As the Court has stated, a legislature may "provide for the special problems of women." *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 653 (1975).

Applying those principles to this case, the fact that the California Legislature criminalized the act of illicit sexual intercourse with a minor female is a sure indication of its intent or purpose to discourage that conduct.[2] This Court has long recognized that "inquiries into congressional motives or purposes are a hazardous matter," *United States* v. *O'Brien,* 391 U. S. 367, 383–384 (1968); *Palmer* v. *Thompson,* 420 U. S. 217, 224 (1970), and the search for the "actual" or "primary" purpose of a statute is likely to be elusive. *Arlington Heights* v. *Metropolitan Housing Corp.* 429 U. S. 252, 265 (1977); *McGinnis* v. *Royster,* 410 U. S. 263, 276–277 (1973). Here, for example, the individual legislators may have voted for the statute for a variety of reasons. Some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of "chastity," and still others about promoting various religious and moral attitudes towards premarital sex.

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[2] The statute was enacted as part of California's first penal code in 1859, Cal. Sts. 1859, ch. 99, § 47, p. 234, and recodified and amended in 1970.

The justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies. That finding, of course, is entitled to great deference. *Reitman* v. *Mulkey*, 387 U. S. 369, 373–374 (1967). And although our cases establish that the State's asserted reason for the enactment of a statute may be rejected, "if it could not have been a goal of the legislation," *Weinberger* v. *Wiesenfeld*, *supra*, at 648, n. 16, this is not such a case.

We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the "purposes" of the statute, but that the State has a strong interest in preventing such pregnancy. At the risk of stating the obvious, illegitimate pregnancies, which have increased dramatically over the last two decades,[3] pose enormous problems for the mother, the child, and the State. The social, economic and medical consequences associated with teenage childbearing are far-reaching.[4] The mother's "probable education, employment skills, [and] financial resources," for example, make illegitimate pregnancy exceptionally burdensome for both mother and State. *Bellotti* v. *Baird*, 443 U. S. 622, 642 (1979) (POWELL,

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[3] In 1976 approximately one million 15–19 year olds became pregnant, one-tenth of all women in that age group. Two-thirds of the pregnancies were illegitimate. Illegitimacy rates for teenagers (births per 1,000 unmarried females ages) increased 75% for 14–17 year olds between 1961 and 1974 and 33% for 18–19 year olds. Alan Guttmacher Institute, 11 Million Teenagers 10, 13 (1976); C. Chilman, Adolescent Sexuality In A Changing American Society, 195 (NIH Pub. No. 80-1426, 1980).

[4] The risk of maternal death is 60% higher for a teenager under the age of 15 than for a women in her early twenties. The risk is 13% higher for 15–19 year olds. The statistics further show that teenage mothers are more likely to drop out of school and face bleak futures of unemployment. See *e. g.*, 11 Million Teenagers, *supra*, at 23, 25; Bennett & Bardon, The Effects of a School Program On Teenager Mother And Their Children, 47 Am. J. of Orthopsychiatry 671 (1977); Phipps-Yonas, Teenage Pregnancy and Motherhood, 50 Am. J. of Orthopsychiatry 403, 414 (1980).

J.). Of particular concern to the State is that approximately half of all teenage pregnancies end in abortion.[5] And of those children who are born, their illegitimacy makes them likely candidates to become wards of the State.[6]

We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant and they can not escape the profound physical, emotional, and psychological consequences of sexual activity as readily as can men. The statute at issue here protects women from sexual intercourse at an age when those consequences are particularly severe.[7]

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[5] This is because teenagers are disproportionately likely to seek abortions. Center for Disease Control, Abortion Surveillance 1976, 22–24 (1978). In 1978, for example, teenagers in California had approximately 54,000 abortions and 53,800 live births. California Center for Health Statistics, Reproductive Health Status of California Teenage Women 1, 23 (1980).

[6] The policy and intent of the California Legislature evinced in other legislation buttresses our view that the prevention of teenage pregnancy is a purpose of the statute. The preamble to the "Maternity Care for Minors Act," for example, states "The legislature recognizes that pregnancy among unmarried persons under 21 years of age constitutes an increasing social problem in California." Cal. Welfare & Inst. Code § 16145 (West Supp. 1979).

Subsequent to the decision below, the California Legislature considered and rejected proposals to render § 261.5 gender neutral, thereby ratifying the judgment of the California Supreme Court. That is enough to answer petitioner's contention that the statute was the "accidental by product of a traditional way of thinking about women." *Califano* v. *Webster*, 430 U. S. 313, 320 (1977) (quoting *Califano* v. *Goldfarb*, 430 U. S. 199, 223 (1977) (STEVENS, J., concurring)). Certainly this decision of the California Legislature is as good a source as is this Court in deciding what is "current" and what is "outmoded" in the perception of women.

[7] Although petitioner concedes that the State has a "compelling" interest in preventing teenage pregnancy, he contends that the "true" purpose of § 261.5 is to protect the virtue and chastity of young women. As such, the statute is unjustifiable because it rests on archaic sterotypes. What we

The question thus boils down to whether a State may attack the problem of sexual intercourse and teenage pregnancy directly by prohibiting a male from having sexual intercourse with a minor female.[8] We hold that such a statute is

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have said above is enough to dispose of that contention. The question for us—and the only question under the Federal Constitution—is whether the legislation violates the Equal Protection Clause of the Fourteenth Amendment, not whether its supporters may have endorsed it for reasons no longer generally accepted. Even if the preservation of female chasity were one of the motives of the statute, and even if that motive be impermissible, petitioner's argument must fail because "it is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States* v. *O'Brien*, 391 U. S. 367, 383 (1968). In *Orr* v. *Orr*, 440 U. S. 268 (1979), for example, the Court rejected one asserted purpose as impermissible, but then considered other purposes to determine if they could justify the statute. Similarly, in *Washington* v. *Davis*, 426 U. S. 229, 243 (1976) the Court distinguished *Palmer* v. *Thompson*, 420 U. S. 217 (1970), on the grounds that the purposes of the ordinance there were not open to impeachment by evidence that the legislature was actually motivated by an impermissible purpose. See also *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U. S. 263, 270, n. 21 (1976); *Mobile* v. *Bolden*, 466 U. S. 55, 91 (1980) (STEVENS, J., concurring).

[8] We do not understand petitioner to question a state's authority to make sexual intercourse among teenagers a criminal act, at least on a gender-neutral basis. In *Carey* v. *Population Services International*, 431 U. S. 678, 694, n. 17 (1977) (BRENNAN, J., plurality), four Members of the Court assumed for the purposes of that case that a State may regulate the sexual behavior of minors, while four other Members of the Court more emphatically stated that such regulation would be permissible. *Id.*, at 702, 703 (WHITE, J., concurring); *Id.*, at 705–707, 709 (POWELL, J., concurring); *Id.*, at 13 (STEVENS, J., concurring); *Id.*, at 718, (REHNQUIST, J., dissenting). The Court has long recognized that a State has even broader authority to protect the physical, mental, and moral well-being of its youth, than of its adults. See, *e. g.*, *Planned Parenthood of Missouri* v. *Danforth*, 428 U. S. 52, 72–74 (1976), *Ginsburg* v. *New York*, 390 U. S. 629, 639–640 (1968); *Prince* v. *Massachusetts*, 321 U. S. 158, 170 (1944). As JUSTICE POWELL stated in *Bellotti* v. *Baird*, 433 U. S. 622, 635 (1979) "states may validly limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious

sufficiently related to the State's objectives to pass constitutional muster.

Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly "equalize" the deterrents on the sexes

We are unable to accept petitioner's contention that the statute is impermissibly underinclusive and must, in order to pass judicial scrutiny, be *broadened* so as to hold the female as criminally liable as the male. The argument is that this statute is not *necessary* to deter teenage pregnancy because a gender-neutual statute, where both male and female would be subject to prosecution, would also discourage sexual intercourse by young females. The relevant inquiry, however, is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the California Legislature is within constitutional limitations. *Kahn* v. *Shevin*, 416 U. S., at 356, n. 10. Here, the State persuasively contends that a gender-neutral statute would frustrate, rather than further, the purposes of the statute. The State's view is that a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution.

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consequences" because "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Teenage sexual intercourse, and the concommitant problems of pregnancy and abortion, involve such "important affirmative choices with potentially serious consequences" and thus may be validly regulated by the State.

In an area already fraught with prosecutorial difficulties, we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement.[9]

We similarly reject petitioner's argument that § 261.5 is impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant. Quite apart from the fact that the statute could well be justified on the grounds that very young females are particularly susceptible to physical injury from sexual intercourse, see *Rundlett* v. *Oliver*, 607 F. 2d 495 (CA1 1979), it is ludicrous to suggest that the Constitution requires the California Legislature to limit the scope of its rape statute to older teenagers and exclude young girls.

There remains only petitioner's contention that the statute is unconstitutional as it is applied to him because he, like Sharon, was under 18 at the time of sexual intercourse. Petitioner argues that the statute is flawed because it presumes that as between two persons under 18, the male is the culpable aggressor. We find petitioner's contentions unpersuasive. Contrary to his assertions, the statute does not rest on the assumption that males are generally the aggressors. It is instead an attempt by a legislature to prevent illegitimate teenage pregnancy by providing an additional deterrent for men. The age of the man is irrelevant since young men are as capable as older men of inflicting the harm sought to be prevented.

In upholding the California statute we also recognize that

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[9] Petitioner contends that a gender-neutral statute would not hinder prosecutions because the prosecutor could take into account the relative burdens on females and males and generally only prosecute males. But to concede this is to concede all. If the prosecutor, in exercising discretion, will virtually always prosecute just the man and not the woman, we do not see why it is impermissible for the legislature to enact a statute to the same effect.

this is not a case where a statute is being challenged on the grounds that it "invidiously discriminates" against females. To the contrary, the statute places a burden on males which is not shared by females. But we find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts. Nor is this a case where the gender classification is made "solely . . . for administrative convenience," as in *Frontiero* v. *Richardson*, 411 U. S. 677, 690 (1970) or rests on "the baggage of sexual sterotypes" as in *Orr* v. *Orr*, 440 U. S. 268, 283 (1979). As we have held, the statute instead reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male.

Accordingly, the judgment of the California Supreme Court is affirmed.

Affirmed.

GM 12/10/80

To: Mr. Justice Powell

From: Greg Morgan

Re: No. 79-1344: Michael M. v. Sonoma County Superior Court

Although Justice Rehnquist's opinion reaches the result you favor, and largely by the rationale you favor, I note below a few reservations which you might consider.

(1) The opinion's statement of general principles.

Justice Rehnquist rehearses the "law" of gender-based classifications at pages 3-4. In the full paragraph on page 3, as in Railroad Retirement Board v. Fritz, Justice Rehnquist avoids holding that the objective offerred to justify a gender-based statute must be the objective, or a primary objective, actually considered by the Legislature. However, Justice Rehnquist essentially uses the standard of Craig v. Boren, and he does not endorse expressly an "any-conceivable-basis" test. Furthermore, Craig itself did not decide the question whether the objective offerred must be the objective the legislature considered in passing the gender-based classification (429 U.S. at 199 n.7). I therefore do not think that this part of the opinion need trouble you. However, more on this below.

I find one sentence which is more troubling in the next paragraph, which begins at the bottom of page 3 ("Because...") and runs onto page 4. Justice Rehnquist cites Parham v. Hughes for the proposition that a legislature may

treat men and women differently "so long as" the classification is not "entirely unrelated to any differences between men and women ...." Parham does not use that phrase ("entirely unrelated to any differences") to define the outer limit of a state legislature's power to adopt gender-based classifications. Rather, Parham uses that phrase to describe a gender-based classification which a state legislature cannot pass. I therefore think that Justice Rehnquist has distorted the quotation by taking it out of context.

yes

WHR corrected this in 2nd draft

(2) The opinion's statements about discerning legislative purpose.

Beginning with the first full paragraph on page 4, Justice Rehnquist discusses the difficulty of discerning the actual purpose behind legislation. He cites U.S. v. O'Brien, Palmer v. Thompson, and Arlington Heights. Justice Rehnquist cites these cases again, to the same effect, in note 7. These cases say what JusticeRehnquist cites them to say. But as you know, these cases, and the statements in them about discerning legislative purpose, are not addressed to the question whether the Court should require a statutory classification to be related to the "actual" legislative purpose or to a legislative purpose. Rather, these cases are about the elements of proof in a discrimination purpose, and they are sucessive steps toward the Court's decision that one must prove discriminatory intent in order to establish most equal-protection claims.

Thus, I again think that Justice Rehnquist has quoted out of context.

To be sure, Justice Rehnquist could reply that statements in one context about discerning legislative purpose are true in another context as well. But the statement that legislative intent is difficult to discern is not an answer to the question whether the Court should insist that gender-based classifications be based only on the actual legislative purpose. Indeed, one could argue that the difficulty of discerning purpose is one reason for insisting upon a clear legislative statement of purpose.

The bottom line is this: It seems clear to me that Justice Rehnquist cited these cases and statements for two reasons. One, he wished to get around the uncertainty in this case about the legislative purpose behind the statutory-rape law. Two, he wished to suggest, or to lay a foundation for holding, that gender-based classifications may be upheld on a showing of any conceivable basis. It also seems clear to me that these citations are unnecessary to the opinion. The opinion could proceed directly from the end of the first sentence of the full paragraph on page 4 ("Applying ... conduct.") to the beginning of page 5 ("The justification ...."). The opinion would not lose any reasoning or persuasiveness if it did so.

Other than having these reservations, I think that Justice Rehnquist resolves this case as you believe it should be resolved. The crux of his opinion is that men and women are not similarly situated with regard to the risks and dangers of pregnancy. That being so, the state can impose a deterrent at only one of the two, and the State acts reasonably when it imposes the deterrent on men because men have no "natural" deterrent. Justice Rehnquist then dispels the arguments that the classification is "underinclusive" and "overinclusive," and finally he rejects the argument that the statute is unconstitutional as applied to a minor such as Michael M.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 11, 1980

Re: 79-1344 - Michael M. v.
Superior Court of Sonoma County

Dear Bill,

I shall await the dissent.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 11, 1980

Re: No. 79-1344, Michael M. V.
Sonoma County Superior Court

Dear Bill,

I am glad to join your opinion for the Court. It is quite possible that I shall file a concurring opinion. If so, it will be circulated sometime in the next few days.

Sincerely yours,

P.S.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 11, 1980

Re: No. 79-1344 - Michael M. v. Superior Court of Sonoma County

Dear Bill:

I await the dissent.

Sincerely,

T.M.

Justice Rehnquist

cc: The Conference

December 15, 1980

79-1344 Michael M v. Superior Court

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 15, 1980

RE: No. 79-1344 Michael M. v. Superior Court of Sonoma County

Dear Bill:

In due course I shall circulate a dissent in the above.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 17, 1980

Re: No. 79-1344 - Michael M. v. Superior Court

Dear Bill:

I have read your proposed opinion with great care. It is a matter of regret for me that I am unable to join it in its present form. For now, I shall await the dissent. Whether I shall write separately, concurring in the judgment, or merely concur in the result, or even join the dissent, will depend on what else is forthcoming.

My problems center in: (1) a concern that the opinion does not follow the analysis of Craig v. Boren, but has substituted a lower level of scrutiny (Craig itself also involved a statute that burdened males disproportionately to females); (2) petitioner's companion's eager participation, at least initially, in the intimacies of June 3, 1978; (3) a concern about the validity of the opinion's reliance on Washington v. Davis, Palmer v. Thompson, and Arlington Heights, all racial cases, in the present context; (4) concern with footnote 8, particularly its reliance on Lewis' statement in Bellotti v. Baird which I did not join (incidentally, the volume citation is in error) (I also think that the extent to which the States can legislate in this area is still an open question, which prompts me to conclude that footnote 8 is unnecessary); and (5) a feeling that the opinion is somewhat at odds with my steadfast positions on abortion and privacy rights, and with what I thought was the Court's acknowledged commitment to privacy rights.

I say again that I regret to give you this response. I am fully aware of the fact, and am somewhat burdened by it, that my vote may well be the controlling one for this case. I had thought that the California statute was sustainable and, because I did, I voted to affirm. As of now, I am still of that view, but for the reasons stated above could not join your opinion. I shall see what the dissent has to say and then shall come down one way or the other.

Sincerely,

Harry

Mr. Justice Rehnquist
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 31, 1980

Re: No. 79-1344 - Michael M. v. Superior Court of Sonoma County

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 5, 1981

Re: 79-1344 - Michael M. v.
Superior Court of Sonoma County, CA

Dear Bill,

Please join me.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 7, 1981

Re: 79-1344 - Michael M. v. Superior Court of Sonoma County

Dear Bill:

I join.

Regards,

Justice Rehnquist

Copies to the Conference

jpp. 3,5,6,7

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

2nd DRAFT

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SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner,
v.
Superior Court of Sonoma County (California, Real Party in Interest).

On Writ of Certiorari to the Supreme Court of California.

[February —, 1981]

JUSTICE BLACKMUN, concurring in the judgment.

It is gratifying that the plurality recognizes that "[a]t the risk of stating the obvious, teenage pregnancies . . . have increased dramatically over the last two decades" and "have significant social, medical and economic consequences for both the mother and her child, and the State." *Ante*, at 5. There have been times when I have wondered whether the Court was capable of this perception, particularly when it has struggled with the different but not unrelated problems that attend abortion issues. See, for example, the opinions (and the dissenting opinions) in *Beal* v. *Doe*, 432 U. S. 438 (1977); *Maher* v. *Roe*, 432 U. S. 464 (1977); *Poelker* v. *Doe*, 432 432 U. S. 519 (1977); *Harris* v. *McRae*, — U. S. — (1980); *Williams* v. *Zbaraz*, — U. S. — (1980); and today's opinion in *H. L.* v. *Matheson*, *ante*.

Some might conclude that the two uses of the criminal sanction—here flatly to forbid intercourse in order to forestall teenage pregnancies, and in *Matheson* to prohibit a physician's abortion procedure except upon notice to the parents of the pregnant minor—are vastly different proscriptions. But the basic social and privacy problems are much the same. Both Utah's statute in *Matheson* and California's statute in this case are legislatively-created tools intended to achieve similar ends and addressed to the same societal con-

cerns: the control and direction of young people's sexual activities. The plurality opinion impliedly concedes as much when it notes that "approximately half of all teenage pregnancies end in abortion," and that "those children who are born" are "likely candidates to become wards of the State," *Ante*, at 5–6, and n. 6.

I, however, cannot vote to strike down the California statutory rape law, for I think it is a sufficiently reasoned and constitutional effort to control the problem at its inception. For me, there is an important difference between this state action and a State's adamant and rigid refusal to face, or even to recognize, the "significant . . . consequences"—to the woman—of a forced or unwanted conception. I have found it difficult to rule constitutional, for example, state efforts to block, at that later point, a woman's attempt to deal with the enormity of the problem confronting her, just as I have rejected state efforts to prevent women from rationally taking steps to prevent that problem from arising. See, *e. g.*, *Carey* v. *Population Services International*, 431 U. S. 678 (1977). See also *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). In contrast, I am persuaded that, although a minor has substantial privacy rights in intimate affairs connected with procreation, California's efforts to prevent teenage pregnancy are to be viewed differently from Utah's efforts to inhibit a woman from dealing with pregnancy once it has become an inevitability.

Craig v. *Boren*, 429 U. S. 190 (1976), was an opinion which, in large part, I joined, *id.*, at 214. The plurality opinion in the present case points out, *ante*, at 3, the Court's respective phrasings of the applicable test in *Reed* v. *Reed*, 404 U. S. 71, 76 (1971), and in *Craig* v. *Boren*, 429 U. S., at 197. I vote to affirm the judgment of the Supreme Court of California and to uphold the State's gender-based classification on that test and as exemplified by those two cases and by *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975); *Weinberger* v.

Wiesenfeld, 420 U. S. 636 (1975); and *Kahn* v. *Shevin,* 416 U. S. 351 (1974).

I note, also, that § 261.5 of the California Penal Code is just one of several California statutes intended to protect the juvenile. JUSTICE STEWART, in his concurring opinion, appropriately observes that § 261.5 is "but one part of a broad statutory scheme that protects all minors from the problems and risks attendant upon adolescent sexual activity." *Ante,* at 2.

I think, too, that it is only fair, with respect to this particular petitioner, to point out that his partner, Sharon, appears not to have been an unwilling participant in at least the initial stages of the intimacies that took place the night of June 3, 1978.* Petitioner's and Sharon's nonacquaintance

*Sharon at the preliminary hearing testified as follows:

"Q [by the Deputy District Attorney]. On June the 4th, at approximately midnight—midnight of June the 3rd, were you in Rohnert Park?

"A [by Sharon]. Yes.

"Q. Is that in Sonoma County?

"A. Yes.

"Q. Did anything unusual happen to you that night in Rohnert Park?

"A. Yes.

"Q. Would you briefly describe what happened that night? Did you see the defendant that night in Rohnert Park?

"A. Yes.

"Q. Where did you first meet him?

"A. At a bus stop.

"Q. Was anyone with you?

"A. My sister.

"Q. Was anyone with the defendant?

"A. Yes.

"Q. How many people were with the defendant?

"A. Two.

"Q. Now, after you met the defendant, what happened?

"A. We walked down to the railroad tracks.

"Q. What happened at the railroad tracks?

"A. We were drinking at the railroad tracks and we walked over to this bush and he started kissing me and stuff, and I was kissing him back, too, at first. Then, I was telling him to stop—

with each other before the incident; their drinking; their withdrawal from the others of the group; their foreplay, in which she willingly participated and seems to have encour-

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"Q. Yes.

"A. —and I was telling him to slow down and stop. He said, 'Okay, okay.' But then he just kept doing it. He just kept doing it and then my sister and two other guys came over to where we were and my sister said—told me to get up and come home. And then I didn't—

"Q. Yes.

"A. —and then my sister and—

"Q. All right.

"A. —David, one of the boys that were there, started walking home and we stayed there and then later—

"Q. All right.

"A. —Bruce left Michael, you know.

"The Court: Michael being the defendant?

"The Witness: Yeah. We was laying there and we were kissing each other, and then he asked me if I wanted to walk him over to the park; so we walked over to the park and we sat down on a bench and then he started kissing me again and we were laying on the bench. And he told me to take my pants off.

"I said, 'No,' and I was trying to get up and he hit me back down on the bench and then I just said to myself, 'Forget it,' and I let him do what he wanted to do and he took my pants off and he was telling me to put my legs around him and stuff—

"Q. Did you have sexual intercourse with the defendant?

"A. Yeah.

"Q. He did put his penis into your vagina?

"A. Yes.

"Q. You said that he hit you?

"A. Yeah.

"Q. How did he hit you?

"A. He slugged me in the face.

"Q. With what did he slug you?

"A. His fist.

"Q. Where abouts in the face?

"A. On my chin.

"Q. As a result of that, did you have any bruises or any kind of an injury?

"A. Yeah.

aged; and the closeness of their ages (a difference of only one year and 18 days) are factors that should make this case an unattractive one to prosecute at all, and especially to pros-

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"Q. What happened?
"A. I had bruises.
"The Court: Did he hit you one time or did he hit you more than once?
"The Witness: He hit me about two or three times.

. . . . .

"Q. Now, during the course of that evening, did the defendant ask you your age?
"A. Yeah.
"Q. And what did you tell him?
"A. Sixteen.
"Q. Did you tell him you were sixteen?
"A. Yes.
"Q. Now, you said you had been drinking, is that correct?
"A. Yes.
"Q. Would you describe your condition as a result of the drinking?
"A. I was a little drunk." App. 20–23.

CROSS-EXAMINATION

"Q. Did you go off with Mr. *M.* away from the others?
"A. Yeah.
"Q. Why did you do that?
"A. I don't know. I guess I wanted to.
"Q. Did you have any need to go to the bathroom when you were there.
"A. Yes.
"Q. And what did you do?
"A. Me and my sister walked down the railroad tracks to some bushes and went to the bathroom.
"Q. Now, you and Mr. *M.*, as I understand it, went off into the bushes, is that correct?
"A. Yes.
"Q. Okay. And what did you do when you and Mr. *M.* were there in the bushes?
"A. We were kissing and hugging.
"Q. Were you sitting up?
"A. We were laying down.
"Q. You were lying down. This was in the bushes?
"A. Yes.
"Q. How far away from the rest of them were you?

ecute as a felony, rather than as a misdemeanor chargeable under § 261.5. But the State has chosen to prosecute in that

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"A. They were just bushes right next the railroad tracks. We just walked off into the bushes; not very far.

. . . . .

"Q. So your sister and the other two boys came over to where you were, you and Michael were, is that right?

"A. Yeah.

"Q. What did they say to you, if you remember?

"A. My sister didn't say anything. She said, 'Come on, Sharon, let's go home.'

"Q. She asked you to go home with her?

"A. (Affirmative nod.)

"Q. Did you go home with her?

"A. No.

"Q. You wanted to stay with Mr. *M.*?

"A. I don't know.

"Q. Was this before or after he hit you?

"A. Before.

. . . . . .

"Q. What happened in the five minutes that Bruce stayed there with you and Michael?

"A. I don't remember.

"Q. You don't remember at all?

"A. (Negative head shake.)

"Q. Did you have occasion at that time to kiss Bruce?

"A. Yeah.

"Q. You did? You were kissing Bruce at that time?

"A. (Affirmative nod.)

"Q. Was Bruce kissing you?

"A. Yes.

"Q. And were you standing up at this time?

"A. No, we were sitting down.

. . . . . .

"Q. Okay. So at this point in time you had left Mr. *M.* and you were hugging and kissing with Bruce, is that right?

"A. Yeah.

"Q. And you were sitting up.

"A. Yes.

"Q. Was your sister still there then?

"A. No. Yeah, she was at first.

manner, and the facts, I reluctantly conclude, may fit the crime.

"Q. What was she doing?
"A. She was standing up with Michael and David.
"Q. Yes. Was she doing anything with Michael and David?
"A. No, I don't think so.
"Q. Whose idea was it for you and Bruce to kiss? Did you initiate that?
"A. Yes.
"Q. What happened after Bruce left?
"A. Michael asked me if I wanted to go walk to the park.
"Q. And what did you say?
"A. I said, "Yes."
"Q. And then what happened?
"A. We walked to the park.

"Q. How long did it take you to get to the park?
"A. About ten or fifteen minutes.
"Q. And did you walk there?
"A. Yes.
"Q. Did Mr. *M.* ever mention his name?
"A. Yes." *Id.*, at 27–32.

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A B.	L. F. P.	W. H. R.	J. P. S.
							11/15/80	
Join WHR 1/7/81	will dissent 12/15/80	Join WHR 12/11/80	await dissent 12/11/80	await dissent 12/11/80	1st draft Con in judgment 2/4/81	Join WHR 12/15/80	1st draft 12/9/80	dissent typed draft 1/12/81
	1st draft 12/31/80	Concurring opinion 12/17/80	Join w JB 1/5/81	Join WJB 12/31/80	2nd draft 2/6/81		2nd draft 12/18/80	1st printed draft 1/15/81
	2nd draft 2/3/81	2nd draft 12/19/80					3rd draft 1/7/81	
	3rd draft 2/6/81						4th draft 3/20/81	2nd draft 2/20/81

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