OVER THE LAST several decades, the Equal Protection clause has de-
veloped into a viable and dynamic device for constitutional confronta-
tions. Formerly, it was characterized as “the . . . last resort of constitutional arguments . . . .” Since that time, though, it has been employed to challenge a myriad of statutes and regulations. 2 Michael M. v. Superior Court of Sonoma County 3 carries on that tradition. The defendant was a 17 1/2-year-old male charged with violating California’s statutory rape law. 4 Before his trial, the petitioner sought to set aside the information by claiming that section 261.5 unlawfully discriminated on the basis of gender and was underinclusive. The trial court, the California Court of Appeal, and the Supreme Court of California 5 denied the petitioner’s motion, and the United States Supreme Court granted certiorari. 6 In a plurality opinion written by Justice Rehnquist, the Court affirmed the judgment of the California Supreme Court. Before delving into his reasoning, however, Justice Rehnquist gives the reader a caveat: “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.” 7 Indeed, there were five separate opinions produced in this case 8—a fact which reinforces the controversy surrounding the development and the application of the intermediate scrutiny standard. 9

Unlike the Supreme Court of California, the United States Supreme Court did not hold that gender-based classifications were inherently suspect, thus the Court did not apply a strict scrutiny approach. 10 The Court applied

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4 CAL. PENAL CODE § 261.5 (West Supp. 1981) states that “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” is unlawful sexual intercourse.
6 447 U.S. 904 (1980).
7 101 S. Ct. at 1204.
8 Justice Rehnquist announced the judgment of the Court and delivered an opinion in which Chief Justice Burger, Justice Stewart and Justice Powell joined. Justice Stewart filed a con-
curring opinion. Justice Blackmun filed an opinion concurring in the judgment. Justice Brennan filed a dissenting opinion in which Justices White and Marshall joined. Justice Stevens filed a dissenting opinion. Id. at 1202.
9 See infra text accompanying notes 78-81.
10 101 S. Ct. at 1204. The California Supreme Court held that the respondent state had demonstrated a compelling state interest and upheld the statute. 25 Cal. 3d 608, 610, 601 P.2d 572, 573, 159 Cal. Rptr. 340, 341 (1979).
the test articulated in Craig v. Boren: the traditional rational basis test takes on a somewhat "sharper focus"\textsuperscript{11} when gender-based classifications are challenged and the classification must "bear a 'substantial relationship' to 'important governmental objectives.'"\textsuperscript{12} The Court also stated that "the Equal Protection Clause does not 'demand that a statute necessarily apply equally to all persons' or require 'things which are different in fact . . . to be treated in law as though they were the same.'"\textsuperscript{13} In affirming the decision of the California Supreme Court, the United States Supreme Court gave great deference to the state court findings that illegitimate births among teenagers had become a serious social, medical, and economic problem and that the state had a strong interest in trying to prevent them.\textsuperscript{14}

The Court did not feel that a gender-neutral statute would necessarily be as effective as the gender-based statute, and further pointed out that it was not unreasonable for a statute designed to protect minor females to exclude them from punishment.\textsuperscript{15} The petitioner's contention that the statute presumed the male to be the culpable aggressor was rejected.\textsuperscript{16} The statute did not "invidiously discriminate," but was a constitutional attempt by the legislature to prevent illegitimate teenage pregnancies by deterring the male.\textsuperscript{17} The Court noted that the majority of cases on this subject had been decided with the same result.\textsuperscript{18} “[W]e find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts.”\textsuperscript{19}

Justice Stewart, in his concurring opinion, also described California's broad statutory scheme whereby females could be charged with molestation, deviant acts, and aiding and abetting rape.\textsuperscript{20} Neither the plurality, Justice

\textsuperscript{11} 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring).
\textsuperscript{12} 101 S. Ct. at 1204 (citing Craig v. Boren, 429 U.S. at 197).
\textsuperscript{13} 101 S. Ct. at 1204 (quoting Rinaldi v. Yeager, 384 U.S. 305, 309 (1966) and Tigner v. Texas, 310 U.S. 141, 147 (1940)).
\textsuperscript{14} 101 S. Ct. at 1205. Statistics found significant by the Court showed: (1) the risk of maternal death for a teenager under the age of fifteen was 60% higher than for a woman in her early twenties, id. at 1205 n.4 (sources omitted); (2) most teenage mothers dropped out of school and were likely to become wards of the state, id. (sources omitted); (3) 88% of sexually abused minors were female, id. at 1209 n.8 (Stewart, J., concurring) (sources omitted); and (4) the suicide rate for teenage mothers was seven times greater than for teenage girls without children, id. at 1210 n.9 (Stewart, J., concurring) (sources omitted).
\textsuperscript{15} 101 S. Ct. at 1206-07.
\textsuperscript{16} Id. at 1207.
\textsuperscript{17} Id. “The risk of pregnancy itself constitutes a substantial deterrence to young females.” Id. at 1206. “[Y]oung 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 suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity.” Id. at 1205.
\textsuperscript{18} Id. at 1203 n.1 (citing cases).
\textsuperscript{19} Id. at 1207-08.
\textsuperscript{20} Id. at 1208 (Stewart, J., concurring) (footnotes omitted).
Stewart, nor the dissenters questioned the Craig intermediate scrutiny test that was applied. The dispute arose in the application of the test.

The "demand for purity of motive" established by the Equal Protection clause had become increasingly difficult to attach rigid objective tests to. The realization that the two-tiered model was outcome-determinative—that the test applied determined the result reached—led to the emerging middle ground which responded to a broader range of values. The tiers continued to blur with the landmark decision of Reed v. Reed, a unanimous opinion which applied an intermediate level of scrutiny, without describing it as such, to strike down a sexually discriminatory statute. The Reed Court stretched the rational basis test into what was really a disguised balancing test similar to a strict scrutiny approach, but without the demand for a compelling state interest.

The plurality in Frontiero v. Richardson further confused the lower courts by declaring that sex-based classifications were inherently suspect and must be subjected to strict scrutiny. In subsequent cases the Court

21 Id. at 1204, 1211 (Blackmun, J., concurring), 1213 (Brennan, J., dissenting). But see id. at 1219 n.4 (Stevens, J., dissenting) (arguing that the test remains the same; it is the burden of proof which becomes heavier).

Various names have been applied to this type of scrutiny including vigorous scrutiny, intensified means scrutiny, means-focused scrutiny, Gunther, "The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection, 86 HARV. L. REV. 1, 20, 24 (1972); heightened scrutiny, Meloon v. Helgemoe, 564 F.2d 602, 604 (1st Cir. 1977), cert. denied, 436 U.S. 950 (1978) (apparently limited in Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979); and middle-tier approach, Craig v. Boren, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring).

22 Id. at 1204, 1211 (Blackmun, J., concurring), 1213 (Brennan, J., dissenting). But see id. at 1219 n.4 (Stevens, J., dissenting) (arguing that the test remains the same; it is the burden of proof which becomes heavier).

The phrase indicates that legislation motivated by hatred or favoritism is unconstitutional. Tussman and tenBroeck, The Equal Protection of the Laws, 37 CAL. L. REV. 341, 358 (1949).

23 Id. See also Comment, supra note 2.


26 Reed involved an Idaho statute (IDAHO CODE § 15-314 (1931) (repealed 1972)) which provided that between two persons equally qualified to administer estates, males must be preferred to females. See Frontiero v. Richardson, 411 U.S. 677, 684 (1972) (describing Reed as a "departure from the 'traditional' rational-basis analysis").

27 Comment, Legislative Purpose, Rationality, and Equal Protection, 82 YALE L.J. 123, 151 (1972).


29 Id. at 688. The statutes were enacted solely for purposes of administrative convenience. Id. at 688. They provided that spouses of male members of the uniformed services were dependents for purposes of obtaining certain benefits (medical, dental, increased quarters allowance), but that spouses of female members were not dependents unless they were in fact dependent for over one-half of their support. 37 U.S.C. §§ 401 & 403 (1976); 10 U.S.C. §§ 1072 & 1076 (1976).
retreated on the issue of sex as a suspect classification. But with the Court teetering on the brink of applying an intermediate scrutiny standard, the stage was set for the splintering of the members and the seven opinions produced in Craig v. Boren.

The statutes struck down in Craig prohibited the sale of 3.2% beer to males below the age of twenty-one, but only to females below the age of eighteen. The Court, as it did in Michael M., applied the Reed test that gender classifications must serve important governmental objectives and must be substantially related to achieving those objectives. But unlike Michael M., this Court not only had trouble with the application of the test, but also with the correctness of the test itself. Justice Rehnquist vigorously questioned its use, contending that a minimum rationality standard should have been applied, not the "intermediate-level" scrutiny and therefore, the statute should have been upheld. The plurality, however, felt that the Reed test should apply and that the statistics presented by the state did not demonstrate a substantial "relationship between gender and traffic safety." The statute was "discrimination... under the guise of alcohol regulation." It is interesting to note at this point that the plurality opinion in Michael M., which acquiesced in the application of the intermediate scrutiny

30 Stanton v. Stanton, 421 U.S. 7 (1975) (statute specifying lower age of majority for females is unconstitutional since not supported by a rational basis). See also Kahn v. Shevin, 416 U.S. 351 (1974) (upholding a discriminatory statute that provided a $500 exemption from property taxes to widows on the basis of its compensatory purpose).


33 404 U.S. at 76.

34 429 U.S. at 197-98.

35 Id. at 217-18 (Rehnquist, J., dissenting). This dissenter was troubled that the "substantially" language of the test would invite inexpert subjective judgments by the Court. "I would think we have had enough difficulty with the two standards of review which our cases have recognized... so as to counsel weightily against the insertion of still another 'standard' between those two." Id. at 220-21.

Justice Stevens claimed that the two-tiered analysis was "not... a completely logical method of deciding cases," and that the Court has actually employed a single standard. Id. at 212 (Stevens, J., concurring). The most famous characterization, though, and the first time that the Court speaks openly of another tier is found in one of Justice Powell's footnotes which states:

As has been true of Reed and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification.

Id. at 210-11 n.* (Powell, J., concurring) (emphasis added).

36 Id. at 204.

37 Id. at 208. A correlation of 2% to prove that more males than females were involved in auto accidents after drinking 3.2% beer was considered an "unduly tenuous fit." Id. at 200-02.
test, was delivered by Justice Rehnquist who had so valiantly tried to save
the two-tiered approach in Craig.88

Ironically, one of the first cases to follow Craig was Meloon v. Helgemoe,39 a statutory rape case with a defense identical to the defense raised in
Michael M. In Meloon, a New Hampshire prisoner sought habeas corpus relief
from his statutory rape conviction on the ground that the gender-based classifi-
cation contained in the statute violated equal protection.40 The Court of Ap-
peals for the First Circuit affirmed the judgment of the district court, which
had granted the relief,41 and held that the statute violated equal protection.
Although the court felt that the rule was “hardly a precise standard,” it
felt that the reasons presented by the state were insufficient to demonstrate
a “fair and substantial relationship” between the classification and the as-
serted governmental objectives.42

The court quickly distinguished other cases with similar equal protec-
tion challenges as either dealing with forcible rape or having been decided
before the Craig rule was announced.43 Proceeding to the state’s justifica-
tions, the court rejected all of them in turn in an excellently reasoned
opinion. The first two justifications related to the size of the class: first,
the class of potential male victims is smaller because “pre-pubescent males
are physiologically incapable of becoming victims”44 and, second, the class
of potential male offenders is larger, perhaps partially due to pedophilia—a
psychological disorder characterized by an erotic attraction to children.45
Thus the state argued that the statutory classifications were constitutional.

The court, however, reasoned that the first purpose could not support
the statute because (a) a gender-neutral statute would protect all children;
(b) there was no greater enforcement capability with a gender-based stat-
ute; and (c) since only a “slight penetration” was necessary, minor males
were technically able to be victims. A pedophilia argument was unfounded
since there were no statistics to show any specified number or percentage of
deviants.46

88 Compare 101 S. Ct. at 1204 with Craig v. Boren, 429 U.S. 217-18 (Rehnquist, J., dis-
senting).
39 564 F.2d 602 (1st Cir. 1977), cert. denied, 436 U.S. 950 (1978) (apparently limited by
Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979).
for a male to have sexual intercourse with a female under the age of 15, but did not make
it a crime for a woman to have normal sexual intercourse with a male under the age of 15.
42 Id. at 604-05. The scrutiny applied by the court of appeals required, “at a minimum,
. . . that the actual and constitutionally acceptable objectives of New Hampshire’s law be
substantially furthered in fact and reason by the divergent treatment that law extends to
different sexes.” Id. at 609.
43 564 F.2d at 605 n.4.
44 Id. at 605.
45 Id. at 605-06. The state failed to mention whether there were any similar disorders affecting
females. Id. at 606.
46 Id. at 606.
The state's third justification, that minor females were more likely to be physically injured than were males, was controverted by the similar danger to young boys and the "slight penetration" language.\(^47\) The state presented "not an iota of testimony or evidence" to prove its fourth justification, that the legislative purpose of the statute was to prevent pregnancy.\(^48\) The fact that contraceptives were not allowed as a defense to the crime also influenced the court in rejecting the state's reasoning.\(^49\) The court was inclined to believe that the statute was based on outmoded sexual stereotypes.\(^50\)

Much of the same critical analysis, with an added emphasis on the history of the California statutory rape law, is seen in the dissenting opinions of Michael M. in both the state and federal supreme courts.\(^51\)

The court in Meloon expressly pointed out that its holding was limited to the New Hampshire statute in question.\(^52\) This factor was cited by the same circuit when it decided Rundlett v. Oliver,\(^53\) which held that a similar Maine statute did not violate the Equal Protection clause. The petitioner urged the court to apply the Meloon rule, but perhaps because of the severe criticism of the Meloon decision and the apparent number of courts not following it, the court upheld the statute.\(^54\) Judge Campbell's concurring opinion frankly indicated his dissatisfaction with a theory under which "two identical statutes could be held unconstitutional in one instance and constitutional in another simply because of the 'purposes' attributed to [the legislators] . . . who supported them."\(^55\) Judge Campbell also reasoned that courts should avoid declaring laws unconstitutional simply because the legislature has not provided new reasons for old statutes.\(^56\)

\(^{47}\) Id. at 606-08.  
\(^{48}\) Id. at 607.  
\(^{49}\) Id. at 607 n.6.  
\(^{50}\) Id. at 607.  
\(^{51}\) See 25 Cal. 3d at 615-25, 601 P.2d at 572-83, 159 Cal. Rptr. at 345-51 (1979) (Mosk, J., dissenting); 101 S. Ct. at 1213-18 (Brennan, J., dissenting) and 101 S. Ct. at 1218-21 (Stevens, J., dissenting).  
\(^{52}\) 564 F.2d at 609.  
\(^{53}\) 607 F.2d 495 (1st Cir. 1979).  
\(^{54}\) Id. at 503. See 101 S. Ct. at 1203 n.1 (listing cases upholding statutory rape laws) and Comment, The Constitutionality of Statutory Rape Laws, 27 U.C.L.A. L. Rev. 757, 794-95 & n.211, 798 (1980). But see 607 F.2d at 502 n.15, which questions the court's acceptance of the pregnancy prevention rationale as possibly developed "after-the-fact" by the state court and not by the legislature. This is analogous to the dissent's contentions in Michael M., 101 S. Ct. at 1217-18 (Brennan, J., dissenting).  
\(^{55}\) 607 F.2d at 504 (Campbell, J., concurring).  
\(^{56}\) I am especially unwilling to condemn statutes . . . by inferring that, because they were passed in earlier times, they must be tainted by now outmoded moralisms. Religious or moral precepts have been known to have sound — albeit unarticulated — biological, genetic, or social underpinnings. The question for us should be whether the legislation bears scrutiny under presently accepted modes of thought, not whether its supporters may have endorsed it for reasons we can no longer accept. The proper question in my view is whether in today's world we can discern a substantial relationship between the statutory classification and a governmental objective important enough to sustain such a gender-based classification. In making such a judgment, history is perhaps relevant, but far more important is a court's perception of the world around it, and the current interests reasonably to be served.  
Id. at 504 n.3 (Campbell, J., concurring).
Whatever merit, or lack of merit, this view may contain, it seems that practical considerations are the strongest reasons for upholding a gender-based statutory rape law. As suggested earlier, most courts have upheld the laws, if only through strained reasoning. Females raping young males is really not the problem. As Justice Stevens pointed out in his dissent in *Michael M.*, it simply should be impermissible to punish only the male in a joint consensual act. The "sovereign [cannot] . . . govern impartially" where there is no "even-handed enforcement of the law." He also characterized the plurality's pregnancy prevention rationale as "newly found wisdom." Justice Brennan's dissent went even further in proposing that the state did not meet its burden of proof under the intermediate scrutiny test. The plurality placed too much emphasis on the "desirability of achieving the State's asserted . . . goal . . . [rather than] on the fundamental question of whether the sex-based discrimination . . . is substantially related to [achieving] that goal." His opinion is basically supported by the same reasons articulated by the Court in *Meloon v. Helgemoe* and by the California Supreme Court justices dissenting in *Michael M.* Also, at least thirty-seven other states had gender-neutral statutory rape statutes, and contrary to the plurality's belief that a gender-neutral statute would be harder to enforce, Justice Brennan noted that the state had not shown "that those enforcement problems would make such a statute less effective." In fact, Justice Brennan believed that it would be a greater deterrent because minor females could be prosecuted as well.

The plurality's pregnancy prevention rationale was simply not supported by the facts. Statutory rape laws are as old as the 4,000-year-old Code of Hammurabi. Statutory rape was originally a property crime. The history of California's statutory rape law was cogently summarized in the landmark decision of *People v. Hernandez*, which held that a defendant's

58 See 101 S. Ct. at 1203 n.1.
59 Id. at 1221 (Stevens, J., dissenting).
60 Id. at 1219 (Stevens, J., dissenting).
61 Id. at 1215-16 (Brennan, J., dissenting).
62 Id. at 1214 (Brennan, J., dissenting) (first emphasis added).
63 564 F.2d 602.
64 25 Cal. 3d at 615, 601 P.2d at 577, 159 Cal. Rptr. at 345 (Mosk, J., dissenting, joined by Tobriner and Newmann, JJ.).
65 101 S. Ct. at 1216; see Comment, supra note 53, at 765 n.50 for a current list of 39 gender-neutral statutory rape laws. See also Comment, supra note 53, at 760-70 for a discussion of the history and reasoning behind statutory rape laws.
66 101 S. Ct. at 1216 (Brennan, J., dissenting).
67 101 S. Ct. at 1216-17 (Brennan, J., dissenting); see, e.g., Comment, Rape Laws, Equal Protection, and Privacy Rights, 54 TUL. L. REV. 456, 470 (1980).
68 Comment, supra note 54, at 762 (footnote omitted).
69 Id. at 767.
70 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964).
reasonable belief that the prosecutrix had reached the age of consent was a defense.\textsuperscript{71} Just fifteen years before the California Supreme Court declared that pregnancy prevention was the purpose of the statute in \textit{Michael M.}, the court had stated in \textit{Hernandez} that there was a "popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a young woman."\textsuperscript{72} Further evidence of the purpose of the statute was gleaned from an 1896 decision,\textsuperscript{73} and the reasoning was retained in \textit{Hernandez}:

\quote{The protection of society, of the family, and of the infant, demand that one who has carnal intercourse under such circumstances shall do so in peril of the fact . . . .} The age of consent at the time of the Ratz decision was 14 years, and it is noteworthy that the purpose of the rule . . . was to afford protection to young females therein described as ‘infants.’\textsuperscript{74}

Protecting the "sexually naive" minor female from exploitation was the "sound policy" of the \textit{Hernandez} court.\textsuperscript{75} The view that this protection rationale continued to be the purpose of the statute is further supported by the fact that the use of contraceptives was not a valid defense to the statute.\textsuperscript{76} But as \textit{Meloon} and several other cases have pointed out, only males can impregnate females.\textsuperscript{77} Courts are reluctant to strike down discriminatory statutory rape laws, even though nothing even remotely resembling a forcible rape is alleged. So they uphold the laws based upon practical reasons rather than upon logical justifications.\textsuperscript{78}

This explanation is also supported by examining the reasoning of \textit{Michael M.} in relationship to the model of intermediate scrutiny developed by Professor Laurence Tribe. Based on the applicable case law of the last ten years, Tribe's model consists of five elements or "techniques" of intermediate scrutiny.\textsuperscript{79} The most interesting element in comparison to \textit{Michael M.} is number four: "limiting the use of afterthought," or 'no hindsight allowed.' "[I]nquiry into the actual purposes of the rule, as illuminated by its language, its structure, and its history, warrants the rule's invalidation when it

\textsuperscript{71} \textit{Id.} at 536, 393 P.2d at 677-78, 39 Cal. Rptr. at 365-66.
\textsuperscript{72} \textit{Id.} at 531, 393 P.2d at 674, 39 Cal. Rptr. at 362.
\textsuperscript{73} People v. Ratz, 115 Cal. 132, 46 P. 915 (1896).
\textsuperscript{74} 61 Cal. 2d at 533, 393 P.2d at 675, 39 Cal. Rptr. at 363 (quoting 115 Cal. at 135, 46 P. at 916).
\textsuperscript{75} 61 Cal. 2d at 536, 393 P.2d at 677, 39 Cal. Rptr. at 365.
\textsuperscript{76} \textit{Michael M.} v. Superior Court of Sonoma County, 25 Cal. 3d at 620, 601 P.2d at 580, 159 Cal. Rptr. at 348 (Mosk, J., dissenting).
\textsuperscript{77} 564 F.2d at 607; see 101 S. Ct. at 1210 (Stewart, J., concurring).
\textsuperscript{78} See Comment, supra note 67, at 464-65.
\textsuperscript{79} (1) Assessing importance; (2) demanding a close fit; (3) requiring current articulation; (4) limiting the use of afterthought; and (5) permitting rebuttal. \textsc{L. Tribe, American Constitutional Law} at 1082-89 (1978). \textit{See also Fox, supra} note 24, at 535-45 (discussing Professor Tribe's model).
can be defended only with considerations that did not in fact contribute to its enactment.\textsuperscript{80}

If, as Professor Tribe claims,\textsuperscript{81} this requirement is based on the Court's past case law dealing with intermediate scrutiny, since the Court in \textit{Michael M.} did not invalidate the statute in question, the Court's reasoning was not consistent. The Court also did not follow an earlier declaration from \textit{Weinberger v. Weisenfeld}: "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation."\textsuperscript{82} In addition, some of the figures relied upon by the plurality deal with minors younger than those involved in \textit{Michael M.}, where the female was 16½ and the male was 17½.\textsuperscript{83}

One final point left unresolved by the Court concerns the plurality's suggestion that a state may lawfully regulate the sexual behavior of its minors. Justice Rehnquist noted that regulation of the sexual behavior of minors would probably be permissible.\textsuperscript{84} "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."\textsuperscript{85}

In response, Justice Blackmun felt 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 . . . efforts to inhibit a woman from dealing with pregnancy once it has become an inevitability."\textsuperscript{86} Due to numerous split decisions, the due process privacy rights of minors have remained foggy.\textsuperscript{87} This case only perpetuates that lack of clarity. Commentators have observed very truthfully that the Court has avoided the question.\textsuperscript{88} Justice Brennan simply notes in his dissent that "our cases would not foreclose such a privacy challenge."\textsuperscript{89}
Despite the increased sexual activity of today's youth, the courts—including the United States Supreme Court—continue to shed little light on the equal protection problems presented by gender-based statutory rape classifications. Decisions applying the recently developed intermediate scrutiny analysis are numerous and without guiding cohesiveness. Although Michael M. demonstrates that the Justices agree that intermediate scrutiny is the correct test to apply, the actual application by the plurality reveals inconsistent reasoning. Outmoded sexual stereotypes continue to flourish following decisions which permit only one partner of a consensual sexual rendezvous to be criminally punished. Equal protection attacks have not been enormously successful against gender-based statutory rape laws, but with a new member on the Court, and only a plurality decision for guidance, a uniform scheme of judicial analysis may eventually emerge.

RANALD D. SHIELDS

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91 101 S. Ct. at 1204, 1211 (Blackmun, J., concurring), 1213 (Brennan, J., dissenting). But see id. at 1219 n.4 (Stevens, J., dissenting).

92 Although the plurality cites alarming statistics on the consequences of teenage pregnancy, it must be pointed out that in most instances these statistics were compiled while gender-based classification schemes were still in effect. See, e.g., 101 S. Ct. at 1205 nn.3 & 4. Perhaps by enacting gender-neutral statutes (in those states which have not already adopted them) and lowering the age of consent, legislatures would be more realistically expressing societal concern for young females without provoking constitutional challenges to their statutes. Criminal statutes prohibiting forcible rape should be retained to provide societal redress for non-consensual rapes.

93 Justice Sandra Day O'Connor became the first female member of the Court when she was sworn in on September 25, 1981. 39 Cong. Q. 1831 (Sept. 26, 1981).