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New Hampshire Statutory Rape Provision Punishing Only Males and Protecting Only Females Is Violative of Equal Protection Clause of Fourteenth Amendment.

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CASE NOTES

CONSTITUTIONAL LAW—Equal Protection—New Hampshire Statutory Rape Provision Punishing Only Males and Protecting Only Females Is Violative of Equal Protection Clause of Fourteenth Amendment

Meloon v. Helgemoe,
564 F.2d 602 (1st Cir. 1977), *cert. denied*, 98 S. Ct. 2858 (1978).

Thomas E. Meloon was convicted in 1974 under a subdivision of the New Hampshire rape statute[1] which prohibited sexual intercourse with a non-spouse female less than 15 years old. At his trial Meloon pointed out that under the statute only males could be convicted and only females were protected. Therefore, Meloon contended, the statute violated the equal protection clause of the fourteenth amendment of the United States Constitution. The New Hampshire Supreme Court upheld the constitutionality of the statute.[2] Meloon next sought a writ of habeas corpus from the United States District Court for the District of New Hampshire. That court held that the statute violated the fourteenth amendment's equal protection clause.[3] The State of New Hampshire appealed to the Court of Appeals for the First Circuit. Held—*Affirmed.* Under the provisions of the fourteenth amendment, the New Hampshire statutory rape provision, which punishes only males and protects only females, is violative of the equal prtection clause.[4]

While a state has broad discretion in the use of its power to make and amend laws conforming to the desires of its citizens,[5] no state has the power to legislate in such a way to deny any person equal protection of the laws.[6] Since no precise test of equal protection is possible,[7] however, the courts

1. 1971 N.H. Laws, ch. 518, § 1 (current version at N.H. REV. STAT. ANN. § 632-A:3 (Supp. 1977)) stated in pertinent part: "A male who has sexual intercourse with a female not his wife is guilty of a class A felony if . . . (c) the female is unconscious or less than fifteen years old . . . ."

2. State v. Meloon, 366 A.2d 1176, 1177 (N.H. 1976).

3. *See* Meloon v. Helgemoe, 436 F. Supp. 528, 532 (D.N.H.), *aff'd*, 564 F. 2d 602 (1st Cir. 1977), *cert. denied*, 98 S.Ct. 2858 (1978).

4. Meloon v. Helgemoe, 564 F.2d 602, 603 (1st Cir. 1977), *cert. denied*, 98 S.Ct. 2858 (1978).

5. *E.g.*, Levy v. Louisiana, 391 U.S. 68, 71 (1968); McGowan v. Maryland, 366 U.S. 420, 425 (1961); Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955).

6. U.S. CONST. amend. XIV, § 1; *see* B. SCHWARTZ, CONSTITUTIONAL LAW § 153 (1972). *See generally* 16 AM. JUR. 2d *Constitutional Law* §§ 485-525 (1964).

7. Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37 (1928); *see* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 669 (1966).

have had to delicately balance state power against the freedom of the individual.[8] Equal protection decisions have recognized that a state cannot function without classifying its citizens for various purposes and treating some differently from others.[9] Some statutes are specifically applicable only to a given class. Thus, a new law may be applied to "all males between eighteen and twenty years of age" or "females under the age of fifteen." In order to withstand an equal protection challenge the classification embodied in such statutes must be reasonable;[10] in making this determination the courts examine the relationship between the purpose of the statute and the manner in which individuals have been grouped.[11]

Historically, cases regarding the reasonableness of statutes challenged upon equal protection grounds have been decided on the basis of two different tests: the rational basis test[12] or the strict scrutiny test.[13] At one extreme, the rational basis test presumes the statute is valid and constitutional.[14] Consequently, a state is given great leeway in regulating the activities of its constituents.[15] The burden of proving that the statute is unconstitutional is placed upon the one challenging it.[16] In judging the constitu-

8. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 669 (1966) (state's interest in voter registration versus individual's right to vote); Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 36 (1928) (state's right to tax long term loans versus individual's right not to be deprived of property).

9. *See* Snowden v. Hughes, 321 U.S. 1, 8 (1944); Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37 (1928); Stebbins v. Riley, 268 U.S. 137, 142 (1925). *See generally Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1076 (1969).

10. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974); Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966).

11. *See* Carrington v. Rash, 380 U.S. 89, 92-93 (1965); McLaughlin v. Florida, 379 U.S. 184, 191 (1964); *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1076 (1969). *See generally* 16 AM. JUR. 2d *Constitutional Law* § 502 (1964).

12. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, ___ U.S. ___, ___, 98 S. Ct. 2733, 2783, 57 L. Ed. 2d 750, 814 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911). *See generally Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1108 (1969) (termed the "permissive standard"); Comment, *Fundamental Personal Rights: Another Approach to Equal Protection,* 40 U. CHI. L. REV. 807, 810 (1973) (termed the "reasonable relationship" test).

13. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, ___ U.S. ___, ___, 98 S. Ct. 2733, 2782, 57 L. Ed. 2d 750, 813 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting); Frontiero v. Richardson, 411 U.S. 677, 688 (1973); Korematsu v. United States, 323 U.S. 214, 216 (1944). *See generally Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1087 (1969) (termed the "active review"); Comment, *Fundamental Personal Rights: Another Approach to Equal Protection,* 40 U. CHI. L. REV. 807, 812 (1973) (termed "strict scrutiny approach").

14. *See* Dandridge v. Williams, 397 U.S. 471, 486-87 (1970); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808-09 (1969).

15. *See* Dandridge v. Williams, 397 U.S. 471, 486-87 (1970); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808-09 (1969).

16. *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973); Madden v.

tionality of a statute under this test the court is required first to determine whether the purpose of the statute is reasonable.[17] Upon an affirmative finding, the focus of the examination shifts to the classification affected by the statute.[18] If the scope of the classification bears a rational relationship to the stated purpose of the statute, the statute is declared constitutional.[19] Despite this test's failure to meet a standard of "mathematical nicety,"[20] it continues to be used.[21]

The strict scrutiny test is at the opposite extreme in that it places a heavy burden on the state, or the one relying on the statute, to justify the regulation.[22] The strict scrutiny approach is employed with "suspect"[23] classifications—those based on race,[24] alienage,[25] and national origin.[26] In

Kentucky, 309 U.S. 83, 88 (1940); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-78 (1969); 42 Mo. L. REV. 470, 472 (1977).

17. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 487 (1970) (application of rational basis test to administration of public welfare assistance program); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (statute limiting sales by vendor on Sunday not unconstitutionally discriminatory); Allied Stores, Inc. v. Bowers, 358 U.S. 522, 528 (1959) (taxation of merchandise belonging to nonresident not violative of resident's equal protection).

18. When statutory classifications are examined they may be under-inclusive or over-inclusive. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483, 488-89 (1955) (under-inclusive) (optician subject to regulations while sellers of ready-to-wear glasses were not); Hirabayashi v. United States, 320 U.S. 81, 101 (1943) (over-inclusive) (order during wartime for "all persons of Japanese ancestry" to meet certain curfews); Buck v. Bell, 274 U.S. 200, 208 (1927) (under-inclusive) (sterilization required of certain confined mental defectives while not required of those not confined); Missouri, K. & T. Ry. v. May, 194 U.S. 267, 270 (1904) (over-inclusive) (private landowners permitted to grow Johnson grass along railway, but railroad companies owning adjacent land denied privilege). Thus under-inclusive classifications would not include some persons who should logically be included. Over-inclusive classifications tend to place burdens on more persons than would logically belong in the class based on the purpose of the legislation. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 348, 351 (1949).

19. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974); Reed v. Reed, 404 U.S. 71, 76 (1971); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). This substantial relationship test has been described in various terms. *See* Frontiero v. Richardson, 411 U.S. 677, 683 (1973) ("traditional approach"); Reed v. Reed, 404 U.S. 71, 76 (1971) ("rational relationship" test); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1108 (1969) ("permissive" test).

20. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

21. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 487 (1970); Allied Stores, Inc. v. Bowers, 358 U.S. 522, 528 (1959); Williamson v. Lee Optical, Inc., 348 U.S. 483, 488-89 (1955).

22. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 633 (1969); Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring); Bates v. Little Rock, 361 U.S. 516, 525 (1960).

23. A legal restriction which impinges on an individual's civil rights is not necessarily unconstitutional, but it is considered suspect. Korematusu v. United States, 323 U.S. 214, 216 (1944).

24. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (statute prohibiting unmarried, interracial couple from habitually living in same room at nighttime held unconstitutional); Korematsu v. United States, 323 U.S. 214, 216 (1944) (order directing persons of Japanese ancestry to detention centers held constitutional).

25. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634, 641-43 (1973) (civil service rules restrict-

addition to suspect classifications, certain personal rights have been identified as "fundamental" and therefore deserving of special treatment.[27] Both suspect and fundamental classifications require a stricter level of scrutiny by the court in its analysis of a particular statute.[28] As in the rational basis test, the purpose of the statute under this test must also be reasonable.[29] The examination of the affected classification, however, requires more than finding that the classification bear a rational relationship to the statute's purpose. Here the classification must further a compelling state interest.[30] In *McLaughlin v. Florida*[31] a criminal statute containing a racial classification was challenged on the ground of equal protection.[32] The Court held that when a criminal statute is questioned, a "special sensitivity" is required to ensure that the law subjects all persons to the same punishments and penalties.[33]

The proper standard to be applied does not fall clearly within either of the two traditional tests when statutes containing gender-based classifications are challenged on equal protection grounds. In 1971, the United States Supreme Court began a "modern approach"[34] to gender-based clas-

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ing permanent positions to only United States citizens held violative of equal protection); Graham v. Richardson, 403 U.S. 365, 372 (1971) (denial of welfare benefits to resident aliens violates equal protection clause); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (state law preventing legal aliens within state from securing employment held unconstitutional).

26. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (directive placing Japanese in detention centers held constitutional); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (refusal to issue laundry license due to hostility toward Chinese held impermissible).

27. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (privacy); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966) (voting); NAACP v. Button, 371 U.S. 415, 430 (1963) (association); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation).

28. *See* Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Korematsu v. United States, 323 U.S. 214, 216 (1944).

29. *See* Bates v. Little Rock, 361 U.S. 516, 525 (1960).

30. Shapiro v. Thompson, 394 U.S. 618, 634 (1969); *see, e.g.,* American Party v. White, 415 U.S. 767, 782 n.14 (1974) (preservation of the integrity of the electoral process); *In re* Griffiths, 413 U.S. 717, 722 n.9 (1973) (character and fitness of bar applicants); Roe v. Wade, 410 U.S. 113, 162-63 (1973) (preserving and protecting the health of pregnant women and protecting the potentiality of human life of a viable fetus). *But see* Kahn v. Shevin, 416 U.S. 351, 358 (1974) (Brennan, J., dissenting) (administrative convenience not considered compelling); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 264 (1974) (fiscal savings in medical care program not considered compelling).

31. 379 U.S. 184 (1964).

32. *Id.* at 192.

33. *Id.* at 192. In criminal cases the power of the state "weighs most heavily upon the individual or the group" and the courts need to be especially sensitive to how the state uses this power. *Id.* at 192; *accord,* United States v. Boone, 347 F. Supp. 1031, 1035 (D.N.M. 1972).

34. Comment, *Constitutional Law: Sex as a Legislative Classification,* 29 OKLA. L. REV. 711, 711 (1976).

sifications with its decision in *Reed v. Reed*.[35] Although the Court quoted language used in the traditional rational basis test,[36] it has been suggested that the level of review was stricter than that mandated by the rational basis test.[37] Subsequent Supreme Court decisions indicate that the Court is divided on whether to apply the *Reed* test or the strict scrutiny test in determining the constitutionality of a gender-based statute.[38] Lower courts have tended to use the rational basis test, or a modification of it, when ruling on gender-based statutes.[39] In *Craig v. Boren*[40] the Supreme Court considered the constitutionality of a gender-based statute which imposed criminal sanctions upon venders selling 3.2 per cent beer to male purchasers between eighteen and twenty years of age. The statute did not prohibit sale to females of the same age.[41] The test established by the Court to evaluate such statutes involves two criteria: first, the gender-based classification "must serve important governmental objectives,"[42] and second, the classification "must be substantially related to achievement of those objectives."[43] Although the stated objective of the statute, to promote traffic safety, was an important governmental objective,[44] the Court found

35. 404 U.S. 71, 76 (1971).

36. *Id.* at 76. The basis of a classification must have a "fair and substantial relation to the object of the legislation." *Id.* at 76 (citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

37. *See* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 34 (1972). More recent equal protection decisions indicate a trend toward an intermediate level of review, particularly with respect to classifications affecting gender, illegitimacy, and indigency. *See* Trimble v. Gordon, 430 U.S. 762, 767 (1977) (illegitimacy); Craig v. Boren, 429 U.S. 190, 210 (1976) (Powell, J., concurring) (gender); Mathews v. Lucas, 427 U.S. 495, 510 (1976) (illegitimacy); Douglas v. California, 372 U.S. 353, 355, (1963) (indigency). This intermediate level has been referred to as a "middle tier" of judicial scrutiny between that of the rational basis test (lower tier) and the strict scrutiny test (upper tier). *See* Craig v. Boren, 429 U.S. 190, 210 (1976) (Powell, J., concurring); Gunther, *The Supreme Court, 1971 Term—Forward: In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 34-35 (1972); Wilkinson, *The Supreme Court, The Equal Protection Clause, and The Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 953 (1975).

38. *Compare* Schlesinger v. Ballard, 419 U.S. 498 (1975) (five justices support rational basis approach in mandatory discharge rule discriminating against males) *and* Kahn v. Shevin, 416 U.S. 351 (1974) (six justices favor rational basis approach in examining gender-based property tax provision) *with* Frontiero v. Richardson, 411 U.S. 677 (1973) (four justices favor strict scrutiny approach in examining gender-based statute).

39. *See, e.g.*, Hall v. McKenzie, 537 F.2d 1232, 1235 (4th Cir. 1976) (non-forcible, non-marital statutory rape statute upheld); State v. Brothers, 384 A.2d 402, 405 (Del. Super. Ct. 1978) (statutory rape statute upheld); Finley v. State, 527 S.W.2d 553, 555 (Tex. Crim. App. 1975) (forcible rape statute upheld).

40. 429 U.S. 190 (1976).

41. *Id.* at 193.

42. *Id.* at 197.

43. *Id.* at 197.

44. *Id.* at 199. The Court "accepted for purposes of discussion" that the state's objective

that the "relationship between gender and traffic safety [was] far too tenuous to satisfy Reed's requirement that the gender-based difference be substantially related to achievement of the statutory objective."[45] The Court held, therefore, that the state had failed to meet the burden of justifying the statute.[46] It is apparent from the Court's failure to presume the constitutionality of the statute in *Craig* and its imposition of the burden of justification upon the state, that the test established in *Craig* comes closer to the strict scrutiny test than to the rational basis test.[47]

In *Meloon v. Helgemoe*[48] the Court of Appeals for the First Circuit stated that a gender-based statutory rape law required an analysis based on the heightened scrutiny test of *Craig*.[49] Further, because the statute provided for criminal penalties, the analysis was said to require "special sensitivity."[50] The state's general objective in legislating the gender-based statute was "the protection of children from exploitation through the act of sexual intercourse."[51] The court ruled that the state failed to show how the four reasons offered for the classification connected the classification to the stated objective.[52] Although the court indicated that the state's contention that there were more potential offenders in the class of males than the class of females may have been adequate under the minimal rationality test, the classification could not withstand the "stricter scrutiny" now used when analyzing a gender-based statute.[53] The court also determined that a number of potential male victims under 15 years of age were unprotected by the statute.[54]

Turning its attention to the state's argument that the statute was justified because of the state's interest in preventing pregnancy and physical injury to young girls, the court found that the New Hampshire law defining sexual intercourse as involving "any penetration, however slight; emission

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in enacting the statute was truly traffic safety, but the Court implied that perhaps the state merely selected "a convenient, but false *post-hoc* rationalization." *Id.* at 199 n.7.

45. *Id.* at 204.

46. *Id.* at 204.

47. *See id.* at 210 (Powell, J., concurring); *id.* at 218 (Rehnquist, J., dissenting); 29 BAYLOR L. REV. 423, 427 (1977); 42 MO. L. REV. 470, 475 (1977).

48. 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 98 S. Ct. 2858 (1978).

49. *Id.* at 604. The New Hampshire statute was changed to a gender-neutral classification in 1975. *Compare* 1971 N.H. Laws, ch. 518, § 1 (crime for male of any age to have sexual intercourse with female less than 15 years old) *with* N.H. REV. STAT. ANN. § 632-A:3 (Supp. 1977) (*"person* is guilty . . . if he engages in sexual penetration with a *person"* between 13 and 16 years of age) (emphasis added).

50. Meloon v. Helgemoe, 564 F.2d 602, 604 (1st Cir. 1977), *cert. denied*, 98 S. Ct. 2858 (1978).

51. *Id.* at 605-06.

52. *Id.* at 606.

53. *Id.* at 606. The state failed to show any evidence that males suffer from pedophila (erotic attraction to children) to any greater extent than do females. *Id.* at 606.

54. *Id.* at 606.

not required"[55] did not comport with these objectives.[56] Finally, because the case before the First Circuit involved more serious criminal penalties than did *Craig*[57] and because the statute left potential victims (young males) unprotected, the court reasoned that it had to subject the New Hampshire statute to "at least comparable scrutiny" to that which was employed in *Craig*.[58]

Meloon is not the first time that a lower court has applied the *Craig* test to a gender-based statute,[59] but it is the first time that a lower court has attempted to apply it to a gender-based criminal statute. Because of the criminal sanctions involved, the court felt compelled to heed the "special sensitivity" admonishment set out in *McLaughlin*.[60] Despite its insistence that it relied on the *Craig* test,[61] the court may have used a higher level of scrutiny than was applied in *Craig*.[62] Eventual passage of the Equal Rights Amendment (ERA) may resolve the question by according sex the same constitutional status as race and national origin.[63] In that event, the applicable approach would be the strict scrutiny test.[64] With the fate of ERA

55. 1971 N.H. Laws, ch. 518, § 1 (current version at N.H. REV. STAT. ANN. § 632-A:1 subd. V (Supp. 1977)).

56. Meloon v. Helgemoe, 564 F.2d 602, 607 n.6 (1st Cir. 1977), *cert. denied*, 98 S. Ct. 2858 (1978). The court was not persuaded by the state's contention that the vast weight of authority supported the constitutionality of statutory rape laws. *Id.* at 605 n.4. Emphasizing that its analysis was predicated on the consensual nature of the crime committed, the court would not consider in its decision rape or statutory rape cases involving force. *Id.* at 605 n.4.

57. *Id.* at 608.

58. *Id.* at 609.

59. *See* Cape v. Tennessee Secondary School Athletic Ass'n, 563 F.2d 793, 795 (6th Cir. 1977) (different rules for girl's and boy's basketball not violative of equal protection); Blake v. City of Los Angeles, 435 F. Supp. 55, 60 (C.D. Cal. 1977) (qualities of disposition, physical size, and strength valid basis for classification).

60. Meloon v. Helgemoe, 564 F.2d 602, 604 (1st Cir. 1977), *cert. denied*, 98 S. Ct. 2858 (1978); *see* McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

61. *See* Meloon v. Helgemoe, 564 F.2d 602, 604, 607, 609 (1st Cir. 1977), *cert. denied*, 98 S. Ct. 2858 (1978).

62. *See* State v. Brothers, 384 A.2d 402, 406 (Del. Super. Ct. 1978). The Delaware state court criticized the First Circuit for imposing a heavy burden of proof on the State of New Hampshire to justify a long established classification found in statutes outlining statutory rape. *Id.* at 406. *Meloon*, the Delaware court stated, held the State of New Hampshire to a "very strict" standard. *Id.* at 405.

63. Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring). Mr. Justice Powell stated that the outcome of the Equal Rights Amendment would represent the will of the people regarding the placement of sex in the same category as race and national origin. *Id.* at 691-92 (Powell, J., concurring); *see* Comment, *Waiting for Mr. Justice Powell: The Supreme Court and Sex-Based Discrimination*, 5 CAP. U.L. REV. 227, 238 (1976); Comment, *Constitutional Law: Sex as a Legislative Classsification*, 29 OKLA. L. REV. 711, 712 (1976). *But see* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 880 (1971); Comment, *An Overview of the Equal Rights Amendment in Texas*, 11 HOUS. L. REV. 136, 138 (1973).

64. *See* Frontiero v. Richardson, 411 U.S. 677, 687-88 (1973); Mercer v. Board of Trustees,

unresolved,[65] however, the courts, as in *Meloon,* will likely profess to use a less strict test when analyzing the constitutionality of gender classifications.

Meloon was an attempt to harmonize the various tests applicable when an equal protection challenge is made to a gender based criminal statute. Out of the rational basis-strict scrutiny range has evolved the *Craig* test, applicable when gender-based statutes are in question.[66] Yet criminal statutes, in light of *McLaughlin,* seem to require an additional consideration.[67] The effect of a *Meloon* approach upon other gender-based criminal statutes is unclear. Courts, applying the loose rational basis test, have consistently upheld such gender-based statutes as relate to prostitution,[68] forcible rape,[69] and statutory rape.[70] These cases, however, were decided before the Supreme Court adopted the heightened scrutiny standard found in *Craig.*[71] If the *Meloon* approach is adopted by other federal courts, such statutes will be subjected to an even closer scrutiny. Many states have attempted to avoid these problems by enacting gender-neutral statutes.[72]

North Forest Indep. School Dist., 538 S.W.2d 201, 206 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.). The *Mercer* court stated that under the Texas Equal Rights Amendment gender-based classifications would have to meet a strict judicial scrutiny. *See id.* at 206. To withstand such scrutiny the classification must be shown to be required by physical characteristics, by other constitutionally protected rights, or by other compelling reasons. *Id.* at 206.

65. At this writing thirty-five of the necessary thirty-eight states have ratified the ERA. U.S.C.A. CONST. amend. 14 to end, 1102 note (West Supp. 1978).

66. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

67. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

68. *See, e.g.,* Sumpter v. State, 306 N.E.2d 95, 100-01 (Ind. 1974); Wilson v. State, 278 N.E.2d 569, 571 (Ind. 1972); State v. Mertes, 210 N.W.2d 741, 743 (Wis. 1973). In *Wilson v. State,* Justice De Bruler dissented. Relying on *Reed v. Reed,* he stated that there were no justifiable grounds for the gender-based distinction. Wilson v. State, 278 N.E.2d 569, 572-73 (Ind. 1972) (De Bruler, J., dissenting). Even when a gender-neutral prostitution statute exists, a court may find that it may be "rationally" enforced by arresting only females. *See* United States v. Wilson, 342 A.2d 27, 30 (D.C. App. 1975).

69. *See, e.g.,* State v. Price, 529 P.2d 85, 89 (Kan. 1974); Brooks v. State, 330 A.2d 670, 673 (Md. 1975); Finley v. State, 527 S.W.2d 553, 556 (Tex. Crim. App. 1975).

70. *See* Hall v. McKenzie, 537 F.2d 1232, 1235 (4th Cir. 1976); People v. Mackey, 120 Cal. Rptr. 157, 160 (Dist. Ct. App. 1976); *In re* W.E.P., 318 A.2d 286, 290 (D.C. App. 1974); State v. Elmore, 546 P.2d 1117, 1119 (Or. 1976); Flores v. State, 230 N.W.2d 637, 639 (Wis. 1975).

71. *Craig* was decided December 20, 1976. *See* Craig v. Boren, 429 U.S. 190 (1976).

72. At least twenty-eight states have enacted gender-neutral statutes protecting young persons of both sexes from sexual exploitation by older individuals. *See* ARIZ. REV. STAT. § 13-1405 (Supp. 1978); ARK. STAT. ANN. § 41-1800 (1976); COLO. REV. STAT. § 18-3-401 to 410 (Supp. 1976); CONN. GEN. STAT. ANN. § 53a-71 (West Supp. 1978); DEL. CODE ANN. tit. 11, § 767 (Supp. 1978); FLA. STAT. ANN. § 794.05 (West 1976); ILL. ANN. STAT. ch. 38, § 11-4 (Smith-Hurd Supp. 1977); IND. CODE ANN. § 35-42-4-3 (Burns Supp. 1977); IOWA CODE § 709.4(3) (West Supp. 1978); KAN. CRIM. CODE & CODE OF CRIM. PROC. § 21-3503 (Vernon Supp. 1977); KY. REV. STAT. ANN. § 510.060 (Baldwin 1975); ME. REV. STAT. tit. 17-A, § 254 (Supp. 1977); MD. ANN. CODE art. 27, § 464C (3) (Supp. 1977); MASS. ANN. LAWS ch. 265, § 23 (Michie/Law.

Despite the passage of the Texas Equal Rights Amendment (TERA),[73] the Texas Court of Criminal Appeals appears to regard the proper test of the constitutionality of a gender-based criminal statute to be the rational basis standard.[74] The passage of TERA was expected to resolve the question whether gender-based statutes should be subjected to the strict scrutiny test. The use of the rational basis approach by the court of criminal appeals indicates some confusion on the part of the court with respect to which test is properly applicable in equal rights cases.[75]

The recent decision of *Ex parte Groves*,[76] however, has apparently rendered moot, at least for the moment, the equal protection question with respect to Texas rape laws. In *Groves* the court of criminal appeals decided to consider the defendant's appeal from a denial of a writ of habeas corpus even though the defendant could have directly appealed his conviction.[77] Groves contended that his conviction for statutory rape was void since it was based on a statute which he alleged was unconstitutional.[78] The court found it unnecessary to reconsider the question of the proper test to use in evaluating a gender-based criminal statute,[79] since it concluded that the Texas Penal Code in fact was gender-neutral.[80] The Code Construction Act,[81] which expressly applies to the Penal Code,[82] requires that "words of one gender include the other genders."[83] Texas' statutory rape law can be read, therefore, to prohibit *anyone* from having sexual intercourse with a

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Co-op 1978); MICH. STAT. ANN. § 28.788(4)(a) (Supp. 1978); MINN. STAT. ANN. § 609.344 (West Supp. 1978); MONT. REV. CODE ANN. § 94-5-502 (Supp. 1977); NEB. REV. STAT. § 28-408.03 (1975); N.H. REV. STAT. ANN § 632-A:3 (Supp. 1977); N.M. STAT. ANN. § 40A-9-21B(1) (Supp. 1975); N.D. CENT. CODE § 12.1-20-3d (1976); OHIO REV. CODE ANN. § 2907.04(A) (Baldwin 1974); PA. STAT. ANN. tit. 18, § 3122 (Purdon Supp. 1978); S.D. COMPILED LAWS ANN. § 22-22-1(2) (Supp. 1977); VT. STAT. ANN. tit. 13, § 3252(3) (Supp. 1977); WASH. REV. CODE ANN. § 9.79.200-220 (1977); W. VA. CODE § 61-8B-5(a)(2)(i) (1977); WIS. STAT. ANN. § 940.225(2)(e) (West Supp. 1978).

73. TEX. CONST. art. I, § 3a. *See generally* Comment, *An Overview of the Equal Rights Amendment in Texas*, 11 HOUS. L. REV. 136 (1973).

74. *See* Finley v. State, 527 S.W.2d 553, 556 (Tex. Crim. App. 1976); 7 TEX. TECH. L. REV. 724, 728 (1976).

75. *See* Finley v. State, 527 S.W.2d 553, 556 (Tex. Crim. App. 1976); 7 TEX. TECH. L. REV. 724, 727 (1976).

76. No. 58,945 (Tex. Crim. App. Oct. 4, 1978) (not yet reported).

77. *Id.* at 2. The court expressed its concern that if this case were not promptly decided it would be years before the case reached the court, thus leaving the constitutionality of the Texas statutory rape law in question. *Id.* at 3.

78. *Id.* at 1-2. The Texas statutory rape law provides that "[a] person commits an offense if *he* has sexual intercourse with a *female* not *his wife* and *she* is younger than 17 years." TEX. PENAL CODE ANN. § 21.09(a) (Vernon Supp. 1978) (emphasis added).

79. The court of criminal appeals entirely avoided the equal protection question by presenting several circuitous arguments supporting gender-based statutory rape laws. *See Ex parte* Groves, No. 58,945, slip op. at 4-8 (Tex. Crim. App. Oct. 4, 1978) (not yet reported).

80. *Id.* at 9.

81. TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 2.02(c) (Vernon Supp. 1978).

82. *See* TEX. PENAL CODE ANN. § 1.05(b) (Vernon 1974).

83. TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 2.02(c) (Vernon Supp. 1978).