NEW MEXICO LAW REVIEW

Volume 3
Issue 1 *Symposium: The New Mexico Equal Rights Amendment—Asessing Its Impacts*

Winter 1973

The Impact of Equal Rights Amendment on the New Mexico Criminal Code

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THE IMPACT OF THE EQUAL RIGHTS AMENDMENT ON THE NEW MEXICO CRIMINAL CODE

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The impact of the Equal Rights Amendment on the criminal law in New Mexico should be minimal. In 1963, the New Mexico legislature enacted the first codification of the criminal laws of New Mexico[1] and in the process, revised and updated much of the previously existing law.[2] The statutory definitions of most criminal acts in the New Mexico statutes as well as the punishment[3] which may be imposed on conviction apply with equal force to members of both sexes. Not surprisingly, it is in the area of sexual offenses that the statutes are more likely to specify a particular sex of the actor or of the victim.

The Equal Rights Amendment introduces a new factor into the pre-Amendment controversy concerning the appropriate standard to be applied in reviewing classifications based on sex. In many cases the courts have upheld sex-based classifications unless the challenger overcame a presumption of validity and demonstrated that the distinction was not "based on some reasonable classification."[4] In other cases, courts have taken the position that, like classifications based on race,[5] ancestry[6] and financial status,[7] they must be subjected to the "most rigid scrutiny"[8] to determine whether the distinction is necessary to serve a compelling state interest.[9] The Supreme Court of California, in an in bank opinion, recently observed:

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1. Laws 1963, ch. 303, N.M. Stat. Ann. §§ 40A-1-1 to 29-25 (2d Repl. 1972).

2. Weihofen, *The Proposed New Mexico Criminal Code*, 1 Natural Resources J. 123 (1961).

3. N.M. Stat. Ann. §§40A-29-1 to -25 (2d Repl. 1972), "Disposition of Offenders," makes no distinction between female and male offenders. The only possible discrimination in punishment appearing in the statutes is in N.M. Stat. Ann. §§ 42-3-1 to -3 (2d Repl. 1972), a 1921 act which permits female prisoners to be confined in penal institutions of other states when adequate facilities do not exist in New Mexico. There is no longer any justification for the continued existence of this act, and it should therefore be repealed. *Cf.*, United States *ex rel.* Robinson v. York, 281 F.Supp. 8 (D.Conn. 1968); Commonwealth v. Daniels, 430 Pa. 642, 243 A.2d 400 (1968).

4. Hoyt v. Florida, 368 U.S. 57, 61 (1961). *See* Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 Harv. L. Rev. 1499 (1971).

5. Loving v. Virginia, 388 U.S. 1 (1967).

6. Korematsu v. United States, 323 U.S. 214 (1944).

7. Britt v. North Carolina, 404 U.S. 226 (1970); Douglas v. California, 372 U.S. 353 (1963).

8. Korematsu v. United Stated, 323 U.S. 214, 216 (1944).

9. Loving v. Virginia, 388 U.S. 1 (1967).

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. . . . Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.[10]

It is not yet clear what standard of review will be articulated by the courts in responding to challenges under the Equal Rights Amendment. It does seem obvious, however, that any law singling out members of one sex or the other by its terms will be subjected to close scrutiny. The Amendment is based on the principle that "the law must deal with particular attributes of individuals, not with a classification based on the broad and impermissible attribute of sex."[11] This would not prevent classifications which are expressed in terms of sex but are in reality based on physical characteristics *unique* to one sex.

Some of the classifications in the statutes may withstand constitutional challenges under the Equal Rights Amendment, but others are unlikely to survive. Since the courts must resolve all doubts as to the proper interpretation and construction of a criminal statute in favor of the defendant,[12] neither sex may be punished for offenses which impermissibly discriminate on the basis of sex. For this reason, the Legislature may not depend on the courts to extend coverage of the penal provisions to members of the sex excluded by the express statutory language.

This article will attempt to identify those portions of the New Mexico Criminal Code which may be subject to challenge under the Equal Rights Amendment.[13]

THE "UNWRITTEN LAW"

At common law, a man who discovered his wife and her lover

10. Sail'er Inn, Inc. v. Kirby, 1 Cal.3d 1, 18, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340 (1971).

11. Brown, Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L. J. 871, 893 (1971).

12. State v. Ortiz, 78 N.M. 507, 433 P.2d 92 (Ct.App. 1969); State v. Couch, 52 N.M. 127, 193 P.2d 405 (1948); Territory v. Davenport, 17 N.M. 214, 124 P. 795 (1912).

13. There appear to be no sex discrimination problems in the New Mexico criminal case law which would require legislative correction.

in the act of committing adultery and killed either in the heat of passion was guilty of no more than manslaughter.[14] New Mexico, however, is one of those few states[15] which has gone even further and transformed this rule into an absolute license to kill:

> *The "unwritten law" as a defense.*—Upon a prosecution for murder or manslaughter, in addition to other defenses which may be offered, it may be shown as a complete defense that the homicide resulted from the person's use of deadly force upon another who was at the time of the homicide in the act of having sexual intercourse with the accused's wife. In order for this defense to be available to the accused, the accused and his wife must have been living together as husband and wife at the time of the homicide.[16]

This statute managed to survive the 1963 revision and codification, but it will not be able to withstand a constitutional challenge based on the Equal Rights Amendment. It permits the husband to kill his wife's lover,[17] but grants no such justification for the wife to kill her husband's lover.[18] There is no rational basis, and certainly no compelling state interest to justify this sex-based discrimination.

The legislature may choose one of three courses of action in dealing with this statute.

One course is to do nothing and let the courts deal with the problem when it arises. This option is unsatisfactory not only for the uncertainty it injects into the criminal law, but also for the reason that it deprives the legislature of the opportunity to take the various public policy factors into account in reshaping this law. A failure to act on the part of the legislature would probably result in a judicial decision extending the defense to wives who catch their husbands in *flagrante delicto,* since under the strict rules of penal construction the court could hardly resolve the problem by denying the defense to those who are specifically included in the statute.

A second possibility is to avoid the sex discrimination problem by rewriting the statute to allow wives the defense now afforded

14. Weihofen, *The Proposed New Mexico Criminal Code*, 1 Natural Resources J. 123, 137 (1961), and cases cited therein.

15. *See, e.g.*, Tex. Penal Code, Art. 1220 (Vernon's 1961); Utah Code Ann. § 76-30-9(4) (1953).

16. N.M. Stat. Ann. § 40A-2-4 (2d Repl. 1972).

17. One who plans to take advantage of this kind of statute should practice his marksmanship, since it does not justify killing the spouse. *See, e.g.*, Morris v. State, 442 S.W.2d 703 (Tex. Cr. App. 1969).

18. *Cf.* Barr v. State, 172 S.W.2d 322 (Tex. 1943); Reed v. State, 59 S.W.2d 122 (Tex. 1933).

to husbands alone. Before doing so, however, it would be wise to re-examine the social policy justifications for this license to kill. It is a defense that is inconsistent with the other statutory defenses to homicide, not being grounded on necessity[19] or accident.[20] It sanctions what would be first-degree murder[21] against one committing an act which is not even punishable under the Criminal Code.[22] If the statute is based on some sort of property concept of a husband's possessory rights to his wife, "a personal 'prize' whose value is enhanced by sole ownership,"[23] its existence cannot be justified. If it is based on the possibility that a killing under such circumstances may be the result of uncontrollable emotional forces, its language sweeps more broadly than is necessary to deal with that situation and also fails to take into account other situations which may result in similar or more compelling emotional forces.[24]

Finally, the statute could be repealed.[25] This would be the course of action most consistent with our society's belief in the sanctity of human life, as well as the one which recognizes the value of rationality in the criminal law.

JUSTIFIABLE HOMICIDE

The only other provision in the homicide article of the New Mexico Code which makes a sexual distinction is that making a homicide by any person justifiable "when committed in the necessary defense of his life, his family or his property, or in necessarily defending against any unlawful action directed against himself, his wife or family."[26]

19. N.M. Stat. Ann. §§ 40A-2-7, 8 (2d Repl. 1972).

20. N.M. Stat. Ann. § 40A-2-6 (2d Repl. 1972).

21. The defense is available even when the killing was done with malice and premeditation.

22. New Mexico has no crime of adultery. It is, however, one of the grounds for divorce. N.M. Stat. Ann. § 22-7-1 (1953). The unlawful cohabitation statute, N.M. Stat. Ann. § 40A-10-2 (Repl. 1972), which imposes a maximum punishment of a judicial warning on a first offender, is applicable only when the offenders are "cohabitating together as man and wife." The unwritten law defense is not available unless "the accused and his wife . . . have been living together as husband and wife at the time of the homicide." N.M. Stat. Ann. § 40A-2-4 (2d Repl. 1972).

23. Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objective of the Consent Standard*, 62 Yale L.J. 55, 72 (1952).

24. For example, where a parent finds someone in the act of sexually abusing her or his child.

25. This would not negate the possibility of other defenses being available, if the circumstances should warrant. The facts could be such as to reduce a charge from first degree murder to second degree murder, N.M. Stat. Ann. § 40A-2-1B (2d Repl. 1972), voluntary or involuntary manslaughter, N.M. Stat. Ann. § 40A-2-3 (2d Repl. 1972), or to justify an acquittal on grounds of excusable homicide, N.M. Stat. Ann. § 40A-2-6 (2d Repl. 1972), or justifiable homicide, N.M. Stat. Ann. § 40A-2-8 (2d Repl. 1972).

26. N.M. Stat. Ann. § 40A-2-8 (2d Repl. 1972).

There is no rational basis for distinguishing between the situation in which a husband defends against an unlawful action directed against his wife and that in which a wife defends against an unlawful action directed against her husband. The social stereotype of the husband as the defender of his weak and helpless wife not only is inconsistent with the Equal Rights Amendment but also ignores current realities.

Amendment of this statute could be a simple matter: Delete the reference to the wife in the last line. A spouse would then be included in the more inclusive term "family." This would also make this line consistent with the first line of the statute, which makes no specific reference to a spouse. If the statute is to be amended, however, the most desirable solution would be to remove all references to the sex of the actor:

> When committed in the necessary defense of one's life, family or property, or in necessarily defending against any unlawful action directed against one's self or family.

ABORTION

The New Mexico abortion statutes[27] exhibit an apparent facial impartiality by not specifying the sex of those persons who may be punished under their provisions.[28] Statutes similar to these, however, are now being subjected to constitutional attack in many jurisdictions on various grounds, primarily the right of privacy in matters relating to marriage and sex.[29] Challenges to a number of abortion statutes are now before the United States Supreme Court[30] and should be decided this term.[31] If the

27. N.M. Stat. Ann. §§40A-5-1 to -3 (2d Repl. 1972).

28. Although the person who is prevented from obtaining an abortion is necessarily a woman.

29. *See, e.g.*, Poe v. Menghini, 339 F.Supp. 986 (D.Kan. 1972); Corkey v. Edwards, 322 F.Supp. 1248 W.D.N.C. 1971; *appeal docketed*, 41 U.S.L.W. 3019 (U.S. July 11, 1971) (No. 71-92); Doe v. Scott, 321 F.Supp. 1385 (N.D.Ill. 1971); Steinberg v. Brown, 321 F.Supp. 741 (N.D. Ohio 1970); Rosen v. Louisiana State Bd. of Medical Examiners, 318 F.Supp. 1217 (E.D.La. 1970); Babbity v. McCann, 310 F.Supp. 293 *E.D.Wis) appeal dismissed*, 400 U.S. 1 (1970); State v. Scott, 260 La. 190, 262 So.2d 431 (1972); Beechan v. Leahy, 287 A.2d 836 (Vt. 1972).

For an analysis of the New Mexico Abortion Law which concludes the law is "unnecessary, undesirable and unconstitutional," *see* Sutin, *New Mexico's 1969 Criminal Abortion Law*, 10 Natural Resources J. 591, 612 (1970). The constitutionality of the New Mexico statute is now under consideration in *State v. Strance*, (Ct.App. No. 961).

30. Doe v. Bolton, *restored to calendar for reargument*, 92 S.Ct. 2477 (U.S. June 26, 1972) (No. 70-40); Roe v. Wade, *restored to calendar for reargument*, 92 S.Ct. 2476 (U.S. June 26, 1972) (No. 70-18); Kruye v. Ohio, *petition for cert. filed*, 41 U.S.L.W. 3064 (U.S. July 13, 1972) (No. 72-69); Markle v. Abele, *petition for cert. filed*, 41 U.S.L.W. 3136 (U.S. July 10, 1972) (No. 72-56); Spears v. Mississippi, *appeal docketed*, 41 U.S.L.W. 3028 (U.S. May 23, 1972) (No. 71-1528); Corkey v. Edwards, *appeal docketed*, 41 U.S.L.W. 3019 (U.S. July 11, 1971) (No. 71-92); Hefferman v. Doe, *appeal docketed*, 41 U.S.L.W. 3018 (U.S. Mar. 29, 1971) (No. 70-106); Hanrahan v. Doe, *appeal*

abortion statutes are to be invalidated, it is likely that the basis will be something other than the Equal Rights Amendment.[32]

ABANDONMENT OF DEPENDENT

Men as well as women are protected by the Equal Rights Amendment against sex-based discrimination. A criminal statute which would be partially unenforceable after passage of the Amendment is the abandonment of dependent statute, which provides:

> Abandonment of dependent consists of:
>
> A. a *man* having the ability and means to provide for *his wife and minor child's* support, and abandoning or failing to provide for the support of such dependent and thereby leaving such wife or minor child dependent upon public support; or
>
> B. a *woman* having the ability and means to provide for *her minor child's support,* and abandoning or failing to provide for the support of such minor child and thereby leaving such child dependent upon public support.
>
> Whoever commits abandonment of dependent is guilty of a fourth degree felony.[33] [Emphasis supplied.]

In its present form, the statute could not be used as a basis for prosecution of a woman who abandons her husband. If the Legislature wishes to retain the criminal sanction for use in that situation, it must amend the statute to impose the same punishment on a wife who abandons her husband under similar circumstances. Any amendment should be consistent with the legislative treatment of Chapter 57 of the statutes governing rights and duties of husband and wife.[34]

Assuming the Legislature wishes to make each spouse responsible for the support of the other and assuming further that it wishes to impose a criminal sanction on a spouse who breaches that duty, it should amend the statute to read:

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docketed, 41 U.S.L.W. 3018 (U.S. Mar. 29, 1971) (No. 70-105); Thompson v. Texas, *appeal docketed,* 41 U.S.L.W. 3023 (U.S. Mar. 20, 1971) (No. 71-1200); Rodgers v. Danforth, *appeal docketed,* 41 U.S.L.W. 3018 (U.S. Feb. 8, 1971) (No. 70-89).

31. The Court appears to be closely divided on the abortion issues. It heard arguments in two cases last term and now has called for reargument this term. Doe v. Bolton, *restored to calendar for reargument,* 92 S.Ct. 2477 (U.S. June 26, 1972) (No. 70-40); Roe v. Wade, *restored to calendar for reargument,* 92 S.Ct. 2476 (U.S. June 26, 1972) (No. 70-18).

32. If the Supreme Court should decide the states legitimately may regulate or prohibit abortions, the abortion statutes could be upheld against an Equal Rights challenge on the basis of the "unique physical characteristics" test. *See, generally,* Pitt, *The Equal Rights Amendment—Positive Panacea or Negative Nostrum?,* 59 Kentucky L.J. 953, 978-80 (1971).

33. N.M. Stat. Ann. § 40A-6-2 (2d Repl. 1972).

34. N.M. Stat. Ann. §§ 57-1-1 to -49 (Repl. 1962).

> Abandonment of dependent consists of a person having the ability and means to provide for the support of her or his spouse and minor child, and abandoning or failing to provide for such support and thereby leaving such spouse or minor child dependent on public support.
>
> Whoever commits abandonment of a dependent is guilty of a fourth degree felony.

RAPE

During the Congressional debates on the federal Equal Rights Amendment, Congresswoman Martha Griffiths, a leader in the struggle for its passage, assured her colleagues:

> This law does not apply to criminal acts capable of commission of only one sex. It does not have anything to do with the law of rape or prostitution. You are not going to have to change those laws.[35]

Congressman White was one of those who disagreed:

> Criminal laws such as rape, seduction, certain types of assault that now apply only to men could be challenged.[36]

In New Mexico, the crime of rape is committed by "a male causing a female other than his wife to engage in sexual intercourse without her consent. . . ."[37] Sexual intercourse is defined as "penetration of the vagina of a female to any extent by the penis of a male."[38] By definition, this offense is one that only a man is capable of committing, and the distinction could therefore be sustained as based on a unique physical characteristic of men. By limiting the definition of the prohibited act to a

35. 116 Cong. Rec. 28005 (1970).
36. 116 Cong. Rec. 28012 (1970).
37. The statute reads:

> Rape consists of a male causing a female other than his wife to engage in sexual intercourse with him without her consent, and when committed under any of the following circumstances:
>
> A. When the female's resistance is forcibly overcome;
>
> B. When the female is unconscious or physically powerless to resist;
>
> C. When the female is incapable of giving her consent because of mental disability of which the male has knowledge; or
>
> D. When the female's resistance is prevented by the effect of any alcoholic liquor, narcotic drug or other substance being administered to the female by the male or with his privity, for the purpose of preventing the female's resistance unless the female voluntarily consumes or allows the administration of the substance with knowledge of its nature.
>
> Whoever commits rape is guilty of a second degree felony.

N.M. Stat. Ann. § 40A-9-2 (2d repl. 1972).
38. N.M. Stat. Ann. §40A-9-1 (2d Repl. 1972).

penetration of the vagina, thereby excluding anal and oral sex acts, the limitation of the statute's protection to females may also be sustained as based on a unique physical characteristic of women.[39]

Whether or not the statutory classifications could be justified under the Equal Rights Amendment, however, a revision might be more consistent with the policies underlying the Amendment. Such a revision would impose criminal sanctions on any person who sexually assaults any other person, regardless of the sex of the actor or the victim.[40]

SEXUAL OFFENSES AGAINST MINORS

The New Mexico Criminal Code contains several statutes dealing with sexual offenses against minors.

Two of the statutes, statutory rape[41] and rape of a child,[42] impose criminal penalties on males who have sexual intercourse[43] with females under specified ages. Females who have intercourse with males under the same ages are not affected by the two statutes. Unlike forcible rape, these offenses do not permit a defense of consent.[44] This type of distinction has been justified by courts on a theory "of the legal incapacity of a female below the statutory age to give a meaningful consent to the

39. For an analysis of the arguments that may be made in attacking or defending this kind of rape statute, see Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: Constitutional Basis for Equal Rights for Women*, 80 Yale L. Rev. 871, 956 (1971).

40. If the sexual assault were defined to include those acts now included in the sodomy statute, N.M. Stat. Ann. § 40A-9-6 (2d Repl. 1972), the legislature should consider repealing the sodomy statute. The only independent significance the statute would have would be to regulate sexual conduct between consenting adults. For an excellent discussion of the constitutionality of such regulation, *see* State v. Trejo, No. 748 (Ct. App. Feb. 4, 1972) (Sutin, J., dissenting).

41. N.M. Stat. Ann. § 40-9-3 (2d Repl. 1972) provides:

> *Statutory rape.*—Statutory rape consists of the commission of sexual intercourse by a male with a female other than his wife when the female is under the age of sixteen [16] years.
>
> A reasonable belief on the part of the male at the time of the alleged crime that the female was sixteen [16] years of age or older is a defense to criminal liability for statutory rape.
>
> Whoever commits statutory rape is guilty of a fourth degree felony, except that if the male is twenty-one [21] years of age or older, he is guilty of a third degree felony.

42. N.M. Stat. Ann. § 40A-9-4 (2d Repl. 1972) provides:

> *Rape of a child.*—Rape of a child is committed when a male has sexual intercourse with a female who is under the age of thirteen [13] years, regardless of the male's knowledge of or mistaken belief about her age.
>
> Whoever commits rape of a child is guilty of a first degree felony.

43. " 'Sexual intercourse' means penetration of the vagina of a female to any extent by the penis of a male." N.M. Stat. Ann. § 40A-9-1A (2d Repl. 1972).

44. State v. Richardson, 48 N.M. 544, 154 P.2d 224 (1944).

intercourse—a rationalization that is reminiscent of the general contractual incapacity of minors and the formerly general common law disabilities of married women."[45] There is no reason to believe male children are any more capable than female children of giving a meaningful consent to intercourse.

The other statutes in this area apply to males and females alike. The aggravated sodomy statute applies to "a *person* committing the crime of sodomy with a *child* under the age of thirteen years. . . ."[46] [Emphasis supplied.] Either sex may be guilty of sexual assault, which consists of:

> A. any indecent handling or touching of any person under the age of sixteen [16] years; or
>
> B. any indecent demonstration or exposure of, upon or in the presence of any person under the age of sixteen [16] years.
>
> A reasonable belief on the part of the person that the victim at the time of the alleged crime was sixteen [16] years of age or older is a defense to criminal liability for sexual assault.[47]

It would be a simple matter to make the former statutes as sexually neutral as the latter.[48] Whether or not such a revision would be necessary, it would have the virtue of avoiding any uncertainty about the constitutionality of these provisions.

45. L. Kanowitz, Women and the Law: The Unfinished Revolution 19 (1969).

46. N.M. Stat. Ann. § 40A-9-7 (2d Repl. 1972).

47. N.M. Stat. Ann. § 40A-9-99 (2d Repl. 1972). N.M. Stat. Ann. § 40A-9-10 (2d Repl. 1972) is also sexually neutral on its face:

> *Enticement of child.*—Enticement of child consists of:
>
> A. enticing, persuading or attempting to persuade a child under the age of sixteen [16] years to enter any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 of the Criminal Code; or
>
> B. having possession of a child under the age of sexteen [16] years in any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 of the Criminal Code.
>
> Whoever commits enticement of child is guilty of a misdemeanor.

48. *E.g.*, N.M. Stat. Ann. § 40A-9-3 (2d Repl. 1972) could be amended to provide:

> *Sexual Misconduct.*—Sexual misconduct consists of a person eighteen years of age or older engaging in a sexual act with any other person under the age of sixteen years who is not the spouse of the actor.
>
> A reasonable belief on the part of the actor at the time of the alleged crime that the other person was sixteen years of age or older is a defense to prosecution under this section.

N.M. Stat. Ann. § 40-9-4 (2d Repl. 1972) could provide:

> *Sexual Abuse of a Child.* Sexual abuse of a child consists of a person engaging in a sexual act with any other person under the age of thirteen years.

The "sexual act" would consist of the acts of sexual intercourse and sodomy described in § 40A-9-1A and § 40A-9-6. That portion of § 40A-9-7 prohibiting acts of sodomy with children under the age of thirteen should then be repealed.

PROSTITUTION

At common law, prostitution was an offense that could be committed only by women. In the New Mexico Criminal Code, however, a prostitute is "a *person* who engages in, or offers to engage in, sexual intercourse for hire."[49] [Emphasis added.] The language of the other statutory provisions[50] relating to prostitution is similarly neutral with regard to the sex of the actor. The only exception is the abduction statute prohibiting "enticing, taking or carrying away of a female under the age of twenty-one years with intent to induce her to become a prostitute."[51] This statute is particularly vulnerable under the Equal Rights Amendment, since under the Code, either a male or female apparently can be a prostitute.[52]

Three potential areas of conflict with the Equal Rights Amendment exist in the prostitution provisions, despite their sexually neutral wording. First, there is the problem posed by discriminatory enforcement of the statute: "Though the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still, within the prohibition of the constitution. . . ."[53] In responding to a challenge to alleged discriminatory enforcement of the statutes against female prostitutes, the prosecution might point out that the statute is employed primarily against females because males who sell access to their bodies generally perform sexual acts other than "penetration of the vagina . . . by the penis."[54] This argument raises the second problem: Do the statutes unlawfully discriminate against women by covering sexual acts generally performed by women who sell access to their bodies and not those generally performed by men in similar situations? Perhaps the sexual impartiality in the prostitution provisions is illusory. If so, the Legislature should consider rewriting the prostitution laws

49. N.M. Stat. Ann. § 40A-9-1D (2d Repl. 1972).
50. N.M. Stat. Ann. §§ 40A-9-11 to -18 (2d Repl. 1972).
51. N.M. Stat. Ann. § 40A-9-19 (2d Repl. 1972).
52. Amending the statute to replace "female" with "person" and to add "or him" after "her" would cure any Equal Rights problem. An outright repeal would be preferable, however, since the statute deals with acts that are covered under other statutes. *See, e.g.*, N.M. Stat. Ann. § 40A-6-3 and § 40A-9-13 (2d Repl. 1972).
53. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
54. N.M. Stat. Ann. § 40A-9-1A (2d Repl. 1972).

to include the kinds of commercial sex acts performed by males.[55]

The third potential area of conflict lies in the fact that most sellers of the kind of sexual intercourse covered by the prostitution laws are women and most buyers are men. However, the penalties for the patron[56] are less severe than those for the prostitute.[57]

More importantly, the patrons are rarely arrested and prosecuted for hiring a prostitute.[58] Even though the courts may well sustain a classification which distinguishes between the buyer and seller in a prostitution transaction, the Legislature might wish to reconsider its own justifications for that classification.

SEDUCTION AND COMPELLING MARRIAGE

Two statutes which apparently are based on outdated standards of courting and morality are those prohibiting seduction[59] and unlawfully compelling marriage.[60] They are patently discriminatory in that they apply their criminal penalties only to men. Unless the Legislature wishes to make it a crime for a woman to seduce a man or for a woman to force a man to marry her, these statutes should be removed from the books. They have outlived whatever usefulness they once may have had.

CONCLUSION

Although the Equal Rights Amendment will not greatly affect the criminal law in New Mexico, it will have an impact on some statutes in the Criminal Code that make impermissible classifications based on sex. The Legislature could respond to the mandate of the Amendment by replacing the terms in a statute referring to a particular gender by a neutral term such as "person." This simple method of avoiding possible judicial invalidation of the

55. A more desirable solution would be to excise those provisions regulating sexual conduct between consenting adults from the criminal law. *Cf.* State v. Trejo, No. 748 (Ct.App. Feb. 4, 1972) (Sutin, J., dissenting).

56. N.M. Stat. Ann. § 40A-9-11 (2d Repl. 1972) provides: "Whoever commits prostitution is guilty of a petty misdemeanor, unless such crime is a second or subsequent conviction, in which case such person is guilty of a misdemeanor."

57. N.M. Stat. Ann. § 40A-9-12 (2d Repl. 1972) provides: "Whoever commits patronizing of prostitutes is guilty of a petty misdemeanor."

58. L. Kanowitz, Women and the Law: The Unfinished Revolution 16-17 (1969).

59. N.M. Stat. Ann. § 40A-10-4 (2d Repl. 1972).

60. N.M. Stat. Ann. § 40A-10-5 (2d Repl. 1972).

statutes, however, may not be the most desirable one. The examination made necessary by the Equal Rights Amendment will provide an opportunity for reevaluation of the affected statutes, particularly those dealing with sexual offenses, in light of current realities. Hopefully, the Legislature will be able to take advantage of that opportunity.