

CRIMINAL LAW—EQUAL PROTECTION—GENDER-BASED STATUTORY RAPE PROVISION HELD INVALID. *United States v. Hicks*, 625 F.2d 216 (9th Cir. 1980). In *United States v. Hicks*¹ the Ninth Circuit Court of Appeals examined the constitutionality of two federal statutes² that punished males who have carnal knowledge with underaged females. Defendant contended that the statutes violated the fifth amendment guarantee of equal protection³ because they punished only males for the consensual act of heterosexual intercourse.⁴ The Government argued that the statutes' purposes, prevention of unwanted pregnancy and protection of minor females, justified the statutes' sexual classifications,⁵ but offered no evidence to support this contention.⁶

The trial court agreed with defendant's claim and dismissed the indictment.⁷ On appeal, the United States Court of Appeals for the Ninth Circuit affirmed and *held*: In the absence of evidence that punishment of only the male participant in sexual relations with a minor female substantially furthers the protection of the female, such punishment violates the fifth amendment guarantee of equal protection.⁸

Although thirty-nine American jurisdictions have enacted gender-

1. 625 F.2d 216 (9th Cir. 1980). Hicks was charged with a co-defendant, Eli Davis, Jr.

2. 18 U.S.C. §§ 1153, 2032 (1976). Section 1153 provides in relevant part:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, . . . carnal knowledge of any female, not his wife, who has not attained the age of sixteen years . . . shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

The court's ruling on the constitutional validity of the statute was limited to the portion of the statute relating to carnal knowledge. 625 F.2d at 221 n.10.

18 U.S.C. § 2032 (1976) provides:

Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.

Every American jurisdiction has a statute punishing similar conduct. See notes 9 and 10 *infra*. For consistency, this casenote refers to such statutes as "statutory rape provisions" although the various jurisdictions do not consistently use this name.

3. "[T]he Due Process Clause of the Fifth Amendment forbids the federal government from denying equal protection of the laws." *Vance v. Bradley*, 440 U.S. 93, 94 n.1 (1979). *Accord*, *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n.2 (1975). The fourteenth amendment provides similar guarantees against state action: "No state shall . . . deny to any person the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

4. 625 F.2d at 217.

5. *Id.* at 218.

6. *Id.*

7. *United States v. Hicks*, No. 78-56 (D. Ariz. June 19, 1978).

8. 625 F.2d at 221.

neutral statutory rape provisions,⁹ seventeen retain provisions that discriminate on the basis of sex.¹⁰ Like the federal statutes at issue in *Hicks*,¹¹ these provisions discriminate against males in two ways: First, although the provisions seek to deter intercourse involving young females, they provide no protection for young males. Second, while attempting to deter disfavored intercourse, the statutes punish the male, but not the female participant.¹²

The equal protection standard for gender-based classifications is well established. "The burden is on those defending the classification"¹³ to satisfy a two-part test, showing first that the statute "serves important governmental objectives"¹⁴ and second, "that the discriminatory means employed [are] substantially related to the achievement of those objec-

9. See ALASKA STAT. § 11.15.120 (Supp. 1979); A.S. CODE tit. 15, §§ 1103, 1104 (Equity Supp. 1979); ARIZ. REV. STAT. ANN. §§ 13-1404-05 (1978); ARK. STAT. ANN. §§ 41-1803-04, 41-1806 (1977); COLO. REV. STAT. § 18-3-403 (1978); CONN. GEN. STAT. § 53a-71 (1977); FLA. STAT. §§ 794.05, 794.011 (1976); GA. CODE ANN. §§ 26-2018-20 (1978); HAWAII REV. STAT. §§ 707-31 (Supp. 1979); ILL. ANN. STAT. ch. 38, §§ 11-5 to -6 (Smith-Hurd 1979); IND. CODE ANN. § 35-42-4-3 (Burns 1979); IOWA CODE ANN. §§ 709-1, 709-3, 709-4 (West 1979); KAN. STAT. ANN. § 21-3503 (Supp. 1979); KY. REV. STAT. ANN. §§ 510.040 -.060 (Baldwin 1975); LA. REV. STAT. ANN. § 14.42 (West Supp. 1980); ME. REV. STAT. ANN. tit. 17A, § 252-254 (Supp. 1979); MD. CRIM. LAW CODE §§ 463, 464A, 464C (Supp. 1979); MASS. ANN. LAWS ch. 265, § 23 (Michie/Law. Co-op 1980); MICH. STAT. ANN. §§ 28.788(2)-788(4) (Supp. 1980); MINN. STAT. ANN. §§ 609-342, 609-345 (West Supp. 1980); MO. REV. STAT. §§ 566.030, 566.040 (1978); MONT. REV. CODES ANN. §§ 45-5-501 -03 (1979); NEB. REV. STAT. § 28-319 (1979); NEV. REV. STAT. §§ 200.364(3), 200.368, 201.230 (1977); N.H. REV. STAT. ANN. §§ 632A:3, 632A:4 (Supp. 1977); N.J. STAT. ANN. § 2C:14-2 (West Supp. 1980); N.M. STAT. ANN. §§ 30-9-11, 30-9-13 (1978); N.C. GEN. STAT. §§ 14-27.2, 14-27.4 (Supp. 1979); N.D. CENT. CODE §§ 12.1-20-03, 12.1-20-05, 12.1-20-07 (1976); OHIO REV. CODE ANN. §§ 2907.04 (Page 1975); PA. STAT. ANN. tit. 18, § 3122 (Purdon Supp. 1978); R.I. GEN. LAWS §§ 11-37-2, 11-37-4, 11-37-6 (Supp. 1979); S.C. CODE §§ 16-3-630, 16-3-640 (Supp. 1979); S.D. COMP. LAWS ANN. § 22-22-1 (1979); UTAH CODE ANN. § 76-5-40.1 (Supp. 1979); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1980); WASH. REV. CODE ANN. §§ 9A.44.060-.090 (Supp. 1980); WIS. STAT. ANN. § 940.225 (West Supp. 1979-80); WYO. STAT. §§ 6-4-303, 6-4-305 (1977).

10. See 18 U.S.C. § 2032 (1976); ALA. CODE § 13A-6-61 (1978); CAL. PENAL CODE § 261.5 (Deering 1971); DEL. CODE ANN. tit. 11, §§ 703, 767(3) (1979); D.C. CODE ENCYCL. § 22-2801 (West 1967); GUAM PENAL CODE § 261 (1970); IDAHO CODE § 18-6101 (1979); MISS. CODE ANN. §§ 97-3-65, 97-3-67 (1972 & Supp. 1979); N.Y. PENAL LAW §§ 130.25, 130.30, 130.35 (McKinney 1975); OKLA. STAT. ANN. tit. 21, §§ 1111, 1114 (West 1951); OR. REV. STAT. §§ 163.355, 163.365, 163.375 (1979); P.R. LAWS ANN. tit. 33, § 4061 (Supp. 1979); TENN. CODE ANN. §§ 39-3703, 39-3705 (Supp. 1980); TEX. PENAL CODE ANN. § 21.09 (Vernon Supp. 1980); V.I. CODE ANN. tit. 14, §§ 1702-03 (1964 & Supp. 1979); VA. CODE §§ 18.2-61, 18.2-63 (1975); W. VA. CODE §§ 61-8B-2 to -3, 61-8B-5 (1977). See also MODEL PENAL CODE §§ 213.0(d), 213.3(a) (Proposed Official Draft, 1962).

11. See note 2 *supra*.

12. See statutes cited in note 10 *supra*.

13. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980).

14. *Id.* at 150.

tives."¹⁵ When criminal statutes are involved, a "special sensitivity" to the classification is merited.¹⁶ A statute that fails to meet the two-part test is constitutionally invalid.

Equal protection challenges to sexually discriminatory statutory rape provisions have not fared well. Challengers usually focus on the "important governmental objectives" prong of the equal protection test. Defendants question the propriety of protecting young women without similarly protecting young men.¹⁷ An overwhelming majority of courts, however, have held valid the state interest in specially protecting young females, reasoning that young women who engage in intercourse are susceptible to pregnancy,¹⁸ physical and emotional injury,¹⁹

15. *Id.* Thus, in *Wengler* the Court struck down a Missouri Workmen's Compensation provision that automatically paid death benefits to widows, but required widowers to demonstrate dependence on their spouse to receive death benefits. The Court found that the state failed to prove that this system provided substantial administrative convenience.

In *Caban v. Mohammed*, 441 U.S. 380 (1979), the Court invalidated a New York law allowing unwed mothers, but not fathers, to veto adoption of their children. The Court's ruling depended, *inter alia*, on the state's failure to demonstrate that the discriminatory treatment of fathers substantially furthered the state's interest in promoting the adoption of illegitimate children.

In *Craig v. Boren*, 429 U.S. 190 (1976), the Court struck down an Oklahoma law prohibiting the sale of beer to males under the age of twenty-one and to females under the age of eighteen. The Court found the state's statistical evidence insufficient to prove that the discriminatory treatment of males substantially furthered the state's goal of traffic safety. *Id.* at 200-04.

See generally *Califano v. Westcott*, 443 U.S. 76 (1979); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Davis v. Passman*, 442 U.S. 228 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Califano v. Goldfarb*, 430 U.S. 199 (1977). *See also* *Symposium—Sexual Equality Under the Fourteenth and Equal Rights Amendment*, 1979 WASH. U.L.Q. 160, 162-72; Comment, *Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C.L. REV. 529, 541-45 (1979); Comment, *Developing an Equal Protection Standard for Gender Discrimination Cases—Where's the Rub?*, 11 RUT.-CAM. L.J. 293, 294-300 (1980).

16. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). *See also* 10 ST. MARY'S L.J. 320, 323 (1978).

17. *See* cases cited in notes 18-19 *infra*.

18. *See, e.g.*, *Hall v. McKenzie*, 537 F.2d 1232 (4th Cir. 1976); *State v. Gray*, 122 Ariz. 445, 595 P.2d 990 (1979) (en banc); *Michael M. v. Superior Court*, 25 Cal. 3d 608, 601 P.2d 572, 159 Cal. Rptr. 340 (1979), *cert. granted*, 100 S. Ct. 2984 (1980); *People v. McKellar*, 146 Cal. Rptr. 327 (Ct. App. 1978); *Acosta v. State*, 417 A.2d 373 (Del. 1980); *State v. Brothers*, 384 A.2d 402 (Del. Super. Ct. 1978); *In re W.E.P.*, 318 A.2d 286 (D.C. 1974), *aff'd sub nom. Arnold v. United States*, 358 A.2d 335 (D.C. 1976) (en banc); *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979); *State v. Bell*, 377 So. 2d 303 (La. 1979); *State v. Rundlett*, 391 A.2d 815 (Me. 1978); *Olsen v. State*, 95 Nev. 1, 588 P.2d 1018 (1979) (per curiam); *State v. Meloon*, 116 N.H. 669, 366 A.2d 1176 (1976); *State v. Thompson*, 162 N.J. Super. 302, 392 A.2d 678 (1978); *People v. Whidden*, 71 A.D.2d 367, 423 N.Y.S.2d 512 (1979); *People v. Mndange-Pfupfu*, 97 Misc. 2d 496, 411 N.Y.S.2d 1000 (Tompkins County Ct. 1978); *People v. Prainito*, 97 Misc. 2d 66, 410 N.Y.S.2d 772 (Sup. Ct. 1978); *People v. Weidiger*, 96 Misc. 2d 978, 410 N.Y.S.2d 209 (Oneida County Ct. 1978); *People v. Davoli*, 95 Misc. 2d 402, 407 N.Y.S.2d 432 (Onandaga County Ct. 1978); *State v. Manthe*, 38 Or. App. 90, 588

and other harms²⁰ that men do not face. Only two cases have relied on the lack of important governmental objectives to invalidate sexually discriminatory statutory rape provisions. In *Meloon v. Helgemoe*²¹ the court of appeals rejected the objectives that New Hampshire articulated in support of its statutory rape law. The court found that prevention of pregnancy was not an actual objective of the New Hampshire statute,²² and that the danger of physical injury was remote on the facts of the

P.2d 1131 (per curiam), *cert. denied*, 444 U.S. 851 (1979); *State v. Elmore*, 24 Or. App. 651, 546 P.2d 1117 (1976); *State v. Ware*, ___ R.I. ___, 418 A.2d 1 (1980); *Stewart v. State*, 534 S.W.2d 875 (Tenn. Crim. App. 1975); *State v. Housekeeper*, 588 P.2d 139 (Utah 1979); *Flores v. State*, 69 Wis. 2d 509, 230 N.W.2d 637 (1975). *See also* *People v. Salinas*, 191 Colo. 171, 174, 551 P.2d 703, 706 (1976) (en banc) (statute justified by "physiological differences between men and women"); *In re J.D.G.*, 498 S.W.2d 786, 792 (Mo. 1973) (statute justified by protection of women); *State v. Gorman*, 584 S.W.2d 420, 423 (Mo. App. 1979) (following *In re J.D.G.*); *People v. Fauntleroy*, 94 Misc. 2d 606, 612-13, 405 N.Y.S.2d 931, 934-35 (Westchester County Ct. 1978) (statute demonstrated "viable sociological recognition of social and sexual realities").

19. *See* *Rundlett v. Oliver*, 607 F.2d 495 (1st Cir. 1979); *Hall v. McKenzie*, 537 F.2d 1232 (4th Cir. 1976); *State v. Gray*, 122 Ariz. 445, 595 P.2d 990 (1979) (en banc); *Michael M. v. Superior Court*, 25 Cal. 3d 608, 601 P.2d 572, 159 Cal. Rptr. 340 (1979), *cert. granted*, 100 S. Ct. 2984 (1980); *People v. McKellar*, 146 Cal. Rptr. 327 (Ct. App. 1978); *Acosta v. State*, 417 A.2d 373 (Del. 1980); *State v. Brothers*, 384 A.2d 402 (Del. Super. Ct. 1978); *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979); *State v. Bell*, 377 So. 2d 303 (La. 1979); *State v. Rundlett*, 391 A.2d 815 (Me. 1978); *State v. Thompson*, 162 N.J. Super. 302, 392 A.2d 678 (1978); *People v. Whidden*, 71 A.D.2d 367, 423 N.Y.S.2d 512 (1979); *People v. Mndange-Pfupfu*, 97 Misc. 2d 496, 411 N.Y.S.2d 1000 (Tompkins County Ct. 1978); *State v. Wilson*, 296 N.C. 298, 250 S.E.2d 621 (1979); *State v. Ware*, ___ R.I. ___, 418 A.2d 1 (1980). *See also* *State v. Elmore*, 24 Or. App. 651, 546 P.2d 1117 (1976) (males more dangerous than females).

20. *See* *Hall v. State*, 365 So. 2d 1249 (Ala. App.), *cert. denied*, 365 So. 2d 1253 (Ala. 1979) ("animalistic instincts" of some men); *People v. Weidiger*, 96 Misc. 2d 978, 410 N.Y.S.2d 209 (Oneida County Ct. 1978) (stigma and shame of intercourse); *Stewart v. State*, 534 S.W.2d 875 (Tenn. Crim. App. 1975) (venereal disease); *Flores v. State*, 69 Wis. 2d 509, 230 N.W.2d 637 (1975) (stigma and shame of intercourse). Other courts have justified the protection of only young women on a belief that older women are not attracted to young men, and thus there is no need to protect young men. *See* *People v. Mackey*, 46 Cal. App. 3d 755, 120 Cal. Rptr. 157, *cert. denied*, 423 U.S. 951 (1975); *State v. Meloon*, 116 N.H. 669, 366 A.2d 1176 (1976); *State v. Housekeeper*, 588 P.2d 139 (Utah 1978). One court decided that its statutory rape provision had been on the books too long to be open to equal protection challenge. *Ex Parte Groves*, 571 S.W.2d 888 (Tex. Crim. App. 1978). Another court rejected the idea that its statutory rape provision discriminated on the basis of sex. *People v. Green*, 183 Colo. 25, 514 P.2d 769 (1973) (en banc).

21. 564 F.2d 602 (1st Cir.), *aff'g* 436 F. Supp. 528 (D.N.H. 1977), *cert. denied*, 436 U.S. 950 (1978). *See generally* 32 OKLA. L. REV. 159 (1979); 10 ST. MARY'S L.J. 320 (1979). *See also* *Brinson v. State*, 278 So. 2d 317 (Fla. App.), *rev'd on other grounds*, 288 So. 2d 480 (Fla. 1973) (dicta) (violation of equal protection to protect young women from intercourse if men are not similarly protected).

22. 564 F.2d at 607-08.

case²³ and unquantified in general.²⁴ The Eighth Circuit reached a similar result in *Navedo v. Preisser*,²⁵ invalidating the former Iowa statutory rape provision.²⁶

Upon establishing that sex-based statutory rape provisions serve important government objectives, the government must show that the discriminatory means employed by the statute are substantially related to the provision's objectives.²⁷ The fact that males, but not females, are punished for participation in forbidden intercourse is critical because the court's inquiry must focus on whether punishment of only the male is substantially related to protection of the female.

Before *Hicks* only one case directly addressed the propriety of singling out males for punishment.²⁸ In *Michael M. v. Superior Court*²⁹ the California Supreme Court concluded that punishment of the male alone was a permissible means for protecting the minor female and upheld the state's statutory rape law.³⁰ Noting that the female was sub-

23. *Id.* at 608. The court observed: "There is little in this scenario of an adolescent love tryst of a 16 year old boy and a 14 year old girl . . . which invokes the likelihood of physical danger." *Id.*

24. *Id.* The court in *Meloon* carefully narrowed its holding:

We want to take care to indicate the limited nature of our holding. We have found only one particular statutory rape law to be unconstitutional. We have not reflected on nor do we intend to question the constitutionality of the laws of other states. We express no opinion as to whether on a different record some other statute would pass constitutional scrutiny.

Id. at 609. *But see* *Rundlett v. Oliver*, 607 F.2d 495, 501-03 (1st Cir. 1979) (upholding Maine's statutory rape provision upon showing that statute's purpose was to prevent injury and that injury presented substantial danger).

25. 630 F.2d 636 (8th Cir. 1980). In *Navedo* the court first rejected the elimination of physical and emotional trauma as a purpose of the statute on the ground that these dangers had not been quantified, and then found that preventing pregnancy was not an actual purpose of the Iowa statute.

26. The statute at issue, 1925 Iowa Acts ch. 197, § 1, was repealed in 1976 and replaced by a gender-neutral statute. *See* IOWA CODE ANN. § 709.4 (West 1979).

27. *See* note 15 *supra* and accompanying text.

28. Some courts indirectly have found a substantial relationship between punishing only the male and the goal of protecting the female by reasoning that only the male can physiologically cause pregnancy or injury to the female. *See* *People v. McKellar*, 146 Cal. Rptr. 327, 331 (Ct. App. 1978); *State v. Drake*, 219 N.W.2d 492, 495-96 (Iowa 1974) (*dicta*); *People v. Fauntleroy*, 94 Misc. 2d 606, 612-13, 405 N.Y.S.2d 931, 934-35 (Westchester County Ct. 1978); *State v. Elmore*, 24 Or. App. 651, 655, 546 P.2d 1117, 1119 (1976) (Schwab, C.J., concurring). If the female is not involved in the act, however, pregnancy or injury to the female is impossible.

29. 25 Cal. 3d 608, 601 P.2d 572, 159 Cal. Rptr. 340 (1979), *cert. granted*, 100 S. Ct. 2984 (1980).

30. *See* CAL. PENAL CODE § 261.5 (Deering 1971). The statute provides: "Unlawful sexual

ject to prosecution for less serious offenses,³¹ the court justified the disparity in liability by reference to the physical and emotional dangers facing the female in intercourse.³² The court also expressed concern with the difficulty of prosecution if the female was criminally liable and therefore unavailable as a witness.³³

Three justices dissented, rejecting each of the majority's contentions and arguing that the state's failure to hold the male and female equally responsible for consensual intercourse rendered the statute invalid.³⁴ In asserting that the female's greater risks in intercourse fail to justify lesser penalties, the dissent noted that "offenders are not deemed less culpable merely because they may suffer additional punishment from sources outside the legal system."³⁵ The dissent did not share the majority's concern with losing the female as a witness, reasoning that the female was not the only source of proof in all cases, and that if she were, the state could choose to grant her immunity from prosecution.³⁶

In *United States v. Hicks*³⁷ the government argued that the prevention of pregnancy and injury to minor females justifies the sexually discriminatory federal statutory rape provision.³⁸ The court accepted these objectives as suggesting "that Congress had some basis for defining criminal liability for heterosexual contact in terms of the age of the female partner."³⁹ Thus, the Ninth Circuit agreed with the position of the majority of courts⁴⁰ that uphold the protection of young women as an important governmental objective. The court, however, found that the government had failed to produce evidence demonstrating that either of the governmental objectives was substantially furthered by

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." *Id.*

31. 25 Cal. 3d at 613, 601 P.2d at 576, 159 Cal. Rptr. at 344. For other cases relying on the availability of other statutory provisions applicable to the female, see *People v. Mackey*, 46 Cal. App. 3d 755, 760, 120 Cal. Rptr. 157, *cert. denied*, 423 U.S. 951 (1975); *Acosta v. State*, 417 A.2d 373, 376 (Del. 1980); *Barnes v. State*, 244 Ga. 302, 305, 260 S.E.2d 40, 42 (1979); *Moore v. McKenzie*, — W. Va. —, —, 236 S.E.2d 342, 343 (1977).

32. 25 Cal. 3d at 613, 601 P.2d at 576, 159 Cal. Rptr. at 344.

33. *Id.* at 614, 601 P.2d at 576, 159 Cal. Rptr. at 344.

34. *Id.* at 621, 601 P.2d at 580-81, 159 Cal. Rptr. at 348-49 (Mosk, J., dissenting).

35. *Id.* at 622, 601 P.2d at 581, 159 Cal. Rptr. at 349 (Mosk, J., dissenting).

36. *Id.* (Mosk, J., dissenting). The dissent also contended that prevention of pregnancy was not the actual purpose of the provision. *Id.* at 616-22, 601 P.2d at 577-80, 159 Cal. Rptr. at 345-48 (Mosk, J., dissenting).

37. 625 F.2d 216 (9th Cir. 1980).

38. *Id.* at 218.

39. *Id.* at 220 (footnote omitted).

40. See notes 18-20 *supra* and accompanying text.

punishing only the male.⁴¹ Because males of any age could be liable under the statute,⁴² the court refused to accept the bare assertion that the male should be assigned all responsibility for initiating the sexual contact.⁴³ The court was unwilling to accept, without evidence, the proposition that punishing only the male participant deters pregnancy more effectively than punishing only females, or punishing both parties.⁴⁴ The court also rejected the contention that intercourse harms females more often than males.⁴⁵ Finding no evidence that punishing only the male substantially furthers the objective of protecting the female, the court affirmed the dismissal of the indictment.⁴⁶

Hicks properly considered the validity of gender-conscious statutory rape laws under both prongs of the equal protection test.⁴⁷ The decision represents a substantial improvement over the analysis most courts apply in evaluating gender-based statutory rape provisions. The con-

41. 625 F.2d at 220. One of the government's main arguments on appeal was that the defendants had the burden of going forward with the evidence regarding the statute's unconstitutionality. *Id.* at 218. The government was clearly mistaken. See notes 13-16 *supra* and accompanying text.

42. 625 F.2d at 220. Of the seventeen jurisdictions retaining sexually discriminatory statutory rape provisions, eleven provide that males of any age can be liable for intercourse with an underaged female. See CAL. PENAL CODE § 261.5 (Deering 1971); D.C. CODE ENCYCL. § 22-2801 (West 1967); GUAM PENAL CODE § 261 (1970); IDAHO CODE § 18-6101 (1979); MISS. CODE ANN. §§ 97-3-65, 97-3-67 (1972 & Supp. 1979); OKLA. STAT. ANN. tit. 21, §§ 1111, 1114 (West 1951); OR. REV. STAT. §§ 163.355, 163.365, 163.375 (1979); P.R. LAWS ANN. tit. 33, § 4061 (Supp. 1979); TENN. CODE ANN. §§ 39-3703, 39-3705 (Supp. 1980); TEX. PENAL CODE ANN. § 21.09 (Vernon Supp. 1980); V.I. CODE ANN. tit. 14, §§ 1702-03 (1964 & Supp. 1979).

43. 625 F.2d at 220.

44. *Id.*

45. *Id.* The court did observe that other jurisdictions had been presented with sufficient evidence of the danger of physical injury to minor females. *Id.* at 220 n.8 (citing *Rundlett v. Oliver*, 607 F.2d 495 (1st Cir. 1979)). See also *State v. Ware*, ___ R.I. ___, ___, 418 A.2d 1, 4 (1980) ("there is a greater damage as a result of their engaging in sexual intercourse").

It does appear that females under the age of thirteen or fourteen are susceptible to physical injury from intercourse. See *Rundlett v. Oliver*, 607 F.2d 495, 501-02 (1st Cir. 1979); Note, *State v. Heisinger: "Statutory Rape's" Presumption of Incapacity to Consent—Rebuttable or Conclusive?*, 24 S.D. L. REV. 523, 528 (1979); Comment, *Forcible Rape and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 76-77 (1952); 18 S.C. L. REV. 254, 256-57 (1966). Almost all states retaining sexually discriminatory statutory rape provisions, however, punish males for intercourse with women over that age. The physical injury justification cannot support prohibition of intercourse over the age of thirteen or fourteen. Thus, the statutes may be overbroad with respect to this justification. See generally Comment, *The California Statutory Rape Law: A Violation of the Minor's Right to Privacy?*, 12 U. CAL. D.L. REV. 332, 348-49 & n.99 (1979).

46. 625 F.2d at 221.

47. See notes 13-16 *supra* and accompanying text.

ventional analysis considers the importance of the statute's objectives, but ignores the relationship between the discriminatory means employed and the achievement of these objectives.⁴⁸ Until the Government articulates a credible justification for punishing only the male, courts must continue to invalidate gender-based statutory rape provisions. The discriminatory means simply fail to promote the statutory objectives. As the dissent in *Michael M.* properly noted, there is no justification for punishing only male participants of consensual heterosexual intercourse with minors.⁴⁹

If the legislative trend toward repealing gender-based statutory rape provisions continues,⁵⁰ the issue addressed in *Hicks* will become moot. Until that occurs, however, many state courts will continue to reject the *Hicks* analysis.⁵¹ This reaction is unfortunate because *Hicks* should serve as a model for proper analysis under each prong of the equal protection test.⁵² By granting certiorari in *Michael M.*,⁵³ the Supreme Court can adopt the *Hicks* approach and invalidate the California gender-based statutory rape provision.

CONSTITUTIONAL LAW—EQUAL PROTECTION—REFUSAL TO PROVIDE EXPERT WITNESS FOR INDIGENT DEFENDANT DENIES EQUAL PROTECTION. *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980). Appellant wounded one Maybank with a gunshot that paralyzed her and allegedly caused her death eight months later. The State of South Carolina charged appellant, an indigent, with murder.¹ Before trial ap-

48. See note 28 *supra* and accompanying text.

49. See note 35 *supra* and accompanying text.

50. See notes 9 and 10 *supra* and accompanying text.

51. The Supreme Court of Delaware has already rejected the *Hicks* analysis in *Acosta v. State*, 417 A.2d 373, 375 (Del. 1980). The latest state court decision on the question, *State v. Ware*, — R.I. —, —, 418 A.2d 1, 4 (1980), does not refer to *Hicks*, but the court's reasoning implicitly rejects the *Hicks* analysis. By contrast, the single federal court that has considered the question since *Hicks* apparently was influenced significantly by the *Hicks* analysis. *Navedo v. Preisser*, 630 F.2d 636 (8th Cir. 1980).

52. See notes 13-16 *supra* and accompanying text.

53. The Supreme Court granted certiorari in *Michael M.* on June 9, 1980. 100 S. Ct. 2984 (1980).

1. The state originally charged appellant with assault and battery with intent to kill, but it changed the charge to murder following Maybank's death. *Williams v. Martin*, 618 F.2d 1021, 1023 (4th Cir. 1980).