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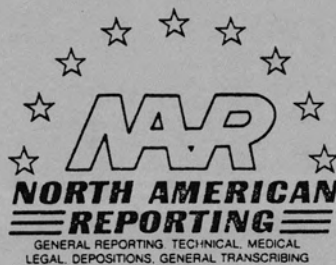
Supreme Court of the United States

MICHAEL M.,)
)
) Petitioner,)
)
v.) No. 79-1344
)
)
SUPERIOR COURT OF SONOMA COUNTY)
(CALIFORNIA, REAL PARTY IN INTEREST))
)

Washington, D.C.
November 4, 1980

Pages 1 through 49

ORIGINAL



202/544-1144

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----
3 MICHAEL M., :
4 Petitioner, :
5 v. : No. 79-1344
6 SUPERIOR COURT OF SONOMA COUNTY :
7 (CALIFORNIA, REAL PARTY IN INTEREST) :
8 -----

9 Washington, D.C.

10 Tuesday, November 4, 1980

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:02 o'clock a.m.

14 APPEARANCES:

15 GREGORY F. JILKA, ESQ., 245 Southwest Boulevard, Rohnert
16 Park, California 94928; on behalf of the Petitioner.

17 SANDY R. KRIEGLER, ESQ., Deputy Attorney General, 3580
18 Wilshire Boulevard, Los Angeles, California 90010;
19 on behalf of the Respondent.
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C O N T E N T S

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ORAL ARGUMENT OF

PAGE

GREGORY F. JILKA, ESQ.,
on behalf of the Petitioner

3

SANDY R. KRIEGLER, ESQ.,
on behalf of the Respondents

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1 the perpetrator, where the female is under the age of 18
2 years."

3 The operative facts in this case are simply that
4 Michael stands accused of the crime. He has not been convicted
5 of the crime and comes before this Court clothed with the
6 presumption of innocence. He is currently awaiting trial,
7 pending the decision of the Court in this case.

8 Both California and the United States, as amicus on
9 behalf of California, have suggested to this Court that Michael
10 is guilty of a crime of which he is not charged; that crime is
11 forcible rape. The suggestion that force existed in this
12 case is unsupported by any judicial finding and is immaterial
13 to the issues presented. And, in my opinion, tends to obfus-
14 cate the issue.

15 QUESTION: What was the charge? I mean, could the
16 charge possibly embrace forcible as well as statutory?

17 MR. JILKA: No, Justice Rehnquist, it could not.
18 The information which is contained in the appendix is the
19 charging document and it clearly states that Michael is
20 charged with violation of the statute and the elements are
21 simply that he participated in an act of sexual intercourse
22 with a female who was under the age of 18. Forcible rape would
23 not be a lesser included offense.

24 QUESTION: So, as you say, the suggestion
25 that force was used is irrelevant because the issue before us

1 is the constitutional validity of the statute on its face --

2 MR. JILKA: That's correct, Your Honor.

3 QUESTION: -- is that correct? So it's equally
4 irrelevant that Michael was 17 years old?

5 MR. JILKA: Well, Your Honor, I --

6 QUESTION: He was not -- I mean, if you're right on
7 the first --

8 MR. JILKA: That's correct, Your Honor.

9 QUESTION: -- the second follows.

10 MR. JILKA: I do believe, however, that we have
11 fairly presented a limited constitutional question on the
12 applicability of the statute as applied to a 17 and a half
13 year old female who is charged with sexual intercourse with a
14 16 and a half year old.

15 QUESTION: Yes?

16 MR. JILKA: I feel that those facts are fairly before
17 the Court because --

18 QUESTION: I thought that Michael was a male?

19 MR. JILKA: Yes, I'm sorry, Your Honor. He is, he
20 certainly is. Those facts were alleged in the petition for
21 writ of mandate, and were admitted by the State of California.

22 QUESTION: Well if we're going to get into the facts
23 of this particular case, then the -- and if this is a question
24 of the constitutionality of the statute as applied, then both
25 the matter that you've been discussing and the age of your

1 client are, perhaps, relevant.

2 But if the issue is the constitutional validity of
3 this statute on its face, then neither the alleged facts of
4 this episode, nor the age of the Defendant, are really rele-
5 vant, are they?

6 MR. JILKA: That is correct, Your Honor, as far as
7 the facial issue of constitutionality goes.

8 QUESTION: Counsel, could I ask you a question about
9 the California situation? Could he have been charged -- well,
10 was he charged with a felony?

11 MR. JILKA: Yes, Your Honor. He was charged with a
12 felony.

13 QUESTION: Could he have been charged for a misde-
14 meanor?

15 MR. JILKA: Yes, Your Honor, this statute could have
16 been charged as a misdemeanor in the discretion of the district
17 attorney, the prosecuting authority.

18 If convicted, Michael --

19 QUESTION: Mr. Jilka, could I interrupt again,
20 because I'm always --

21 MR. JILKA: Certainly.

22 QUESTION: -- somewhat puzzled when we talk about
23 constitutionality as applied or on the face, the case arises
24 out of -- doesn't it really involve a test of the legal suffic-
25 iency or constitutionality of the specific complaint filed

1 against this man?

2 MR. JILKA: That's correct, Your Honor.

3 QUESTION: So, don't we have to take as true, for
4 purposes of decision, whatever facts are alleged therein?

5 Assuming that --

6 MR. JILKA: Yes, Your Honor, that's a fair statement.

7 QUESTION -- they will prove those and that they will
8 not have to prove anything not alleged therein?

9 MR. JILKA: That's true. I would, however, point
10 out that what happened at the trial court was not in the
11 nature of a demurrer, but it was a motion to dismiss, at which
12 evidence was presented and primarily the evidence which was
13 presented was the age of Michael. So --

14 QUESTION: Well that is not -- the age is not in
15 the complaint itself?

16 MR. JILKA: That's correct, it is not part of the
17 complaint, but it is certainly a matter of record.

18 If convicted, Michael's conviction would be pred-
19 icated on the existence of essentially four facts. First of
20 all, that Michael is a male; secondly, that he simply partici-
21 pated in an act of sexual intercourse, that Sharon, his
22 partner, was under the age of 18 years, and fourth, that
23 Michael and Sharon were not married.

24 QUESTION: Counsel, I am troubled, as apparently
25 some of my colleagues are, by the rather abstract question

1 that's presented. Ordinarily, if a motion to dismiss and
2 information is denied, the case goes to trial. And we have
3 testimony and a verdict, or judges' findings, and it goes on,
4 up through appeal to the state system and we get it here with
5 a specific batch of facts, so to speak. You are simply
6 challenging the statute on its face?

7 MR. JILKA: That's essentially correct, Justice
8 Rehnquist. The California Supreme Court, in exercise of its
9 original and discretionary jurisdiction, issued an alternative
10 writ to call that issue before it and decided that very
11 issue of the facial constitutionality of the statute. So
12 when the case comes here, fortunately or unfortunately, it's
13 really without a record below or a very, very limited record.

14 QUESTION: And all the California Supreme Court said
15 was that, on its face this statute is constitutional?

16 MR. JILKA: Yes, Your Honor. I believe that's an
17 accurate synopsis of the California Supreme Court's opinion.

18 The statute, California Penal Code Section 261.5,
19 embodies and reflects the traditional sexual stereotypes.
20 Because only the male can violate the statute, it is presumed
21 that he is the passionate aggressor, and similarly, conversely,
22 that the female is the helpless victim who needs the pater-
23 nalistic protection of the state and the protection of the
24 statute. Neither California nor the United States have even
25 attempted to refute that the statute is cast in terms of the

1 traditional and outmoded sex roles.

2 QUESTION: Well, but there -- there is one thing
3 that isn't outmoded, isn't it, and that is that women can
4 have children and men can't?

5 MR. JILKA: Yes, Your Honor, that's certainly true.

6 QUESTION: Women can become pregnant and men can't?

7 MR. JILKA: That is absolutely true, of course.

8 QUESTION: Is it your basic -- since I've already
9 interrupted you, is it your basic contention that California
10 could have enacted a law such as this, if it applied not only
11 to both men and women, but to people of all ages, victims of
12 all ages?

13 MR. JILKA: No, Your Honor.

14 QUESTION: Why not?

15 MR. JILKA: As far as the age criteria goes, that's
16 not challenged. What we're challenging is the discrimination
17 between males and females.

18 QUESTION: Well, then is it -- is it your submission
19 that California could have enacted a law such as this if it
20 had applied to victims of both sexes?

21 MR. JILKA: That's correct.

22 QUESTION: Under 17?

23 MR. JILKA: That's correct.

24 QUESTION: Although the next claim would be that
25 it was unconstitutional for California to do that for people

1 under 17, when it didn't do it for people over 17?

2 MR. JILKA: That's -- that certainly could be made,
3 Your Honor. I think that that would be a much different case
4 because the discrimination --

5 QUESTION: It would be a different case, but it would
6 be a constitutional challenge, wouldn't it?

7 MR. JILKA: It could be, it certainly could be.
8 In that case, there would not be discrimination, of course,
9 on the basis of sex.

10 QUESTION: So it's your claim that California, having
11 -- cannot enact this for the protection of women alone; that if
12 it enacts this, it has to go the whole hog and enact it for the
13 protection of all people of either sex under 17 years old?

14 MR. JILKA: That's correct, Your Honor. And I
15 believe that has been done in varying forms by at least 37 of
16 the states.

17 QUESTION: Wouldn't it follow that a state that
18 passed a law to protect the purchasers of automobiles would
19 have to pass a law to protect the purchasers of dishwashers?

20 MR. JILKA: Well no, Your Honor, I don't believe so.
21 Certainly not.

22 QUESTION: Well isn't that pretty much what your
23 argument is?

24 MR. JILKA: No, Your Honor. In this case we're talk-
25 ing about classifications on the basis of sex, which perpetuate

1 we feel, the traditional stereotypes. Because --

2 QUESTION: California, if it tries to protect
3 females, must protect males also?

4 MR. JILKA: Similarly situated males, yes --

5 QUESTION: That the constitution requires it to do so?

6 MR. JILKA: Yes, Your Honor, that is our contention.

7 QUESTION: Yes.

8 QUESTION: Then, that would be true of forcible rape
9 as well as statutory rape?

10 MR. JILKA: Well that certainly could be one of the
11 logical conclusions of the invalidity of the statute that's
12 challenged. I think that, when force is involved, there cer-
13 tainly is a much different situation before the Court. But
14 that's -- that argument has certainly been made, and I believe,
15 in a recent Tulane Law School Law Review article
16 that that very hypothesis is set forward.

17 QUESTION: Is that right?

18 MR. JILKA: That's right. But I do not believe
19 that this Court's invalidation of the statute would necessarily
20 force the conclusion that all forcible rape laws are gender
21 neutral, or must be gender neutral.

22 In fact, in California, the forcible rape law is
23 gender neutral, ironically enough, and so are all of the other
24 statutes that are designed to prevent the sexual exploitation
25 of California citizens.

1 QUESTION: Can women be guilty of the offense under
2 this California statute as aiders and abettors?

3 MR. JILKA: Yes, that's correct. As a racial
4 minority --

5 QUESTION: Accessories?

6 MR. JILKA: Yes, that's right, that's right, they
7 could, certainly, but not as a principal.

8 QUESTION: Can the state -- can a state constitu-
9 tionally make it a criminal act for a woman of, let us say, 30,
10 to seduce a young boy of 14 or 15?

11 MR. JILKA: I would certainly say that that's within
12 the realm of the state's legitimate concern --

13 QUESTION: Most states do, do they not?

14 MR. JILKA: Yes, in one form or another; for example,
15 in California, it is a very minor offense, it's contributing
16 to the delinquency of a minor, it's a misdemeanor. Whereas
17 Michael, because -- simply because of his sex, now is facing
18 a felony charge. If the sex roles were reversed around, if it
19 were an older male or a male of any age and a female, there's
20 heightened criminal penalties.

21 QUESTION: You may have answered this before, but if
22 he had been charged with a misdemeanor instead of a felony,
23 would you be here?

24 MR. JILKA: I don't know. The procedure that was
25 utilized in the Supreme Court of California, exercising its

1 original jurisdiction is predicated in the statute and I
2 just don't know if the California Supreme Court would have
3 taken this case had it been in a lower level court; that's
4 problematic.

5 QUESTION: Mr. Jilka, can I pursue a question that
6 Mr. Justice Stewart asked you about washing machines and cars?
7 Did you focus entirely on protection of the victim being
8 sex neutral or are you also focusing at all on the punishment?
9 In other words, are you in effect arguing that it would be
10 unconstitutional to have a statute that said it's unlawful for
11 men to steal cars but there is no prohibition against women
12 stealing cars?

13 MR. JILKA: I think that would follow, Your Honor;
14 certainly.

15 QUESTION: That's more, that's your position?

16 QUESTION: But you told us that women can be guilty
17 of violating this statute?

18 MR. JILKA: As an aider and abettor, that's true.

19 QUESTION: And California, does -- does California
20 generally treat aiders and abettors the same as principals, as
21 far as sentences go?

22 MR. JILKA: I guess I could not, in honesty, answer
23 that question.

24 QUESTION: Do you know the federal criminal law
25 generally does?

1 MR. JILKA: Yes, well, the penalties that are
2 prescribed are the same for aiders and abettors as for the
3 principals, certainly, if that's your question, yes.

4 I would point out to the case, a new Eighth Circuit
5 opinion in a case called Navedo v. Preisser, which was de-
6 cided on September 22nd of this year, in which the Eighth
7 Circuit invalidated the Iowa statutory rape law. That was
8 a different statutory rape law than California, certainly, but
9 I think that some of the reasoning certainly applies here.

10 In considering the pregnancy --

11 QUESTION: That case is not in your brief, I gather?

12 MR. JILKA: No, Your Honor, it's a recent case; it
13 was after the brief, it was decided September 22nd, 1980, in
14 the Eighth Circuit.

15 QUESTION: What's the style of it, the citation?

16 MR. JILKA: Navedo, N-a-v-e-d-o v. Preisser, and I
17 could provide the Court with the case number.

18 QUESTION: Will you do that?

19 MR. JILKA: I certainly will, Your Honor.

20 QUESTION: Preisser?

21 MR. JILKA: Yes, it's P-r-e-i-s-s-e-r, is the second
22 name. The first is Navedo, N-a-v-e-d-o.

23 QUESTION: Eighth Circuit?

24 MR. JILKA: That's correct.

25 QUESTION: September?

1 MR. JILKA: September 22nd.

2 QUESTION: Of this year.

3 QUESTION: Thank you.

4 QUESTION: Mr. Jilka, excuse me again for inter-
5 rupting. Mr. Justice Stewart made the point about aiders and
6 abettors and you said they are equally culpable and equally
7 punishable. Doesn't that entirely destroy your case?

8 MR. JILKA: I don't believe so, Your Honor --

9 QUESTION: Why not?

10 MR. JILKA: Well because, --

11 QUESTION: What's the discrimination if both the
12 male and the female can be punished equally and there can't be
13 a crime unless they are both liable for some kind of punish-
14 ment?

15 MR. JILKA: Well a male and a female can be punished
16 equally only if the female aids and abets the male in perform-
17 ing an act of sexual intercourse with a female under the age
18 of 18. There is no -- what we're focusing on here should be
19 the conduct. If a male engages in sexual intercourse with a
20 female under 18, that's a felony; but if a female does not do
21 the very same -- if the female does the very same act, that is,
22 engages in sexual intercourse with a --

23 QUESTION: It seems to me by hypothesis it's either
24 voluntary or involuntary on the part of the female; and if
25 it's involuntary, why then you've got a forcible rape situation.

1 MR. JILKA: That's certainly correct.

2 QUESTION: And you're not challenging that?

3 MR. JILKA: That's correct.

4 QUESTION: If it's voluntary, then don't you, by
5 hypothesis, have an aiding and abetting situation?

6 MR. JILKA: I suppose so, Your Honor. However, I
7 would represent to the Court that in practice, that the victim,
8 the purported victim is never charged with a crime. I
9 couldn't --

10 QUESTION: Well I suppose a good many men who violate
11 the statute are not charged with it?

12 MR. JILKA: Oh, I would certainly agree with that,
13 Your Honor. There are -- we estimate that there are probably
14 more --

15 QUESTION: So that's no answer, in other words.

16 MR. JILKA: I'm sorry, Your Honor.

17 QUESTION: So your answer to my brother Stevens was
18 really no answer to his question.

19 QUESTION: Moreover I imagine that in these states
20 that have sex neutral statutes like this, probably most of the
21 prosecutions are males anyway.

22 MR. JILKA: I don't know that to be true, Your Honor,
23 but that certainly could be.

24 I suppose the point that I was trying to make was
25 that the engaging in sexual conduct -- sexual intercourse for

1 a male and a female is basically the same act, a mutual act;
2 for a male under the same circumstances it's a felony, but
3 for the female to participate, it is not. And I do not
4 believe that a female can and would be charged as an aider and
5 abettor, a female so-called victim.

6 QUESTION: There is a case in the federal system that
7 said that the so-called victim in a Mann Act prosecution,
8 could be guilty of conspiracy of her own -- to carrying on
9 her own transportation in interstate commerce for immoral
10 purposes; wouldn't the same principal apply?

11 MR. JILKA: I don't believe that it has been applied
12 Your Honor, and I -- in California, Your Honor -- and I don't
13 have the case authority for that, I certainly wish I did.
14 But I believe that to be the case, that the female is in
15 practice and in law not considered to be culpable as an aider
16 and abettor. That is the female victim, excuse me.

17 QUESTION: Would your case still survive if Cali-
18 fornia had a statute that, contributing to the delinquency of
19 a minor boy was a felony?

20 MR. JILKA: It may, it may.

21 QUESTION: When? What doubt do you have about it?

22 MR. JILKA: Well the doubt that I would have would
23 be if the substantive elements of the crime were identical and
24 the purposes were identical, then arguably there would be no
25 discrimination against males, or there would be no unequal

1 treatment of the sexes, but that is not the case --

2 QUESTION: If the range of sentences were the
3 same for both the present statute and the one I hypothesized
4 would there be any difference?

5 MR. JILKA: If the sentences were the same and
6 the substantive elements of the crime were the same, I think
7 that we would have great difficulty with an equal protection
8 tack -- I agree.

9 I would point out to the Court that the California
10 case law resoundingly demonstrates that the motivation for
11 the enactment of the statute is the concern for the virtue
12 of young girls and not the pregnancy prevention rationale.
13 I would point out the cases cited at pages 25 and 26 of the
14 brief of the Petitioner. These cases span the range of
15 years 1895 through 1975 --

16 QUESTION: Of course, Your Supreme Court has said
17 otherwise recently, hasn't it?

18 MR. JILKA: The Supreme Court has recently said
19 otherwise in this case, but --

20 QUESTION: Aren't we bound by that?

21 MR. JILKA: No, Your Honor, this Court is not bound
22 by that and this Court has the right and in fact, the duty,
23 to inquire into the purposes of the statute where the purposes
24 reflect upon a constitutional claim. Otherwise, the state
25 courts, by --

1 QUESTION: Even when the Supreme Court of California
2 pronounces what the purpose of their statute was?

3 MR. JILKA: That's correct, Your Honor.
4 That is correct. This Court has the duty to look into the --

5 QUESTION: Well how could we know any better than
6 the Supreme Court of California or the California legislature
7 what the purpose of enacting a statute was?

8 MR. JILKA: Well in answer to that, I would say that
9 the burden of demonstrating the purpose of the statute is on
10 the government in this case and that --

11 QUESTION: You mean the presumption of constitu-
12 tionality doesn't attend to the statutes in California?

13 MR. JILKA: There is a -- certainly a presumption
14 of constitutionality, Your Honor, but I believe under the
15 cases in this Court, the Wengler case, that it's been stated
16 that the burden is on the state to make out the claim for the
17 justification of stature. I believe that applies here.

18 And I don't think the Court will have --

19 QUESTION: What's the difference between the presump-
20 tion of constitutionality of the statute and the burden of the
21 state to make out the justification for it?

22 MR. JILKA: Well I believe that the presumption of
23 constitutionality is a broad presumption which applies to all
24 statutes in general. But once, in a case, discrimination on
25 the basis of sex is made out, then the burden shifts to the

1 government to justify the classifications of the statute.
2 I believe that that was the reasoning of the Ninth Circuit
3 adopted in the case of the United States v. Hicks, which
4 was cited in our brief, a recent Ninth Circuit case which
5 invalidated a federal statute which --

6 QUESTION: Do you know, has the government taken
7 appeal on that one?

8 MR. JILKA: It's my information that the government
9 has filed a petition for a writ of certiorari; I'm sorry, I
10 don't know the number of it, but it was filed approximately
11 two weeks ago, and it's also my information that the govern-
12 ment has asked this Court to refrain from taking any action in
13 the Hicks case until the disposition of this case.

14 QUESTION: Let me go back to my inquiry about the
15 California courts' observation of the purposes of this
16 statute. I take it it's your position that having said in
17 those older cases what the purpose was, that that's engraved
18 in stone, the Supreme Court of California now may not look
19 at the same material and come to a different conclusion.

20 MR. JILKA: Well not exactly, Mr. Justice Blackmun.
21 The most recent California Supreme Court case is only 1964,
22 it's not an old case. The most recent Court of Appeals case is
23 1975, that also is not an old case. It's not that the justi-
24 fications are --

25 QUESTION: You're arguing calendar, then?

1 MR. JILKA: Well that's certainly part of it, Your
2 Honor. But the pregnancy prevention rationale as pointed out
3 in the Meloon case out of the First Circuit, is suspect,
4 and that the recent Eighth Circuit case, the Eighth Circuit
5 speaks in terms of pregnancy prevention as being a suspect
6 justification because it's so readily used and so readily
7 available to justify discrimination on the basis of sex.

8 QUESTION: Of course what does the Eighth Circuit
9 case have to do with the purpose of the California statute?

10 MR. JILKA: It has nothing to do with the purpose
11 of the California statute, except insofar --

12 QUESTION: I'm just troubled by this apparent re-
13 versal of your Supreme Court as to the purpose of the California
14 Court, and I am troubled, when I ask it doesn't mean that
15 I'm fixed on my answer to it --

16 MR. JILKA: Certainly.

17 QUESTION: -- as to whether we are not bound by
18 your interpretation of the purpose of their statute.

19 MR. JILKA: I believe in the cases cited in my brief,
20 Mr. Justice Blackmun, that we have adequately cited authority
21 for the proposition that this Court does have the obligation
22 and the duty to look beyond the state court's determination of
23 what the purposes of the statute is.

24 QUESTION: Well what real difference does it make what
25 the legislative purpose was? I know that a good deal of

1 time was spent by both you and your brother, in your briefs,
2 in talking about the purpose but isn't it the duty of this
3 Court to look at the statute on its face and to, depending
4 upon what level of so-called scrutiny one wants to apply, to
5 uphold the statute if a rational basis can be conceived for
6 its existence?

7 MR. JILKA: Well, Your Honor --

8 QUESTION: Isn't it a pretty elusive quest to
9 try to find out what the purpose of the California legislature
10 was, back at the time of the enactment of this statute,
11 maybe the various members of the legislature who voted for the
12 statute had a variety of purposes?

13 MR. JILKA: Certainly, yes. However, we would con-
14 tend and we have contended that the standard of Craig v. Boren
15 is applicable in this case.

16 QUESTION: Regardless of the original purpose or the
17 present purpose or whatever this California Supreme Court said
18 about its purpose, the duty of this Court is to look at the
19 statute and its impact and, depending upon, as I say, the
20 level of so-called scrutiny under the Equal Protection Clause
21 to decide whether or not the statute is rationally based.
22 Isn't that about it?

23 MR. JILKA: Well, essentially, Your Honor, I believe
24 there is language in the Court's opinions in the past that do
25 delve into the purposes of the statutes and whether or not

1 the classifications served are substantially related to
2 those purposes.

3 QUESTION: Is there any legislative history of this
4 state legislation that one can look at?

5 MR. JILKA: Essentially none.

6 QUESTION: No, I didn't think so.

7 MR. JILKA: There really is none. All we have is
8 the California Court opinions, basically.

9 QUESTION: Most states have no legislative history
10 of the kind that we find in the Congress, generally, isn't
11 that so?

12 MR. JILKA: That is my understanding.

13 QUESTION: So does that have some connection with
14 the general proposition that if there is any rational basis
15 which the Court can see for the legislation, then there is an
16 obligation to sustain it?

17 MR. JILKA: Well I think as a general proposition
18 that that is certainly correct. However, because discrimina-
19 tion in this case is based upon sex that the burden is on the
20 government to make out the claimed justification. Of course,
21 our argument here is that this is based on heightened scrutiny
22 because of the disparate effect that this has on California
23 teenagers particularly.

24 QUESTION: Disparate effect as between teenaged boys
25 and teenaged girls, or --

1 MR. JILKA: In this case, certainly; and as between
2 males and females of all ages who essentially engage in the
3 same kind of conduct, be it reprehensible or not.

4 QUESTION: But as I understood your answer to one of
5 my earlier questions, you don't attack this statute on the
6 basis that it protects people only under 17 years old?

7 MR. JILKA: No, that's correct. That is correct. If
8 it please the Court, I'd like to --

9 QUESTION: It punishes males of any age, does it
10 not?

11 MR. JILKA: That is correct.

12 QUESTION: Well do you think you are fatally wounded
13 if we accept the purpose of the statute as announced by the
14 State Supreme Court in this case? Justice Mosk didn't seem to
15 think so.

16 MR. JILKA: No, Your Honor, I don't think that we
17 would be fatally wounded. I think that it would be impossible
18 for California to demonstrate that the purpose of the statute
19 prevention of pregnancy is substantially related to -- or that
20 the classification of the statute is substantially related to
21 that purpose because it's quite overinclusive -- it punishes
22 conduct which cannot result in pregnancy.

23 QUESTION: Well, what if it is overinclusive?

24 MR. JILKA: Well the test, as I understand it, is
25 that the classifications have to be substantially related. In

1 this case, sex, the male gender is essentially used as a
2 proxy for culpability, and we contend that that's an imperfect
3 proxy. There is a weak congruence.

4 QUESTION: Well, do you assume there is an equal
5 culpability, but unequal impact on the parties engaging in this
6 conduct; which is what, I take it, the California Court
7 relied upon, and that apparently drawing the conclusion that
8 it is permissible to punish the male even though the female
9 may be equally culpable, because the female is hurt more?

10 MR. JILKA: Well, it --

11 QUESTION: And that the male deserves to be punished
12 for engaging in conduct that will hurt the other person more
13 than it does himself.

14 MR. JILKA: First of all, the --

15 QUESTION: Isn't that -- isn't that generally the --

16 MR. JILKA: Yes, it certainly is. It's --

17 QUESTION: Well how do you answer that?

18 MR. JILKA: Well first of all, the -- the harm
19 is not only a potential harm, and certainly it occurs with some
20 frequency, but does not certainly occur in every case. And,
21 furthermore, at the time the teenage couple or whoever they
22 are, decide to engage in sexual intercourse, the risks are
23 equally apparent to the female as well as to the male and the
24 female, quite voluntarily, as far as --

25 QUESTION: You're just saying she -- the female

1 is equally culpable, that's all you're saying.

2 MR. JILKA: I'm saying she is equally culpable
3 because she can certainly appreciate the dangers and risks of
4 a decision to engage in sexual intercourse. Just as much as
5 the male. There is no showing that punishing the female
6 for example, or punishing the male instead of the female, is
7 any more effective than vice versa, really.

8 QUESTION: Well the State is saying to the male,
9 because the results of this conduct will fall more heavily on
10 the female, you should be especially careful.

11 MR. JILKA: Well, as Justice Mosk stated, this goes
12 to the consequences rather than the reason for the conduct and
13 as such, is irrelevant in weighing the female's moral culpa-
14 bility.

15 QUESTION: Yes, but couldn't you say the same thing
16 about OSHA, for instance, that the risks are possible, but
17 the worker may not fall off the stepladder, but nonetheless,
18 the government has the perfect right to say there's enough
19 of a chance that he will that we're going to make sure it's
20 safe.

21 MR. JILKA: Certainly, Mr. Justice Rehnquist, but
22 as I understand the OSHA statutes, none of them classify on
23 the basis of sex; none of them define conduct for males that
24 is hazardous that is not hazardous for females.

25 QUESTION: Well but they do -- they do allow the

1 legislature to take into consideration -- that the legislature
2 has taken into consideration possible risks as well as actual
3 consequences.

4 MR. JILKA: Yes, that is certainly true.

5 MR. CHIEF JUSTICE BURGER: Mr. Kriegler.

6 ORAL ARGUMENT OF SANDY R. KRIEGLER, ESQ.,

7 ON BEHALF OF RESPONDENT

8 MR. KRIEGLER: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 I am Deputy Attorney General Sandy R. Kriegler,
11 appearing today on behalf of the people of the State of Cali-
12 fornia, real party in interest.

13 I would like to discuss the constitutionality of
14 California Penal Code Section 261.5, in light of the tests
15 set forth by this Court for gender based classifications, in
16 Craig v. Boren.

17 Under Craig v. Boren, classifications based upon
18 gender are constitutional if they serve important governmental
19 objectives, and if the classification scheme is substantially
20 related to the achievement of those objectives. This Court
21 has recognized that classifications based upon gender are not
22 invalid, per se. Indeed, where the sexes are not similarly
23 situated or in those situations where society imposes special
24 burdens upon females, different treatment is allowed.

25 We believe that the classification under the statute

1 before the Court today is based upon physiological differences
2 which do not reflect the type of invidious discrimination
3 which the Equal Protection Clause prohibits.

4 QUESTION: Mr. Kriegler, do prosecutors in California
5 always press these as felonies?

6 MR. KRIEGLER: No, Your Honor.

7 QUESTION: Well, where is the line of distinction?
8 Here you have two young people about the same age, one year
9 and 18 days apart, and you press it as a felony?

10 MR. KRIEGLER: I believe it was pressed as a felony
11 in this case due to the particular facts involved. And these
12 particular facts are revealed in the appendix --

13 QUESTION: Well I read the appendix thoroughly and
14 I would say the particular facts would seem to cut the other
15 way.

16 MR. KRIEGLER: Well Your Honor, the prosecutor
17 obviously disagreed based upon the fact that the victim clearly
18 testified, under oath at the preliminary hearing, that she
19 submitted to the act of intercourse only after being slugged
20 in the face 2 to 3 times with sufficient force to leave bruises.
21 We believe that this case, while it is not perhaps sufficient
22 to constitute a forcible rape, or at least the prosecutor who
23 filed the charges did not feel so, it certainly approached
24 that. And it was above the level of consensual intercourse,
25 that one might normally expect to be involved in a situation

1 involving two minors.

2 Certainly, the use of force, I feel, was the crucial
3 factor in the prosecutor's decision to file this case as a
4 felony. I would point out, however, to the Court that the
5 case was originally filed in Juvenile Court, and the Peti-
6 tioner was found unfit for treatment under the Juvenile Court
7 law and then it came to adult court. So the initial filing
8 was not even as a felony, it was under our Juvenile Court law
9 under which there are no felonies or misdemeanors; it is not a
10 criminal branch of our judiciary.

11 We believe that the important governmental interests
12 served by Penal Code Section 261.5 are the deterrence of teen-
13 age pregnancy, the prevention of physical injury to minor
14 females from sexual intercourse.

15 QUESTION: Mr. Kriegler, would either of those
16 purposes be served any less well by a statute that was entirely
17 neutral that applied to the female as well as the male?

18 MR. KRIEGLER: Absolutely, Your Honor, particularly
19 in this case. If our statute were gender neutral in this case,
20 the victim, Sharon, would be, at least on the face of the
21 statute, subject to prosecution. If she were subject to pro-
22 secution, first of all, she would be less likely to report the
23 incident, because to do so would be to incriminate herself.

24 QUESTION: Also, she might be less anxious to commit
25 it, too, wouldn't she?

1 MR. KRIEGLER: She may, Your Honor, but in view of
2 the --

3 QUESTION: I thought maybe --

4 MR. KRIEGLER: Yes, Your Honor. I would just point
5 out that in view of the testimony that she gave under oath,
6 she was not a willing participant in this act; she submitted --

7 QUESTION: Well, who bought the liquor?

8 QUESTION: Did you say she was not a willing par-
9 ticipant --

10 MR. KRIEGLER: She was not a willing participant.

11 QUESTION: Well doesn't the Appendix show that
12 she began the intimacies?

13 MR. KRIEGLER: Your Honor, she engaged in a certain
14 amount of kissing, apparently, from the record, with the
15 Defendant.

16 QUESTION: Making out, the term was used, and
17 objected to and sustained.

18 MR. KRIEGLER: I believe that was Mr. Jilka's term
19 that he used in the preliminary hearing. However, it's clear
20 that she did not wish to go further and proceed to an act of
21 intercourse. And indeed, in that act she bore all the risks
22 of the potential pregnancy, she was not willing to engage in
23 the act, at least as far as the record that's before this
24 Court.

25 QUESTION: And you say he was a perfect stranger?

1 MR. KRIEGLER: I believe the record indicates she
2 may have known the Petitioner.

3 QUESTION: When you say the record may show, doesn't
4 the record actually show that she rode around in the police
5 car to pick him out on the street?

6 MR. KRIEGLER: That --

7 QUESTION: Doesn't the record show that?

8 MR. KRIEGLER: Yes, Your Honor.

9 QUESTION: Well you don't go around looking for
10 people that you know, do you? You go to their home or where
11 ever they are to pick them out.

12 MR. KRIEGLER: Well all I'm saying is, she may have
13 been familiar with the individual, I don't know that she was
14 a personal friend or a close acquaintance --

15 QUESTION: Well, Mr. Kriegler, if the issue before
16 us is the constitutional validity on its face of this Cali-
17 fornia legislation, what in the world do the facts of this
18 case have to do with it?

19 MR. KRIEGLER: Well we believe the statute is con-
20 stitutional on its face for the reasons set forth by the
21 California Supreme Court. It is Petitioner who has come
22 before this Court urging that the statute is unconstitutional
23 as applied to him because he is also a minor. That is the only
24 reason that the as-applied argument is being made.

25 QUESTION: But if the facts have any relevancy at

1 all, they bear only on the decision of the prosecutor as to
2 whether to prosecute on a felony or a misdemeanor, isn't that
3 so? And that issue is not before us. Only the constitution-
4 ality, as Justice Stewart has said several times, on its face,
5 is the issue here.

6 MR. KRIEGLER: We agree. And our only point would
7 be that insofar as Petitioner is pursuing the argument that
8 the statute is unconstitutional as applied to him as a 17-year
9 old, he cannot have it both ways; he cannot straddle the fence
10 and say it's unconstitutional to apply this to me as a minor,
11 on the other hand ignoring the specific conduct that he engaged
12 in --

13 QUESTION: Well why not? It's perfectly apparent
14 on the face of the statute that it would apply to a consensual
15 act between 17-year olds.

16 MR. KRIEGLER: That is not the facts before this
17 Court. The statute on its face applies to all forms of --

18 QUESTION: But do you not defend the constitution-
19 ality of the statute as applied to a consensual act between
20 two 17-year olds of opposite sexes who are equally culpable?

21 QUESTION: Yes, you do.

22 MR. KRIEGLER: Yes, we certainly do.

23 QUESTION: They why do we have to argue about any-
24 thing else?

25 MR. KRIEGLER: Because it's important to point out,

1 in this case, the two 17-year olds were not equally culpable.

2 QUESTION: Well why is it important if you're
3 defending the statute --

4 QUESTION: How do we know that? You're just --

5 QUESTION: -- instead of the prosecution?

6 QUESTION: -- and there's been no trial and no
7 finding of fact, so we don't know whether that's true or not.

8 MR. KRIEGLER: That is correct, Your Honor, there
9 has been no trial. However, whether the parties are engaged
10 in the type of conduct that occurred in this case or as Your
11 Honor suggests, whether we view the statute on its face, we
12 submit that the statute is nonetheless constitutional because
13 it serves these two important governmental interests that I
14 have mentioned and --

15 QUESTION: You say that the reason it serves it
16 better than a sex neutral statute is that after the act has
17 been committed, then there's a greater likelihood that it
18 will be reported by the female?

19 MR. KRIEGLER: Right --

20 QUESTION: But in terms of the deterrence of the
21 conduct itself, is it not clear that if the penalty applied
22 to both, there would be less likelihood of the risk-creating
23 conduct taking place?

24 QUESTION: Right.

25 MR. KRIEGLER: I don't think that necessarily follows.

1 Females have --

2 QUESTION: You don't think the female should ever
3 be punished for engaging in this kind of conduct as a deter-
4 rent to further examples of the same kind of conduct?

5 MR. KRIEGLER: Well I think the state might -- the
6 state legislature might, in the exercise of its sound judg-
7 ment, --

8 QUESTION: Would it be rational for a parent to
9 say it's perfectly all right for my sons to do this, but it's
10 wrong for my daughters to do this and therefore I will punish
11 my sons but not my daughters? That's what the state is doing.

12 MR. KRIEGLER: It would depend upon the circumstances,
13 Your Honor, and the act --

14 QUESTION: Well it's always a risk-creating act,
15 isn't it?

16 MR. KRIEGLER: It is, but the risks are borne
17 uniquely by the female. But it might --

18 QUESTION: But it takes two participants every time
19 the act is performed, doesn't it?

20 MR. KRIEGLER: Yes, it does, it certainly does.

21 QUESTION: And if it's consensual, why should one
22 be punished and not the other one?

23 MR. KRIEGLER: One should be punished because the
24 California legislature has determined that the female bears
25 these extraordinary risks from the act of intercourse; because

1 of these extraordinary risks which Petitioner has conceded
2 in Petitioner's brief, to be compelling state interests, the
3 legislature has reasonably concluded, we believe, that the
4 sexes are not similarly situated.

5 QUESTION: Has the legislature reasonably concluded
6 that those risks have been sufficient to deter females from
7 voluntarily engaging in this kind of conduct?

8 MR. KRIEGLER: Well, the question of deterrence is
9 one that is very difficult to answer; we don't know how many
10 people have or have not been deterred by the existence of this
11 statute, or any other statute.

12 QUESTION: Not very many have.

13 QUESTION: The point is, must be, I think, that
14 the risk of pregnancy is a deterrence with respect to the
15 female, and --

16 MR. KRIEGLER: I submit--

17 QUESTION: -- and in order to -- and there is no
18 such deterrence with respect to the male. And in order to
19 deter the male this statute is necessary, applicable to males
20 who indulge in this conduct, but not females because they are
21 equivalently deterred by the risk of pregnancy, or the fear
22 of pregnancy, isn't that your argument?

23 MR. KRIEGLER: Yes, it is, Mr. Justice Stewart.

24 QUESTION: Well, Mr. Attorney General, the first
25 statute was passed in 1850, right?

1 MR. KRIEGLER: Yes, Mr. Justice Marshall.

2 QUESTION: And it applied to girls 10 years old,
3 right?

4 MR. KRIEGLER: That is correct.

5 QUESTION: Is there any literature that shows that
6 there was a rash of pregnancies among 9 year olds in 1850?

7 MR. KRIEGLER: No. We are quite confident that the
8 statute as originally enacted in 1950 was intended to prevent
9 physical injury to minor females, 9 year olds certainly, at
10 that time --

11 QUESTION: Well when did it change to pregnancy?

12 MR. KRIEGLER: Well the statute --

13 QUESTION: And I'm going to ask for a citation when
14 you answer.

15 MR. KRIEGLER: Fine. The statute, Mr. Justice
16 Marshall, was amended incrementally, at three stages: the
17 age of the protection for the female raised to 14, 16, and
18 eventually 18, in 1913. We believe that while there is no
19 concrete legislative history to support the reasoning for
20 those increases, certainly one inference that could reasonably
21 be drawn as the age of the victim increased the possibility
22 of pregnancy occurring was more frequent. Now --

23 QUESTION: Have you ever heard of anything more
24 speculative than that in your life?

25 MR. KRIEGLER: Your Honor, there are some additional

1 points I would like to make in regard to the question of
2 legislative intent, if I might?

3 QUESTION: Sure.

4 MR. KRIEGLER: In 1967, California passed its Thera-
5 peutic Abortion Act, and that is cited in our brief. And
6 that of course was well prior to the time that this Court
7 enunciated the rule that abortions were constitutionally man-
8 dated -- must be made available.

9 In that act, the one category of victim that was
10 specifically named as being unconditionally eligible for
11 abortion was statutory rape victims under our former statutory
12 rape law; California Penal Code Section 261 Subdivision 1.
13 Because that particular category of victim under Section 261
14 Subdivision 1, was specifically singled out as being eligible
15 for abortion, we believe that it's very clear at least at that
16 time, the legislature perceived the purpose of the statutory
17 rape law, at least in part, as being intended to deter teenage
18 pregnancies.

19 QUESTION: Did it change its statute?

20 MR. KRIEGLER: Yes, Your Honor. Subsequently the
21 statute was repealed --

22 QUESTION: Subsequently?

23 MR. KRIEGLER: Yes, in 1970, as a matter of fact,
24 the present edition of the statute, Penal Code Section 261.5,
25 was enacted, it was taken out of the former rape section, and

1 it was called unlawful sexual intercourse. We believe that
2 since that occurred three years after the legislative defer-
3 ration of -- the connection between statutory rape and teenage
4 pregnancy --

5 QUESTION: Three years later?

6 MR. KRIEGLER: Yes, Your Honor.

7 QUESTION: It wasn't the same legislature, either.

8 MR. KRIEGLER: No, Your Honor, it was not the same
9 legislature. But certainly, I think, that is the most recent
10 indication, at least at that time, of what the legislatures'
11 thinking was in regards to the purpose of the statutory rape
12 law. I would also point --

13 QUESTION: Mr. Kriegler, really, I don't -- I either
14 didn't understand in reading your briefs, or your opponent's
15 briefs, why you run away from the idea that the purpose of
16 this statute is to protect the chastity of minor females and
17 don't face up to the fact that your opponent argues that
18 California is constitutionally prohibited from passing such
19 legislation unless it also protects -- legislation to protect
20 the chastity of minor males.

21 MR. KRIEGLER: Well first of all --

22 QUESTION: That's the argument.

23 MR. KRIEGLER: I don't think that is the intent of
24 the legislature in this case. First of all, because there's --

25 QUESTION: What difference does it make?

1 MR. KRIEGLER: -- no chastity requirement. Well,
2 there's no chastity requirement in our statute, number one.

3 QUESTION: Well why then, all these statistics on
4 the great rise in pregnancies of unmarried teenagers, 12-13-14
5 years old, if that wasn't related to the legislatures' purpose?

6 MR. KRIEGLER: Well, certainly there is a direct
7 correlation between the frequency of intercourse today and the
8 resulting pregnancies; I don't think there's any dispute
9 about that.

10 My point is --

11 QUESTION: According to the opinion of others I thought
12 that California's position was that the California legislature
13 has a right to try to protect minor children, females, from the
14 whole range of consequences of this kind of conduct?

15 MR. KRIEGLER: That is correct, and we also protect
16 minor males. I don't want to leave this Court with the false--

17 QUESTION: Well in this case, you protect only
18 females, because it applies only when females are victims.

19 MR. KRIEGLER: Because of --

20 QUESTION: But the argument is that California is
21 constitutionally disabled from enacting any such legislation
22 and that it is constitutionally required to protect also minor
23 males, if it protects minor females. Now that's a very odd
24 argument, and you haven't done it at all.

25 MR. KRIEGLER: Well, our response is that California

1 is not constitutionally required to treat dissimilarly situ-
2 ated sexes the same way. We have established that the very
3 narrow category of victim in this case is in need of special
4 protection. Minor males are not in need of the same protec-
5 tion. That is not to say, however, that minor males do not
6 get protection under the California laws.

7 QUESTION: Isn't that because there's a greater
8 moral stigma to this act if it's performed by an unmarried
9 female than by an unmarried male?

10 MR. KRIEGLER: I don't think it is necessarily a
11 moral stigma, it may be a basis of -- of --

12 QUESTION: Well, does California, is it the policy
13 of the state of California to place greater importance on the
14 chastity of the female than on the chastity of the male?

15 MR. KRIEGLER: I don't think --

16 QUESTION: In moral terms?

17 MR. KRIEGLER: I don't think it turns upon the
18 question of chastity, Your Honor. I think it turns upon --

19 QUESTION: Then Mr. Justice Stewart is suggesting
20 you should face up to that, and I'm wondering whether, in
21 facing up to that, you are contending there is a distinction
22 in the, in the morality of the act, depending on the sex of
23 the person who participated.

24 QUESTION: Or that's really -- you don't have to
25 contend that. Just --

1 QUESTION: Or you rely entirely on pregnancy --

2 QUESTION: California legislature determined to
3 protect the chastity of minor females, not of all people of
4 all ages, or of both sexes, and your opponent's argument is
5 that California is constitutionally required, if it protects
6 minor females to at least protect minor males. We don't
7 have here the question of whether it also is constitutionally
8 required to protect the chastity of males and females of all
9 ages but that would be the next case.

10 QUESTION: You certainly must argue -- you certainly
11 must argue that the consequences, apart from any moral issue,
12 the consequences socially, economically and in various other
13 ways, are much greater on the girl, is that not so?

14 MR. KRIEGLER: That is the entire basis of our
15 argument.

16 QUESTION: But you haven't been making that argument,
17 Mr. Kriegler.

18 QUESTION: Yes, you've hardly had time, have you?

19 QUESTION: No.

20 QUESTION: Or a chance.

21 MR. KRIEGLER: Thank you, Mr. Justice White.

22 QUESTION: Well, now, go ahead and make it now, if
23 you are ready to.

24 MR. KRIEGLER: Once the statutory purposes of
25 deterring these teenage pregnancies, and as Mr. Chief Justice

1 has, thankfully, pointed out -- the consequences of these
2 pregnancies are just disastrous on minor females. Eight out
3 of ten never complete high school; 60 percent end up on welfare
4 within 2 to 5 years. The consequences are medically disastrous,
5 the --

6 QUESTION: Is it your argument that there would be
7 less of a deterrent if it was also unlawful for the female to
8 engage in sexual intercourse at this age; that that would be
9 a lesser deterrent to pregnancy?

10 MR. KRIEGLER: I think there would be a problem
11 involved in it, and I started to answer, I think, the same
12 question a little bit earlier and I didn't quite get to com-
13 plete my answer. First --

14 QUESTION: Enforcement problem, you've identified
15 that.

16 MR. KRIEGLER: Well, it even goes beyond the prob-
17 lem of reporting. If the statute were gender neutral, the
18 female would be culpable also as an aider and abettor, or a
19 principal, in this case. That creates problems of who is the
20 state going to prosecute; the male or the female? Well that's
21 a judgment call on the part of prosecutors. You start getting
22 into the question of is this particular case a discriminatory
23 prosecution? So we have a hearing in which this minor female
24 who is supposed to be protected by the statute, goes through
25 all the facts again and we decide whether it's a discriminatory

1 prosecution or not. But even if we were to say that she
2 should be protected under the statute, that creates another
3 problem in California, because she, as an accomplice or an
4 aider or abettor, must have her testimony corroborated under
5 California Penal Code Section 111.1. And under that section,
6 her testimony standing by itself won't be sufficient to con-
7 stitute substantial evidence for a conviction under California
8 law.

9 These acts are, by and large, committed in privacy.
10 This would be a very substantial problem for the state of
11 California to enforce its law, if we had a gender neutral
12 statute. When we add to that the fact that in the great
13 majority of these cases, the perpetrator is the adult -- is
14 an adult. We have cited statistics in our brief which show
15 that it's a very rare case indeed that a minor male is pro-
16 secuted. Perhaps only one --

17 QUESTION: But in terms of the actual conduct you
18 seek to deter, you don't have statistics about that, do you?
19 I mean, isn't there a large volume of conduct in which the
20 participants are both young persons?

21 MR. KRIEGLER: I'm sure there is, Your Honor, yes.
22 I don't think we can deny that fact.

23 QUESTION: And you think that you would not be as
24 equally effective in deterring that conduct if you also imposed
25 a penalty on the female for engaging in it?

1 MR. KRIEGLER: Well it may or may not be --

2 QUESTION: Because of these enforcement problems
3 you describe?

4 MR. KRIEGLER: Well it may or may not be the case.
5 Many states --

6 QUESTION: Well if it's not the case then you have
7 no rational basis for the discrimination. You may have a
8 rational basis for the prohibition, but you have to justify
9 why do we make it just as to one and not the other?

10 MR. KRIEGLER: Well I think it goes beyond the
11 enforcement problems. There I come back to our original point,
12 the statute is based upon deterring the particular harmful --

13 QUESTION: Let me give you an example which I've
14 reflected on. Supposing you had a law that made it reckless
15 driving to drive on a motorcycle at excessive rate of speed.
16 And you said well, if a person doesn't wear a helmet, he'll
17 suffer greater harm if he has an accident, so we will exclude
18 people who do not wear helmets from the prohibition against
19 reckless driving. Under your rationale that would be a per-
20 fectly reasonable exclusion, is that not right?

21 MR. KRIEGLER: I -- I --

22 QUESTION: Because they suffer a greater risk of
23 harm, therefore you don't need to deter them with legal sanc-
24 tions?

25 MR. KRIEGLER: Well, I don't think that necessarily

1 follows.

2 QUESTION: And that's your argument about the female;
3 she suffers a greater risk of harm, and therefore, she should
4 not be deterred. She should know intelligently, no matter how
5 young she is, that she should not do this.

6 MR. KRIEGLER: Well, this statute, Your Honor, is
7 consistent with all of the California laws which prohibit
8 sexual offenses with minors, whether they be male or females.
9 Under California law where the minor is protected from acts
10 involving lewd or lascivious conduct, or annoying or molesting
11 that child or other acts of sex perversion, it matters not
12 whether the minor who engages in those acts with the adult
13 counterpart is acting consensually or not. The statute is
14 there for the protection of that particular individual, because
15 of the consequences of the act. And it doesn't matter whether
16 the act is consensual or not; the severe consequences to the
17 minor victim in all of our California statutes, are recognized,
18 because the minors are not treated as being culpable for the
19 crime that's committed.

20 When the female in this case is properly viewed as
21 the victim and is properly viewed as suffering disparate
22 consequences from the act of intercourse, none of which what-
23 ever are borne by the male who engages in the act of inter-
24 course, we believe that the statute does not contain --

25 QUESTION: Is it part of your position that the male

1 participant never suffers any adverse consequences other than
2 legal prohibition?

3 MR. KRIEGLER: We are unaware of any substantial
4 adverse consequences to the minor male.

5 QUESTION: There's financial responsibility, some-
6 times. There's physical harm, sometimes, isn't there?

7 MR. KRIEGLER: We are unaware of any --

8 QUESTION: Well how about venereal disease?

9 MR. KRIEGLER: That is a potential harm that both
10 suffer.

11 QUESTION: To either one?

12 MR. KRIEGLER: Yes, Your Honor.

13 QUESTION: How about an irate father?

14 MR. KRIEGLER: That may be a more practical consid-
15 eration, I don't know.

16 QUESTION: And some liability for support, even-
17 tually?

18 MR. KRIEGLER: Well I think that's pretty tenuous,
19 particularly in this case, where, you know, we have a minor
20 male participant. I really --

21 QUESTION: Could I ask you -- could I ask you,
22 suppose a young man, a teenager, is on trial under this statute
23 and he's tried before the judge, and he defends on the ground
24 that the statute as applied to him is unconstitutional because
25 in this case the woman was the aggressor, and that he surely

1 shouldn't be punished in those circumstances and the judge
2 finds yes, the woman was the aggressor, and is much more culp-
3 able and blameworthy in the case, but nevertheless says this
4 statute requires it and this statute is constitutional. I
5 suppose you must defend the statute, even in those circum-
6 stances?

7 MR. KRIEGLER: Yes, we would, for the same reasons
8 that I stated previously. But I would like to point out, and
9 emphasize this fact most strongly to the Court, after all the
10 research that has been done in this case, Petitioner has yet
11 to cite to a single instance where the statute has been applied
12 in an unfair manner as suggested by Mr. Justice White's ques-
13 tion. We believe that the statute as applied in this case
14 was clearly applied to the sexual aggressor. The cases
15 that are decided in California under our --

16 QUESTION: Well but that's just avoidance, you
17 would say, even if it were applied every day in those kinds
18 of circumstances that I gave you, it would be constitutional?

19 MR. KRIEGLER: Yes, Your Honor, definitely it would.
20 I would simply point out, though --

21 QUESTION: When you talk about the sexual aggressor,
22 would that be -- a person that plied somebody with liquor?

23 MR. KRIEGLER: Could possibly, Your Honor, yes.

24 QUESTION: And isn't that what happened in this case?

25 MR. KRIEGLER: I believe the girl drank her own

1 liquor in this case, Your Honor. I don't think she plied
2 anybody with liquor.

3 QUESTION: Well she -- she drank it herself?

4 MR. KRIEGLER: Yes, she did, certainly.

5 QUESTION: But if he'd given it to her, he'd have
6 been the aggressor?

7 MR. KRIEGLER: Well, we don't -- we don't base our --

8 QUESTION: I hope not.

9 MR. KRIEGLER: -- on that fact, Your Honor.

10 QUESTION: Well I come back again to where we've
11 been before. We're not dealing with this case of the statute
12 as applied, but on its face, and nothing else.

13 MR. KRIEGLER: Correct, Your Honor. We would strongly
14 urge this Court to recognize the severe consequences that
15 befall only the teenage female participant in an act of inter-
16 course, regardless of the age of the male participant. And
17 with the Court being aware, as it is, of the consequences of
18 teenage pregnancy, I don't need to remind the Court certainly
19 of the statements made in earlier cases. I know, Mr. Justice
20 Powell speaking for the Court in Bellotti v. Baird certainly
21 recognized that the consequences of pregnancy, severe as they
22 are to an adult woman, are even more severe to the unwed,
23 teenage mother.

24 California legislature has recognized the disastrous
25 consequences of teenage pregnancy and sexual abuse of minor

1 females in the state of California. The problem is conceded
2 by Petitioner to be one of monumental proportions. The state
3 of California has made the valid judgment that in view of the
4 risks which are borne only by the minor female, none of which
5 are suffered by the minor male, that criminal sanctions should
6 be employed as it is, under California Penal Code Section
7 261.5.

8 We ask this Court to leave intact California Penal
9 Code Section 261.5 because of the degree of protection it
10 provides to this particular class of individual is so needing
11 in that protection. We submit that the judgment of the
12 California Supreme Court should be affirmed. Thank you.

13 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
14 The case is submitted.

15 (Whereupon, at 10:58 o'clock a.m., the case in the
16 above-entitled matter was submitted.)
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CERTIFICATE

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6 No. 79-1344

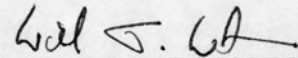
7 Michael M.,

8 v.

9 Superior Court of Sonoma County

10
11 and that these pages constitute the original transcript of the
12 proceedings for the records of the Court.

13 BY:



14 William J. Wilson
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