The California Statutory Rape Law: A Violation of the Minors' Right to Privacy?

This article explores the parameters of the minors' right to privacy as it relates to the California statutory rape law, California Penal Code section 261.5. The article argues that the California statutory rape provision unjustifiably intrudes upon the female minors' right to privacy. Additionally, it maintains that the public interests sought to be protected by the law are better served by the California forcible rape statute.

In California today large numbers of adolescents are sexually active.[1] The state, however, still considers this behavior criminal. California prosecutes males who engage in acts of sexual intercourse with females under the age of eighteen under the statutory rape law.[2] A guilty defendant may be punished for his actions as a misdemeanant or a felon.[3] This law has already been challenged as a denial of the constitutional right to equal protection of the laws.[4] The attack alleged that sex-based discrimination is uncon-

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[1] *See* text accompanying notes 69 to 76 *infra*.

[2] CAL. PENAL CODE § 261.5 (West Cum. Supp. 1979) "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 eighteen years."

[3] CAL. PENAL CODE § 264 (West Cum. Supp. 1979)

> Rape, as defined in Section 261 [CAL. PENAL CODE], is punishable by imprisonment in the state prison for three, six, or eight years. Unlawful sexual intercourse, as defined in Section 261.5 [CAL. PENAL CODE], is punishable either by imprisonment in the county jail for not more than one year or in the state prison, and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison: provided, that when the defendant pleads guilty to an offense under Section 261.5 [CAL. PENAL CODE] the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison.

[4] In a case presently pending before the California Supreme Court, People v. McKellar 81 Cal. App. 3d 367, 146 Cal. Rptr. 327 (1978), *appeal docketed* No. 78-109 (Cal. Sup. Ct. July 17, 1978), the defendant pled guilty to one county of CAL. PENAL CODE § 261.5, and a certificate of probable cause was issued to

stitutional because only females are protected by the statute.[5]

The issue of equal protection is not the only constitutional question raised by California's statutory rape statute. In preventing minor females from engaging in sexual intercourse, the law arguably intrudes upon the minor's fundamental right to privacy. This article examines the statutory rape law and its effects. It concludes that recent United States Supreme Court decisions have created constitutional protections for minors who decide to engage in sexual activity, and that the statutory rape law significantly burdens those activities. It also concludes that the state interests alleged to promote the statute are more appropriately met by the existing forcible rape statute.

I. The Privacy Right and Sexual Intercourse

The keystone of any argument that California's statutory rape law[6] impermissibly burdens the minors right to privacy must be that minors have a constitutionally protected right to engage in sexual intercourse. The United States Supreme Court however has not yet specifically recognized a right to sexual intercourse.[7] In fact, when confronted with the opportunity to recognize such a right, the Court expressly reserved the question.[8] While an examination of the Court's language cannot be predicted with confidence that the Court will ever specifically find a fundamental right to engage in private consensual acts of sexual intercourse, a review of the Court's reasoning in various cases does permit the reasonable conclusion that there is such a fundamental right.

The United States Supreme Court has ruled that privacy is a fundamental right protected by the Constitution.[9] This right has

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pursue the constitutional issue. The defendant asserted that for the purposes of the statute, the sexes are similarly situated and the statute constitutes a *per se* violation of the equal protection clause. 81 Cal. App. at 370, 146 Cal. Rptr. at 329.

[5] *Id.*

[6] Cal. Penal Code § 261.5 (West Cum. Supp. 1979).

[7] L. Tribe, American Constitutional Law 941 (1978).

[8] "We observe that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." Justice Brennan for the plurality, Carey v. Population Servs. Int'l, 431 U.S. 678, 694 n.17 (1977).

[9] "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those rights that help give them life and substance. . . . Various guarantees create zones of privacy." Justice Douglas in the majority opinion, Griswold v. Connecticut, 381 U.S. 479, 484 (1964). "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485.

been found to include the rights to use contraceptives,[10] to decide whether to bear or beget a child,[11] and to make decisions regarding marriage.[12] Although none of these rights specifically include sexual intercourse, they are all related to it. The decision to bear or beget makes necessary the decision to have sexual intercourse. Private acts of sexual intercourse are also fundamental to the marital relationship. It seems unreasonable to extend constitutional protection to contraception, abortion, marriage, and the family without similarly according protection to the sexual act which is intricately involved with these other rights.

An examination of the language used by the courts in other privacy cases indicates that a right to engage in private sexual intercourse is implicit in the cases. The Court defines the right to privacy as it relates to family life and personal autonomy[13] as

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[10] Griswold v. Connecticut, 381 U.S. 479 (1964) struck down a Connecticut law preventing married couples from using contraceptives on the theory that the statute violated the privacy right. The Court in Eisenstadt v. Baird, 405 U.S. 438 (1972), later found this right extended to unmarried individuals. While striking down a contraceptive statute on a theory of equal protection, in *dicta* the *Eisenstadt* court stated that the right to privacy was an individual right. 405 U.S. at 453. In Roe v. Wade, 410 U.S. 113 (1973), the Court held the right of personal privacy included the decision to abort, but that this right must be weighed against the important interests of the state. In Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), the Court found that a statute prohibiting the sale of contraceptives to minors violated their right to privacy.

[11] The privacy right was first characterized as the "decision whether to bear or beget" in the *dicta* of Eisenstadt v. Baird 405 U.S. 438, 453 (1972). This language was adopted and applied to adults in Planned Parenthood v. Danforth, 428 U.S. 52 (1976). That case found unconstitutional a statute requiring written consent of the spouse for an abortion on a married woman, and parental consent for a minor's abortion. This characterization of privacy as "the decision whether to bear or beget" was later applied to minors buying contraceptives in Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

[12] Skinner v. Oklahoma, 316 U.S. 535 (1942) struck down an Oklahoma statute providing for compulsory sterilization of habitual criminals who had been convicted two or more times for crimes of moral turpitude. The Court in an opinion by Justice Douglas stated that marriage is one of the basic civil rights of man. *Id.* at 541. In Loving v. Virginia, 388 U.S. 1 (1967) the Court found a Virginia law banning interracial marriages also denied the fundamental freedom to marry. The Court recently reaffirmed this position in Zablocki v. Redhail 434 U.S. 374 (1978).

[13] The term family life and personal autonomy is sometimes used to refer to the privacy rights protected under Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), Planned Parenthood v. Danforth 438 U.S. 52 (1976), Roe v. Wade 410 U.S. 113 (1973), Eisenstadt v. Baird, 405 U.S. 438 (1972), Griswold v. Connecticut, 381 U.S. 479 (1964) to distinguish them from the privacy issues governed by the Fourth and Fifth Amendments. *See* E. BARRETT, CONSTITUTIONAL LAW, CASES AND MATERIALS 697 (5th ed. 1977), and Note, *Constitutional Protec-*

the right to make decisions to "bear or beget."[14] As stated in *Planned Parenthood v. Danforth*[15] this definition is not limited to the marital relationship.[16] While the word bear indicates the giving of birth to offspring,[17] the word beget has been defined as the act of procreating—the entire process of bringing a new individual into the world.[18] Conception, ordinarily achieved through sex-

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tion for Personal Liberty, 48 N.Y.U.L. REV. 670, 693 (1973).

[14] In Eisenstadt v. Baird, 405 U.S. 438 (1972), the appellant gave contraceptive foam to a member in the audience at a University lecture in violation of a Massachusetts statute which prohibited distribution of contraceptives to unmarried persons. Justice Brennan's plurality opinion held that distinguishing the availability of contraceptives based on marital status was a violation of equal protection. In *dicta*, the Court stated that the right of privacy was the right of the individual to make the decision whether to bear or beget. 405 U.S. at 453. While this definition of privacy was only *dicta* in *Eisenstadt*, it was subsequently adopted by the Court as controlling in two later cases. Planned Parenthood v. Danforth 428 U.S. 52 (1975), quoted the *Eisenstadt* definition in finding the requirement of written consent of a spouse prior to an abortion to be unconstitutional. *Id.* at 70 n.11. In Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), the Court found unconstitutional a statute prohibiting the sale of contraceptives to persons under sixteen. The Court applied the *Eisenstadt* definition of the right to privacy by stating: "Eisenstadt v. Baird, . . . characterized the protected right as the '*decision* whether to bear or beget a child'." 405 U.S., at 453 (emphasis added.)" Carey v. Population Servs. Int'l, 431 U.S. at 687.

[15] 428 U.S. 52 (1976). The Court in *Danforth* was presented with the constitutionality of consent restrictions of both adults and minors seeking abortions. The Court in dealing with the privacy right of the adult referred specifically to the definition originating in *Eisenstadt*, 428 U.S. 52, 70 n.11 (1975). In finding a parental consent restriction on minors unconstitutional, the Court simply referred to the minor's right of privacy without using the "bear and beget" language. *Id.* at 74.

> [16] As the Court recognized in Eisenstadt v. Baird, 'the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with an intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single to be free from unwarranted govermental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' 405 U.S. at 453 (emphasis in original).

428 U.S. 52, 70 n.11 (1975).

[17] Since the Court only defines "bear" in the context of the facts before the Court, it is not possible to know the exact parameters of these terms. The dictionary definition does reveal that the common usage of "bear" includes giving birth. *See, e.g.*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 191 (3d ed. 1966) which defines "bear" as "to give birth of (offspring): bring forth young."

[18] Although the exact definition intended by the Court has never been expressed, in common usage, "beget" refers to procreation. See, e.g., the OXFORD ENGLISH DICTIONARY 766 (1961) which defines "beget" as "to procreate, to generate: usually said of the father, but sometimes of both parents" and DORLAND'S

ual intercourse, initiates the development of new life, leading to the conclusion that procreation includes sexual intercourse. This conclusion is also indicated when one views the right to bear or beget in the context of the male. The Court has consistently used the terms "bear and beget" together, applying them generally to the privacy rights of individuals, and not specifically to males or females.[19] The Court in *Danforth,*[20] however, refused to grant the male the right to prevent his wife from obtaining an abortion. In that case the Court found that a statute requiring the husband's signature for an abortion was unconstitutional, thereby refusing him the right to decide unilaterally to allow the fetus to be born.[21] If the male does not have the right to decide whether to bear the child, the only remaining decision for the male is the right to decide to conceive. If the Court does not allow the male the right to engage in sexual intercourse, then the right to bear or beget as it applies to males would be meaningless. Since sexual intercourse involves both a male and female, it would be unreasonable to accord the right to sexual intercourse to males without similarly according it to females. If this interpretation is correct, the privacy right will include the right to make decisions relating to procreation. It would make little sense to recognize a right to make the decision whether to bear or beget and to prohibit the act necessary to bring the decision into reality.

If the right to bear or beget implies that adults have the right to engage in sexual intercourse, then such a right should be extended to minors. The United States Supreme Court in *Planned Parenthood v. Danforth*[22] noted that constitutional rights do not "mature and come into being magically only when one attains the state defined age of majority."[23] Specifically the Court also recognized that minors have privacy rights.[24] The *Danforth* Court

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ILLUSTRATED MEDICAL DICTIONARY 1223 (24th ed. 1965) which defines "procreate" as "the entire process of bring a new individual into the world."

[19] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Planned Parenthood v. Danforth, 428 U.S. 52, 70 (1976); Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977); For a description of these cases, *see* note 11 and 14 *supra.*

[20] 428 U.S. 52 (1976).

[21] *Id.* at 70.

[22] 428 U.S. 52 (1976).

[23] *Id.* at 74.

[24] In Planned Parenthood v. Danforth, 428 U.S. 52 (1976) the Court was faced with the constitutionality of two sections of the state abortion statutes. One section required consent from the spouse prior to permitting a married woman to have an abortion. The Court resolving the question of the spousal consent statute stated: " . . . we cannot hold that the state has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from

found a consent requirement for a minor's abortion violated the minor's privacy right.[25] A similar attitude toward the minor's right to privacy was reflected in Justice Brennan's opinion in *Carey v. Population Services International.*[26] Speaking for the plurality, the Justice stated that minors have the right to make decisions affecting procreation.[27] Thus the minors' right to privacy originating in *Danforth* was clarified as the right to decide whether to bear or beget. This right, as suggested in this article, should include the right to engage in sexual intercourse.[28]

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terminating her pregnancy when the state itself lacks that right." 428 U.S. 52, 70 n.11 (1976). "As the Court recognized in Eisenstadt v. Baird, . . . (i)f the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* The second section of the abortion statute required parental consent prior to permitting a minor to have an abortion. The Court then impliedly extended the right of privacy to minors.

> Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

Id. at 74.

[25] *Id.*

[26] 431 U.S. 678 (1977).

[27] "Of particular significance to the decision of this case, the right to privacy in connection with decisions affecting procreation extends to minors as well as adults." *Id.* at 693.

[28] It is reasonable to argue that the minor's privacy right includes sexual intercourse. This extension is consistent with the Court's extending minor's constitutional rights in other areas.

> Thus minors are entitled to constitutional protection for freedom of speech, Tinker v. Des Moines School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed. 731 (1969) West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); equal protection against racial discrimination, Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); due process in civil contexts, Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed. 725 (1975); and a variety of rights of defendants in criminal proceedings, including the requirement of proof beyond a reasonable doubt, *In re* Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970), the prohibition of double jeopardy, Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed. 2d 346 (1975), the right to notice, counsel, confrontation, and cross-examination, and not to incriminate oneself, In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967), and the protection against coerced confessions, Gallegos v. Colorado, 370 U.S. 49, 87 S. Ct. 1209, 8 L.Ed. 2d 5 (1962); Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948).

Carey v. Population Servs. Int'l, 431 U.S. 692 n.14, (1977).

II. The Level of Judicial Scrutiny Accorded the Minor's Right to Privacy

Although the Supreme Court has recognized the minor's right to privacy, the Court has not accorded this right to make decisions with respect to sexual matters the same degree of protection. In the case of adults, the Court has classified the right of privacy as fundamental.[29] Accordingly, any burden on the adult's freedom of choice in such matters can be justified only by a compelling state interest. The Court first used the compelling state interest test to examine the right of privacy asserted in *Roe v. Wade*.[30] The Court in *Roe* found an absolute prohibition on abortion unconstitutional by subjecting state legislation to strict scrutiny and requiring the state to show a compelling state interest.[31] In *Carey*[32] the plurality reaffirmed use of the compelling state interest test in reviewing the privacy rights of adults.[33]

In the case of minors, however, the Court permits a greater amount of state regulation.[34] Unfortunately, the Court has not defined clearly the degree to which minors may be regulated. Nor is it clear which level of scrutiny the Court will use in examining state intrusions on the minor's privacy right. *Planned Parenthood v. Danforth*[35] currently provides the most definitive statement of

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[29] "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations of those rights that help give them life and substance. . . . Various guarantees create zones of privacy." Griswold v. Connecticut, 381 U.S. 479, 484 (1964). "The present case, then, concerns a relation lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485.

[30] "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest'." Roe v. Wade, 410 U.S. 113, 155 (1972).

[31] *Id.* at 153-154.

[32] 431 U.S. 678 (1977).

[33] "'Compelling' of course is the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Id.* at 686 (1977).

[34] This test is apparently less rigorous than the "compelling state interest test" applied to restrictions on the privacy rights of adults. *See, e.g.*, n.16, *infra*. Such lesser scrutiny is appropriate both because of the State's greater latitude to regulate the conduct of children, Prince v. Massachusetts, 321 U.S. 158 (1944); Ginzberg v. New York, 390 U.S. 692 (1968), and because the right of privacy implicated here is "the interest in independence in making certain kinds of decisions," Whalen v. Roe, 429 U.S. 589, 599-600 (1977), and the law has generally regarded minors as having a lesser capability for making important decisions. . . .

431 U.S. 678, 693 n.15 (1977).

[35] 428 U.S. 52 (1976).

the Court's treatment of intrusions on a minor's rights. In *Danforth* the Court invalidated a Missouri statute requiring parental consent before a minor could obtain an abortion.[36] The Court applied the test of whether there was a significant state interest not present in the case of an adult to determine whether the state parental consent requirement constituted an unconstitutional infringement of the minor's right.[37] The significant state interest test was reiterated and applied in *Carey v. Population Services International.*[38] The Court noted in *Carey* that "This test is apparently less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults."[39] Although this test appears to treat minors as a separate class, evoking visions of an equal protection analysis, *Carey* does not expressly support such a position. The Court has never characterized the test as part of an equal protection analysis. Moreover, in establishing the level of scrutiny to be applied, the Court focused on the right to privacy.[40] Although the Court acknowledged the fact that different treatment was necessary because minors as a class were involved,[41] it implied that the level of scrutiny is largely determined by the right rather than the class.[42] Thus, a due process rather than an equal protection analysis seems to be appropriate.[43]

In addition to requiring a significant state interest for laws which infringe the privacy rights of minors, the *Carey* court also said that the state cannot exercise an absolute and possible arbitrary veto over the minor's exercise of the privacy right.[44] The Court in *Carey* did not decide whether a statute infringing a

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[36] *Id.* at 74.

[37] "State restriction inhibiting privacy rights of minors are valid only if they serve any significant state interest . . . that is not present in the case of an adult." Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).

[38] 431 U.S. 678, 693 (1977).

[39] *Id.* at 693 n.15.

[40] *Id.* at 693.

[41] *Id.* at 693 n.15.

[42] *Id.*

[43] It is worth noting, however, that the Court has recently been establishing the contours of a constitutionally protected interest in privacy without using the equal protection clause. In a series of cases, the Court has held that the interest in privacy is a "liberty" protected by the due process clause. These cases have focused on the scope of the protection accorded rather than on the classifications and their relationships to the state interests involved.

E. Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U.L. REV. 89, 120 (1976).

[44] *Id.* at 693.

minor's privacy rights, thereby invoking the significant state interest test, must be narrowly drawn to express only those interests, as in cases requiring a compelling state interest test.[45] However, the plurality in *Carey* analogized to the language in *Roe v. Wade*[46] requiring statutes which infringe on adults privacy rights to be narrowly drawn to express only the legitimate state interest at stake.[47] By using the *Roe* court's language, *Carey* laid the groundwork for permitting the *Roe v. Wade* requirement of a narrowly drawn statute to be applied when the significant state interest test is involved.[48] If the Court finds a statute is not narrowly enough drawn, it may void it for overbreath.[49]

Applying these modes of analysis to California's statutory rape law this article will examine: the burden imposed by law on the minor's privacy right and the state interests furthered by the statute, including their reasonableness and the availability of less intrusive means. Since this article has already dealt with the nature of the minor's right to engage in sexual intercourse,[50] the next phase of the analysis examines how California's statutory rape law burdens this right.

III. THE BURDEN

California's statutory rape law burdens the minor's right to privacy by punishing any male who has sexual relations with a minor female not his wife,[51] whether or not she consents to intercourse.[52] It also infringes on the minor female's right because it

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[45] *Id.* at 686.

[46] 410 U.S. 113 (1972).

[47] Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977) (*citing* Roe v. Wade, 410 U.S. 113 (1972)).

[48] Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977) (*citing* Roe v. Wade, 410 U.S. 113, 155 (1972)).

[49] "A law is void on its face if it 'does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise' of protected expressive or associated rights." L. TRIBE, CONSTITUTIONAL LAW § 12-24 at 710 (1978) (*quoting* Thornhill v. Alabama, 310 U.S. 88, 97 (1940)).

[50] *See* text accompanying notes 6 to 49 *supra*.

[51] *Set forth in* notes 2 & 3 *supra*.

[52] In People v. Hernandez, 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P.2d 673 (1964) the defendant was charged with statutory rape and found guilty by a court sitting without a jury. The female victim of the offense was 17 years and 9 months of age, and voluntarily engaged in the act of sexual intercourse with the defendant. The defendant appealed and contended the trial court had erred in refusing to admit evidence to establish his good faith, reasonable belief that the female was 18. The Court held that such good faith, reasonable belief established a lack of criminal intent sufficient to establish a defense.

deprives her of sexual partners. Although the proportion of California's population convicted under this statute is small, the possibility of prosecution does exist.[53] Thus, unless a minor female is engaging in intercourse with her husband, any sexual act she engages in with a male gives rise to a crime which may be prosecuted if reported. Even if the threat of prosecution actually does not inhibit minors' decisions in this area, the fact remains that the threat is real and can result in incarceration of the female minor's sexual partner. Additionally, since the prosecution must prove the act of intercourse beyond a reasonable doubt in order to convict under the statute, the female risks the social stigma, ostracism and loss of reputation which may flow from having her private activities made part of a public record.[54]

The court in *dicta* detailed the role of consent in the offense:

> [T]he lack of consent of the female is not an element of the offense. In a broader sense, however, the lack of consent is deemed to remain an element but the law makes a conclusive presumption of the lack thereof because she is presumed too innocent and naive to understand the implications and nature of her act.

61 Cal. 2d at 531, 39 Cal. Rptr. at 362, 393 P. 2d at 674.

While *Hernandez* was decided during the time statutory rape was part of CAL. PENAL CODE § 261, 1913 CAL. STATS. 212, ch. 122 (current version at CAL. PENAL CODE § 261 and § 261.5), the forcible rape statute, the case of People v. McKellar 81 Cal. App. 3d 367, 146 Cal.Rptr. 327 (1978), *appeal docketed* No. 78-109 (Cal. Sup. Ct., July 17, 1978) has reaffirmed this idea under the new CAL. PENAL CODE § 261.5. In *McKellar,* the defendant claimed the statute violated due process because it created an unreasonable conclusive presumption as to the absence of consent. The court simply noted: "On this argument appellant is raising the proverbial straw man. The section is not, strictly speaking, dealing with a presumption, of even an inference. It is not concerned with presumptions and consent is not an element of the crime. The section simply prohibits the act defendant comitted." 81 Cal. App. 3d 67, 70 n.2, 146 Cal. Rptr. 327, 329 n.2. For further discussion of People v. McKellar, *see* note 4 *supra. See also Forcible and Statutory Rape: An Exploration of the Operation and Objective of the Consent Standard,* 64 YALE L. REV. 54 (1952).

[53] California Department of Justice, Bureau of Criminal Statistics indicated that in 1977 there were 324 adult arrests under CAL. PENAL CODE § 261.5. One hundred eighty-two of those arrests resulted in conviction. During the year 74 minor males were charged as adults with violation of the section. The number of actual convictions of minors is not available. Telephone conversation with Bruce Kaspari, Statistics Analyst, Bureau of Criminal Statistics, Sacramento, California. (1977 Disposition Trees, Cal. Penal Code § 261.5).

[54] The corpus delecti, or body of the crime, must be independently established in order to convict the defendant. 1 CALIFORNIA CRIMINAL LAW PRACTICE (Cal. Cont. Ed. Bar 1964) § 11. 10. Thus to convict defendants under PENAL CODE § 261.5 the prosecution must establish for the finder of fact the act of sexual intercourse between the defendant and the minor. For discussion of stigma involved in identification of a rape victim *see,* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

IV. The State Interests

The state justifies imposing the burden of the statutory rape law on the minor's privacy right by alleging three state interests: preventing unwanted pregnancy,[55] protecting minors from sexual victimization,[56] and preventing emotional or physical trauma to the minor.[57] Before examining these interests however, this article will explore the assumptions which gave rise to this statute.

The original reasons for enacting the California statutory rape law are uncertain since legislative intent and case law from that period are either scarce or non-existent.[58] In 1896, the California Supreme Court indicated that the law was intended to protect society, the family, and the infant.[59] Such a broad pronouncement of purpose, however, did little more than to say that the statute was enacted pursuant to the state's police powers. Recently the court has been more specific in its attempt to describe

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[55] "We agree with the argument of the Attorney General that the Legislature in enacting 261.5 [Cal. Penal Code] was concerned primarily with the 'pregnancy prevention rationale' with females under 18." People v. McKellar, 81 Cal. App. 3d 367, 373; 146 Cal. Rptr. 327, 331.

[56] In People v. Mackey, 46 Cal. App. 3d 755, 120 Cal. Rptr. 157, *cert. denied*, 432 U.S. 951 (1975), the defendant appealed from an order committing him to the Youth Authority after a jury found him guilty of a violation of Cal. Penal Code § 261.5. His basis for the appeal was that the statute violated the equal protection clause of the United States Constitution. The court, in rejecting this argument, inferred the basis of the statute is to protect minor females from molestation. "It would be unrealistic to base a conclusion as to the reasonableness of the statute's classification of the protected class upon a belief that girls of the age of the victim in this case are no more likely than boys of the same age to be the objects of the desires and designs of older people of the opposite sex who are on the prowl." 46 Cal. App. 3d at 760, 120 Cal. Rptr. at 160.

[57] This interest, while never directly asserted in California, was alleged as the basis for a similar New Hampshire statute in Meloon v. Helgemoe, 564 F.2d 602, cert. *denied* 436 U.S. 950 (1st Cir. 1978). The case of People v. Hernandez, 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P.2d 673 (1964), does mention in a note that as age limits are raised to sixteen or eighteen, when the girl becomes a young woman, "the sexual act begins to lose . . . (the) physical danger to the victim." 61 Cal. 2d 529, 534 n.3; 39 Cal. Rptr. 361, 364; 393 P.2d 673, 676 (1964).

[58] The statutory rape provision was enacted as part of Penal Code § 261 in 1850. 1850 Cal. Stats. 645, ch. 125.

[59] In People v. Ratz, 115 Cal. 132, 46 P. 915 (1896), the defendant was convicted of having had intercourse with a minor female. The court found defendant's belief that the female was of the age of consent irrelevant. While the holding in *Ratz* was later overruled in People v. Hernandez 61 Cal. 2d 529, 351, 39 Cal. Rptr. 361, 362; 393 P.2d 673, 674 (1964), the *Ratz* case does reflect the policy behind the law in 1896: "The protection of society, of the family, and of the infant, demand that one who has carnal knowledge under such circumstances shall do so in peril of the fact. . . ." 115 Cal. 132, 134, 46 P. 915, 916 (1896).

the legislature's original purpose in enacting such a law. In *People v. Hernandez*[60] the Court indicated that the statute was intended to promote social morality and to prevent naive females from unwisely disposing of their favors.[61] Such a purpose indicates that the attitude underlying the act was that minor females were incapable of making informed decisions on sexual matters.

The statutory rape law may thus have been justified at the time it was enacted. Prior to 1821, secondary education for females was non-existent.[62] Nor did such educational opportunities become widespread until enactment of the compulsory education laws.[63] Sex education was not initially a part of the curriculum.[64] This cloistering of minor females from the educational process may well have resulted in less responsible sexual behavior.[65]

Today, however, this attitude is no longer justifiable. The state now requires women to attend schools for a period as long as males.[66] Health education is required as part of every minor's secondary school curriculum.[67] Additionally, Planned Parenthood Services are available in most areas to provide both education and counseling in sex-related subjects.[68] Further, studies indicate that fifty-two percent of all adolescents have engaged in sexual intercourse by age nineteen.[69] As a result, today's sexually mature

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[60] 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P.2d 673 (1964).

[61] An unwise disposition of her sexual favor is deemed to do harm both to herself and the social mores by which the community's conduct patterns are established. Hence the law of statutory rape intervenes in an effort to avoid such a disposition. This goal, moreover, is not accomplished by penalizing the naive female but by imposing criminal sanctions against the male, who is conclusively presumed to be responsible for the occurrence.

Id. at 531, 39 Cal. Rptr. at 362, 393 P.2d at 674.

[62] P. STOCK, BETTER THAN RUBIES: A HISTORY OF WOMEN'S EDUCATION 184-185 (1977).

[63] *Id.* California first enacted a compulsory education statute in 1903, 1903 Cal. Stats. 388 ch. 270 (current version at CAL. EDUC. CODE (REORGANIZED) § 48200 (West 1978)).

[64] P. STOCK, *supra* note 63, at 184-185.

[65] J. MCCARY, HUMAN SEXUALITY 20 (2d ed. 1973).

[66] CAL. EDUC. CODE (REORGANIZED) § 48200 (West 1978).

[67] CAL. EDUC. CODE (REORGANIZED) § 51202 (West 1978).

[68] House & Goldsmith, *Planned Parenthood for the Young Teenager*, 4 FAM. PLAN. PERSPECTIVES 27 (1972).

[69] The House Select Committee on Population recently issued a report stating one out of every five 13-and 14-year olds in the United States has had sexual intercourse. The Davis Enterprise, April 25, 1979 at 5, col. 3. A national sample of adolescents responding to a 1973 survey indicated that 52% of adolescents between the ages of 13 and 19 have had previous sexual intercourse experience. SORENSON, ADOLESCENT SEXUALITY IN CONTEMPORARY AMERICA (1973). A 1971 sur-

minor is probably aware of the consequences of her sexual activities.[70]

A minor is also more likely to be informed on sexual matters because of the increased visibility and acceptance our society has accorded sexual activities.[71] This acceptance can be seen in the California legislature's recent repeal of laws prohibiting cohabitation of unmarried persons[72] and cohabitation of persons married to others.[73] Criminal penalties in California have also been repealed for consensual acts of sodomy[74] and oral copulation[75] between adults. The increased frequency of sexual activity among young adults further demonstrates society's changing moral climate. During the last twenty years, the percentage of the population which engaged in premarital sexual activities before age twenty-five increased from one-third to two-thirds.[76]

Despite these changes in the awareness and attitudes of persons who could be affected by the statutory rape law, the state still has a legitimate concern in preventing the sexual victimization of both minors and adults. This concern is reflected in the three interests the state maintains are served by the statute.[77] This article concludes, however, that although the interests are significant, they are protected by the forcible rape statute[78] so no reason for the statutory rape law exists. In addition the current statutory rape provision unnecessarily burdens the privacy right.

The governmental interest in preventing pregnancies in minors

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vey of a Marin County, California, high school revealed that 40% of the students had engaged in sexual activities by the time they had graduated. Cook, Sex and the Rich Kids, San Francisco Chronicle, January 6, 1974 at 1, col. 6. Another study done in 1971 indicated some 25% of all unmarried women between 15 and 19 had engaged in consensual intercourse. Kantner & Zelnick, *Sexual Experiences of Young Unmarried Women in the United States,* 4 FAM. PLAN. PERSPECTIVES 9 (1972).

[70] *But see,* The Davis Enterprise, April 25, 1979, at 5, col. 3.

[71] Mace, *Sex and Marital Enrichment,* in THE NEW SEXUALITY 156 (Otto ed. 1971) defines this change: " . . . the Sexual Revolution itself, like all true cultural mutations, represents a radical change in the way we *think* about sex—a change from negative to positive, from repressive to acceptive." *Id.* at 156-157 (Emphasis supplied).

[72] CAL. PENAL CODE § 269a (repealed by 1975 Cal. Stats. 131, ch. 71.)

[73] CAL. PENAL CODE § 269a (repealed by 1975 Cal. Stats. 131, ch. 71.)

[74] CAL. PENAL CODE § 286 (amended by 1975 Cal. Stats. 131, ch. 71.)

[75] CAL. PENAL CODE § 288a (amended by 1975 Cal. Stats. 131, ch. 71.)

[76] HUNT & MORTON, SEXUAL BEHAVIOR IN THE 1970's 33 (1974).

[77] The interests alleged by the state are the prevention of pregnancy, the protection of minors from child molestation and the prevention of physical and emotional trauma. *See* text accompanying notes 55 to 57 *supra.*

[78] CAL. PENAL CODE § 261 (West Cum. Supp. 1979). *Set forth in* note 87 *infra.*

arose from a belief that minors are mentally and physically unprepared to bring a child into the world.[79] This belief, however, arbitrarily assumes that all minors lack such capacity. This is an unreasonable assumption. Minors mature at different rates and many are fully capable of properly bearing and caring for an infant.[80] Minors are deprived of due process rights when the state irrebuttably presumes that they lack the capacity to make such a decision.

If the state could show that it is reasonable to presume all minors are not capable of caring for a child, such an intrusion upon the minors' privacy right would perhaps be justified in the absence of other considerations. The state does have an interest in preventing persons incapable of assuming the resultant responsibilities from becoming pregnant. It could also be argued that the degree of intrusion is small because the number of competent minors is few, and that the presumption that all minors are incapable is justified by administrative convenience.[81] The state

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[79] The court in People v. McKellar, 81 Cal. App. 3d 367, 146 Cal. Rptr. 327 (1978) *appeal docketed,* No. 78-102 (Cal. Sup. Ct. July 17, 1978) reflects this assumption: "Today's newspapers, almost daily, contain stories of the problems to society caused by the many pregnant unmarried minor females." The court on that basis found the statute did not constitute an unconstitutional discrimination although based on sex.

[80] Intellectually and physically most minors are able to care for a child by age 14. Formal operational thought processes develop around age 12. This stage of mental development allows the adolescent to consider all possible ways a problem might be solved. The adolescent can think deductively and in terms of hypotheticals, the future and the remote. Formal thought processes are oriented toward problem solving; isolating the problem and exploring the solutions. P. MUSSEN, J. CONGER AND J. KAGAN, CHILD DEVELOPMENT AND PERSONALITY, 453-455 (1969). The mandatory health requirement of the secondary school curriculum also includes instruction on the responsibility of family life. CAL. EDUC. CODE (REORGANIZED) § 51202 (West 1978). The average age of physical maturity in the American female is 13. By age 14 she has usually reached her adult height and has become physically capable to conceive. P. MUSSEN, J. CONGER, J. KAGAN, *supra,* at 609-610 (1969). *See also* J. MCCARY, HUMAN SEXUALITY 48 (2d ed. 1973). Further, California law presumes parents are competent and entitled to custody of a child unless found by the court to be incompetent. Bell v. Krauss 169 Cal. 387, 146 p. 873 (1915). *Cf.* CAL. CIVIL CODE § 7001 and § 7003 (West Cum. Supp. 1979) (Conferring legal rights and obligations of parenthood upon the natural mother by proof of her having given birth.) No authority appears to distinguish this presumption when the parent is a minor. Therefore, the presumption of the minor's incompetence in the statutory rape provision is at odds with related areas of the law.

[81] Reed v. Reed, 404 U.S. 71 (1971). In that case a statute automatically granting letters of administration to the father of a deceased child was found a denial of the mother's equal protection. In rejecting an argument that the statute designated the father for purposes of administrative convenience, the Court

could further argue that if the presumption were invalidated, it would no longer be able to protect those minors who are truly incapable.

The state's argument suffers, however, when one applies the *Danforth* test. In *Danforth*[82] the United States Supreme Court ruled that minors could not be deprived of privacy rights absent a significant state interest not present in cases involving adults.[83] The state has an interest in preventing pregnancies in both adults and minors who are incapable of taking responsibility for the consequences of pregnancy.

The statutory rape law cannot satisfy the state's interest in preventing pregnancies in all of those unable to care for children. It is arbitrary because it assumes all minors are incapable of caring for children. Finally, it discriminates against those minors who are competent to care for a child. It should be possible to draft a statute which will serve the state's interest and yet not be a blanket intrusion upon the privacy rights of all minors.

The second interest asserted by the state is the protection of minors from sexual victimization.[84] To the extent this state interest attempts to prevent the sexual victimization of minors who are physically mature but mentally incapable of granting consent, the statute is both unreasonably arbitrary and an unjustifiable infringement on the minor's right of privacy. Some minors are capable of giving informed consent to intercourse before they reach age eighteen.[85] An act of intercourse arising from informed consent cannot be termed sexual victimization. Thus, the statute is over-inclusive in its attempt to prevent sexual victimization. Additionally, because some adults are also incapable of giving knowing and intelligent consent to the act of intercourse, the interest is not one which is unique to minors. The state justification of preventing sexual victimization, therefore, constitutes an improper limitation of the minor's right to privacy.

If the state's most significant interest in retaining the statutory rape statute is to prevent the sexual exploitation of individuals incapable of giving consent to intercourse, this interest is more reasonably served by using a statute which determines whether a crime has been committed on the basis of the victim's compe-

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noted that some classifications based upon administrative convenience are permitted. *Id.* at 76.

[82] 428 U.S. 52 (1976).

[83] *Id.* at 75.

[84] *See* note 56 *supra.*

[85] *See* note 80 *supra.*

tence, rather than age. Age alone is too arbitrary a basis upon which to deny fundamental rights, especially since in this area the individuals involved are generally between the ages of fourteen and eighteen.[86] A less intrusive means of accomplishing the state interest is currently provided for in California's forcible rape statute which defines rape as occurring in five circumstances. One of these circumstances is where the female is unconscious of the nature of the act.[87] This provision is sufficient to protect minor females in jeopardy of sexual victimization and yet allows mature minors to exercise their right to make decisions regarding procreation. Unlike the statutory rape law[88] which irrebuttably presumes the inability of all minor females to consent,[89] the determination of the female's consent under the forcible rape statute is based on the facts of each individual case.

In the context of a forcible rape prosecution, the accused may currently raise the victim's consent as a defense.[90] The jury is

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[86] Because the California Child Molestation Statute, CAL. PENAL CODE § 288 (West Cum. Supp. 1979), provides penalities for sexual acts committed with minors under age 14, the statutory rape law is most applicable to those females between 14 and 18. The California courts have also set 14 as the age where full constitutional rights are normally recognized. In re Roger S. 19 Cal. 3d 921, 927; 141 Cal. Rptr. 298, 301; 569 P.2d 1286, 1289 (1977).

[87] CAL. PENAL CODE § 261 (West Cum. Supp. 1979):

> Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances.
>
> 1. Where she is incapable, through lunacy or other unsoundness of mind, whether temporary or permanent, of giving legal consent;
>
> 2. Where she resists, but her resistance is overcome by force or violence;
>
> 3. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or anaesthetic substance, administered by or with the privity of the accused;
>
> 4. Where she is at the time unconscious of the nature of the act, and this is known to the accused;
>
> 5. Where she submits under the belief that the person committing the act is her husband, and this belief is induced by artifice, pretense or concealment practiced by the accused, with the intent to induce such belief.

[88] *Id.* § 261 (4).

[89] *See* note 52 *supra.*

[90] People v. Alfaro, 61 Cal. App. 3d 414, 132 Cal. Rptr. 356 (1976). The defendants were found guilty of forcible rape of a 16-year old girl. The defendants contended that the victim consented to the beating and sexual intercourse as an initiation into the gang to which the defendants belonged. While the Court found no evidence of consent in that case, it stated that consent was a defense to a charge of rape. *Id.* at 429, 132 Cal. Rptr. at 365.

instructed that to constitute consent the victim must have acted freely, with knowledge of the nature of the act.[91] The victim must also possess the capacity to make an intelligent choice,[92] which is more than passive submission.[93]

Although the ability of some minors to engage in sexual activities will be limited under the forcible rape statute,[94] the significant state interests in protecting minors from victimization outweighs this intrusion. The forcible rape statute does not create a conclusive presumption which discriminates against minors as a class. Under the forcible rape law, the governmental interests are protected by creating a blanket prohibition on all sexual conduct involving minors who are subject to victimization because of their immaturity. In such cases the state interests in protecting the truly naive minor outweighs the intrusion on protected behavior. The forcible rape law thus provides a narrowly-tailored means of achieving the state's ends.[95]

The final state interest used to justify the statutory rape provision is the valid one of preventing physical and emotional harm.[96] Insofar as the statute protects minors who are of such a tender age that emotional and physical trauma may occur, an interest not present in the case of most adults exists. However, the existing statute punishes consensual as well as forcible intercourse.[97] To avoid overbreadth, the state should have to show that the risk of physical and emotional trauma is high in cases where minor females indulge in consensual sexual intercourse.[98] The threat of

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[91] CALIFORNIA JURY INSTRUCTIONS—CRIMINAL CALJIC No. 1.23 (4th ed. 1979).

> To constitute consent on the part of a person to a criminal act or transaction, (1) he must act freely and voluntarily and not under the influence of threats, force or duress; (2) he must have knowledge of the true nature of the act or transaction involved; (3) and he must possess sufficient mental capacity to make an intelligent choice whether or not to do something proposed by another. In law, consent differs very materially from assent. Consent means a free will and positive cooperation in act or attitude. Assent, however, means mere passivity and does not amount to consent.

[92] *Id.*

[93] *Id.*

[94] Incompetent minors will still be restricted by § 261.

[95] CAL. PENAL CODE § 261(4) (West Cum. Supp. 1979).

[96] *See* note 57 *supra.*

[97] *See* note 52 *supra.*

[98] A plausible challenge to a law as void for overbreadth can be made when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to exercise the latter clearly in a single step from the law's reach.
L. TRIBE, AMERICAN CONSTITUTIONAL LAW 711 (1978).

physical and emotional harm attendant with consensual intercourse is speculative at best.[99]

The state has an interest in preventing physical and emotional harm arising from non-consensual acts of intercourse with adults as well as minors. As such, it would fail to satisfy the *Danforth* requirement of a significant state interest not present in the case of adults.[100] Also, the forcible rape statute deals specifically with non-consensual acts of intercourse, it can act to prevent physical or emotional harm without burdening the minor's right to engage in consensual intercourse.[101]

While some aspects of the stated governmental interests in protecting minors are significant, the current statutory rape law is an arbitrary and intrusive means of serving those interests. The statutory rape law is incapable of bending to meet individual circumstances. A more reasonable solution is to use the forcible rape statute in its stead, since it is drafted to protect only those in need of protection.

Conclusion

The California statutory rape law is outmoded, unnecessary and possibly unconstitutional. The assumptions which underlie the law are no longer valid in today's society. Moreover, sexual activity is prevalent among today's adolescents. The law is arguably unconstitutional in that it attempts to prevent female minors from making the decision to engage in sexual conduct. Further, the law is unnecessary because minors can be protected from sexual victimization under the existing forcible rape statute. The public interest is best served by prosecuting sexual victimization of minors under the California forcible rape statute, which does not unduly interfere with the minor's right to sexual privacy. California should repeal its statutory rape law, and sexual victimization of minors should be prosecuted under the forcible rape statute.

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[99] Physiologically, the average female is mature by age 13. *See* note 80 *supra*. Physical harm from intercourse after physical maturity appears unlikely. Further, studies indicate that a large percentage of all minors have experienced sexual intercourse during the period of time they were "protected" by the statute. *See* note 69 *supra*. If in fact consensual intercourse caused emotional and physical trauma, one might reasonably assume that fewer minors would be engaging in the act.

[100] 428 U.S. 52, 57 (1976). *See* text accompanying notes 35 to 37 *supra*.

[101] Cal. Penal Code § 261(2) (West Cum. Supp. 1979).