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Gender-Based Statutory Rape Law Does Not Violate the Equal Protection Clause: Michael M. v. Supreme Court of Sonoma County

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RECENT DEVELOPMENT

GENDER-BASED STATUTORY RAPE LAW DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE: *Michael M. v. Superior Court of Sonoma County*

In a series of cases since *Frontiero v. Richardson,*[1] the Supreme Court has developed a "middle tier"[2] standard of review for use in gender-discrimination cases under the equal protection clause. This "middle tier" analysis lies somewhere between the "rational basis" test[3] and the "strict scrutiny" test,[4] and requires that statutory classifications based on gender bear a "substantial relationship" to "important governmental objectives."[5] Purporting to apply this test, a plurality of the Supreme Court in *Michael M. v. Superior Court of Sonoma County*[6] upheld the California statutory rape law.[7]

The Court in *Michael M.* asserted that punishing only the male participant for sexual intercourse with a minor female is substantially related to the important governmental objective of preventing illegitimate teenage pregnancy.[8] The holding represents an improper application of the middle tier test of constitutionality in the context of gender discrimination. At best, the ruling is an instance of judicial carelessness creating an anomaly in the equal protection doctrine. At worst, it may create a

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1 411 U.S. 677 (1973).

2 *See* Craig v. Boren, 429 U.S. 190 (1976); *infra* notes 5, 21-22 and accompanying text.

3 *See* Parham v. Hughes, 441 U.S. 347, 351 (1979); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . .").

4 The strict scrutiny test applies to cases involving suspect classfications, such as race and national origin, and those involving fundamental rights. Under the test, the Court only upholds statutes that discriminate against suspect classes or impair fundamental rights when they are "necessary " to implement "compelling" governmental objectives. *See, e.g.,* Illinois Election Bd. v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (right to vote as a fundamental right); Loving v. Virginia, 388 U.S. 1, 11 (1967) (race as a suspect class); Korematsu v. United States, 323 U.S. 214, 216 (1944) (national origin as a suspect class).

5 Craig v. Boren, 429 U.S. 190, 197 (1976).

6 450 U.S. 464 (1981).

7 CAL. PENAL CODE § 261.5 (West Supp. 1982). Section 261.5 defines "unlawful sexual intercourse" as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years."

8 Justice Rehnquist wrote the plurality opinion, in which Chief Justice Burger, Justice Stewart, and Justice Powell joined. Justices Stewart and Blackmun wrote concurring opinions. Justice Brennan filed a dissenting opinion in which Justices White and Marshall joined, and Justice Stevens filed a separate dissenting opinion. *See infra* notes 53-68 and accompanying text.

potentially disastrous category of cases in which the biological differences between men and women can justify gender classifications.

I

HISTORICAL BACKGROUND

Constitutional protection against gender discrimination emerged only recently. Prior to 1971, the Supreme Court upheld gender-based classifications after only minimal scrutiny, with little concern for the intent of the legislation or its effect on women. Legislation designed to "protect" the "weaker"[9] sex abounded, and the Court upheld these statutes as a matter of course.[10] The reasoning in *Muller v. Oregon*[11] illustrates the then-prevailing view:

> [A woman] is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. . . . [H]er physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.[12]

The first indication of change came in *Reed v. Reed*,[13] when the Supreme Court, applying the rational basis test,[14] invalidated an Idaho statute that, for administrative ease, gave mandatory preference to males over similarly situated females seeking appointments to administer estates. The Court found that the equal protection clause was designed to prevent precisely this kind of arbitrary discrimination.[15] Because the legislative classification bore no rational relationship to a legitimate governmental interest, the Court held the statute unconstitutional.

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9 Califano v. Webster, 430 U.S. 313, 317 (1977).

10 *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (Florida statute providing that no woman shall be called for jury service unless she volunteers held not to violate equal protection clause); Goesaert v. Cleary, 335 U.S. 464 (1948) (Michigan statute permitting women bartenders only when woman is wife or daughter of bar owner held not to violate equal protection clause) (overruled by Craig v. Boren, 429 U.S. 190, 210 n.23 (1976)); Muller v. Oregon, 208 U.S. 412 (1908) (Oregon statute regulating only women's working hours held not to violate the equal protection clause). *See generally* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 876-79 (1971).

11 208 U.S. 412 (1908).

12 *Id.* at 422.

13 404 U.S. 71 (1971).

14 *See supra* note 3.

15 404 U.S. at 76 ("To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. . . .").

Two years later, in *Frontiero v. Richardson,*[16] the Court departed more radically from the "romantic paternalism"[17] of earlier equal protection cases involving gender-based classifications. The Court in *Frontiero* invalidated a statute that afforded servicemen automatic housing allowances and health benefits for their wives, but required servicewomen to prove their husbands' dependency to qualify for the same benefits. A plurality of the Court held that married servicewomen were entitled to the same benefits as married servicemen. In reaching this conclusion, the plurality[18] held that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny."[19]

Although the *Frontiero* plurality stated that gender is a suspect classification, the Court retreated from this position in subsequent cases; instead, it developed a less stringent "middle tier" level of review applicable to cases of gender classification.[20] This two-prong test, first articulated in *Craig v. Boren,*[21] requires that the governmental objective underlying the statute be "important," and that the gender-based classification be "substantially related" to the objective.[22]

A. *Important Governmental Objectives*

The Supreme Court has never proposed a method for determining what constitutes an "important governmental objective" under the middle tier test. Under the rational basis test, the Court will accept as the legislative purpose any objective that might "reasonably be conceived to justify [the classification]."[23] Under the strict scrutiny test, the Court

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16 411 U.S. 677 (1973).

17 *Id.* at 684.

18 Justice Brennan wrote the *Frontiero* plurality opinion, in which Justices Douglas, White, and Marshall joined. Justice Stewart concurred in the judgment, agreeing that the challenged statute represented unconstitutionally invidious discrimination. Chief Justice Burger and Justices Powell and Blackmun also concurred, but stated that "it is unnecessary for the Court in this case to characterize sex as a suspect classification." *Id.* at 691-92. Justice Rehnquist dissented without writing an opinion.

19 *Id.* at 688.

20 Since *Frontiero,* the Court has applied the intermediate level of scrutiny to classes other than gender. *See, e.g.,* Trimble v. Gordon, 430 U.S. 762, 766-67 (1977) (requiring that statutory classifications based on illegitimacy bear "some rational relationship to a legitimate state purpose," but noting that the standard is not "a toothless one").

21 429 U.S. 190 (1976). In *Craig,* the Court struck down an Oklahoma statute that prohibited the sale of beer to men under 21, but allowed sales to women between 18 and 21. The state asserted that the statute reflected a legislative concern with traffic safety, and presented statistics showing that young men were more likely than young women to drive while intoxicated. The Court rejected the asserted justification, declaring that, even assuming that the statute's purpose was the promotion of traffic safety, the gender classification was not substantially related to that objective. *Id.* at 204. Furthermore, the Court expressed doubts that enhanced traffic safety was the true purpose of the statute. *Id.* at 199 n.7.

22 *Id.* at 197.

23 McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (In upholding Maryland's "Sunday blue law" under the rational basis test, the Court noted that "[s]tate legislatures are

demands a clearer showing of actual legislative intent.[24] No clear rule has emerged for determining an acceptable legislative purpose under the middle tier test; before finding an "important" interest, however, the Court does appear to demand something more than any conceivable set of facts to support a state's asserted legislative purpose. The Court has suggested that, at the very least, it will reject an asserted legislative purpose if legislative history contradicts the assertion.[25] On the other hand, it has declined to rule on the degree of deference to be accorded to state assertions when legislative history is absent.[26]

Assuming that the state persuades the Court that the asserted purpose indeed underlies the statute, the Court must then decide whether that purpose is "important." Despite its failure to articulate a standard by which to make this determination, the Court has recognized two different kinds of legislative objectives. The first and most common type is the gender-based statute designed to implement gender-neutral goals, such as providing for a family's sudden loss of a breadwinner,[27] simplifying property transactions,[28] and eliminating costly hearings to determine eligibility for governmental benefits.[29] This kind of statute employs the gender classification only as a means to these ends.

The other type of gender classification appears in compensatory statutes enacted specifically to eradicate past discimination against women. In these cases, gender classification is a necessary incident to the statutory goal. The Court has exhibited a greater willingness to find statutes with this so-called "benign"[30] purpose to be substantially related to an important governmental objective, than when the statute involves classification for gender-neutral purposes.[31] At the same time,

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presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

24 *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (acknowledging the vast deference usually accorded the state's asserted statutory purpose, but holding that when the statute involves racial classifications the Court's "inquiry . . . is whether there clearly appears in the relevant materials some overriding statutory purpose. . .").

25 In contrast to the rational basis test, a potential rationale cannot justify discriminatory gender classifications if it contradicts relevant legislative history. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975) ("This court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

26 Craig v. Boren, 429 U.S. 190, 200 n.7 (1976) ("[We leave] for another day consideration of whether the statement of the State's Assistant Attorney General should suffice to inform this Court of the legislature's objectives, or whether the Court must determine if the litigant simply is selecting a convenient, but false, *post hoc* rationalization.").

27 Weinberger v. Wiesenfeld, 420 U.S. 636, 651-52 (1975).

28 Kirchberg v. Feenstra, 450 U.S. 455, 459 (1981).

29 Frontiero v. Richardson, 411 U.S. 677, 678-79 (1973).

30 *See infra* note 42 and accompanying text.

31 *See infra* notes 43-47 and accompanying text.

however, the Court has often warily examined a state's assertion that a compensatory purpose justifies the statutory classifications. Presumably, this scrutiny protects against plausible, but false, post-hoc compensatory rationalizations for statutory schemes.

Even when unconvinced by the state's asserted purpose, the Court has assumed that the first prong of the middle tier test is satisfied, relying on the second prong of the test to reject the statutory classification.[32] This mode of analysis is not surprising, for specious purposes cast doubt on the existence of a substantial relationship between gender classifications and state goals. Although a state's failure to demonstrate an important state purpose to the Court's satisfaction might alone support a finding of unconstitutionality under the middle tier test, such a case has yet to arise. Rather, the Court has focused most intently on the "relatedness" question that the second prong of the test poses, and has elected to examine the state's asserted purpose mainly in this context.

B. *Substantial Relationships*

Once the Court finds or assumes an important state objective, it must inquire whether the gender classification is substantially related to that purpose. The Court has relied on this prong of the middle tier test to invalidate gender-classification schemes. Because of what it calls our "long and unfortunate history of sex discrimination,"[33] the Court demands a close nexus between statutory means and ends. This nexus is the core of the middle tier test. The Court generally finds this nexus only when the purpose of the challenged statute is compensatory; gender-based statutes serving gender-neutral purposes rarely pass constitutional muster.[34]

The Court has found that most gender classifications reflect outmoded stereotypes about societal gender roles, rather than studied attempts to achieve legislative ends. These legislative classifications substitute gender-based generalizations for individualized inquiries and equate functional definitions with gender classifications: "childrearer"

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32 *See, e.g.,* Craig v. Boren, 429 U.S. 190, 199-200 (1976).

33 *Frontiero,* 411 U.S. at 684.

34 The Court has upheld gender classifications based on noncompensatory motives in two cases. In Personnel Adm'r v. Feeney, 442 U.S. 256 (1979), the Court upheld a Massachusetts veterans' preference statute, finding that the statute, gender-neutral on its face, was designed to give preference to veterans in state hiring and not to discriminate on the basis of gender. In Rostker v. Goldberg, 453 U.S. 57 (1981), the Court upheld the gender-based draft-registration statute, asserting that because women were not employed by the military to work in combat positions, the male-only draft was justified as a way to quickly provide combat troops in wartime. The Court in *Rotsker* deferred to Congress's determination of military need because of the unique character of military decisions, and did not address the constitutionality of the underlying gender-based work-assignment statute. The military context of the rulings in these two equal protection cases have limited precedential value because of the extraordinary deference that the Court accords Congress's decisions regarding the military.

becomes "mother," "dependant" becomes "wife," and "breadwinner" becomes "husband."[35] Although empirical support sometimes exists for the assumptions underlying these gender classifications, the Court has labeled this use of gender as "invidious,"[36] and demands an "exceedingly persuasive justification"[37] for such statutes. For example, in *Wengler v. Druggists Mutual Insurance Co.*,[38] the Court struck down a Missouri worker's compensation law that automatically entitled widows to death benefits, but prevented a widower from collecting death benefits unless disabled or otherwise dependent on his wife's earnings. Similarly, in *Califano v. Goldfarb*,[39] the Court struck down a similar provision in the Social Security Act[40] because the assumption that wives are dependent does "not suffice to justify a gender-based discrimination in the distribution of employment-related benefits."[41]

When the asserted statutory purpose is benign, however, the Court appears more willing to accept gender classifications as a means of achieving that compensatory goal.[42] Although under these "benign" statutes gender classification replaces individualized inquiry into the effects of past discrimination,[43] the Court has accepted these gender classifications as substantially related to an important underlying compensatory objective. Thus, in *Kahn v. Shevin*,[44] the Court upheld a statute that allowed widows, but not widowers, to take property tax exemptions; the statute was designed "to further the state policy of cush-

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35 *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199, 208-09 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636, 650-52 (1975); *Frontiero*, 411 U.S. at 688-89.

36 *Frontiero*, 411 U.S. at 687.

37 *Kirchberg*, 450 U.S. at 461 (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979)).

38 446 U.S. 142 (1980).

39 430 U.S. 199 (1977).

40 42 U.S.C. § 402(f)(1) (1976). The statute in question was part of the Federal Old-Age, Survivors, and Disability Insurance Benefits (OASDI) program. *See Califano*, 430 U.S. at 201.

41 430 U.S. at 217; *see also* Kirchberg v. Feenstra, 450 U.S. 455 (1981) (Louisiana statute giving husband exclusive control over community property did not further any state purpose and was unconstitutional); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (provision of Social Security Act granting survivors' benefits to wives of deceased wage earners but not to similarly situated husbands, held unconstitutional).

42 The Court first sanctioned the "benign" use of gender classifications in Kahn v. Shevin, 416 U.S. 351 (1974). Ironically, the appellants' brief opposing the classification in *Kahn* coined the expression "benign," in disputing the notion that special statutory "favors" would help women attain equal status with men. Brief for the Appellants at 16, Kahn v. Shevin, 417 U.S 351 (1973). Critics have continued to question the validity of compensatory legislation for women. *See generally* Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813 (1978); Kanowitz, *"Benign" Sex Discrimination: Its Troubles and Their Cure*, 31 HASTINGS L.J. 1379 (1980).

43 *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498 (1975) (statute providing for later discharge of female naval officers passed over for promotion than for male officers held constitutional as an attempt to compensate women, although it argnably allowed males to begin new careers carlier than women); *see also* Ginsburg, *supra* note 42, at 818.

44 416 U.S. 351 (1974).

ioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."[45] In *Califano v. Webster*,[46] the Court upheld a provision of the Social Security Act that computed average monthly wages differently for men and women. The Court found that Congress had "purposely enacted the more favorable treatment for female wage earners to compensate for past employment discrimination against women."[47]

II

MICHAEL M. v. SUPERIOR COURT OF SONOMA COUNTY

Seventeen-year-old Michael met sixteen-year-old Sharon at a bus stop one night in June 1978. Both had been drinking. They walked to a park together and, after Michael struck her for initially refusing,[48] Sharon submitted to intercourse. Although a minor himself, Michael was charged with a felony violation of California's statutory rape law,[49] which prohibits sexual intercourse with a minor female unless the female is the perpetrator's wife. After an unsuccessful motion to set aside the information,[50] Michael sought a writ of prohibition from the California Supreme Court to compel the Superior Court to dismiss the complaint on the ground that the statutory rape law violated the equal protection clauses of both the California and United States Constitutions. The California Supreme Court denied the writ,[51] and the United States Supreme Court granted certiorari to consider the validity of the statute under the fourteenth amendment of the United States Constitution.[52]

Writing for the plurality,[53] Justice Rehnquist acknowledged that

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45 *Id.* at 355.

46 430 U.S. 313 (1977).

47 *Id.* at 318; *see also* Schlesinger v. Ballard, 419 U.S. 498 (1975).

48 Although Sharon was a willing participant in the early stages of the intimacies, the record indicates that Michael struck her when she initially refused intercourse. *Id.* at 485. Neither the California Supreme Court nor the United States Supreme Court suggested that Michael might have been more appropriately prosecuted for forcible rape. This aspect of the case, however, might explain to some extent the unwillingness of the two courts to rule in Michael's favor by striking down the statutory rape law.

49 CAL. PENAL CODE § 261.5 (West Supp. 1982); *see also Michael M.*, 450 U.S. at 466 ("The statute . . . makes men alone criminally liable for the act of sexual intercourse.").

50 *See* CAL. PENAL CODE § 995 (West 1970).

51 Michael M. v. Superior Court of Sonoma County, 25 Cal. 3d 608, 601 P.2d 572, 159 Cal. Rptr. 340 (1979) (adopting reasoning similar to that which the Supreme Court plurality ultimately adopts); *see* Note, *Unlawful Sexual Intercourse: Old Notions and a Suggested Reform*, 12 PAC. L.J. 217 (1981) (critique of the California Supreme Court decision and a suggested statutory reform).

52 447 U.S. 904 (1980).

53 Chief Justice Burger, Justice Stewart, and Justice Powell joined in Justice Rehnquist's opinion.

California's statutory rape law discriminates on the basis of gender.[54] He concluded, however, that the asserted state purpose of preventing illegitimate teenage pregnancy was an important governmental objective and that the gender classification was sufficiently related to that purpose to satisfy the middle tier test of scrutiny.[55]

To support the plurality's conclusion that California had asserted an important state objective, Justice Rehnquist cited statistics on the frequency of teenage pregnancy and its concomitant risks.[56] He also observed that illegitimate children of teenage mothers are likely to become wards of the state.[57] Apparently likening *Michael M.* to cases of benign classification, Justice Rehnquist asserted that a legislature "may provide for the special problems of women."[58]

The plurality enunciated two grounds for finding that the California classification demonstrated the nexus between means and ends required to pass constitutional muster. First, it justified the classification on the ground that, because women would naturally be deterred from unlawful sexual intercourse by the risk of pregnancy, imposing criminal penalties on men was necessary to "roughly 'equalize' the deterrents on the sexes."[59] Second, the plurality opined that a gender-neutral statutory rape law would frustrate effective enforcement of the law because "a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution."[60] The plurality denied that this justification was one of "solely . . . administrative convenience."[61]

In a concurring opinion, Justice Stewart emphasized that this ad-

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54 450 U.S. at 466.

55 "We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the 'purposes' of the statute, but also that the state has a strong interest in preventing such pregnancy." *Id.* at 470. "[S]uch a statute is sufficiently related to the State's objectives to pass constitutional muster." *Id.* at 472-73.

56 *Id.* at 470-71 nn.3-4.

57 *Id.* at 470-71. The plurality regarded California's statistics with less skepticism than that found in earlier gender-discrimination cases. *See, e.g.,* Craig v. Boren, 429 U.S. at 204 ("[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause."). The acceptance of statistics in *Michael M.* may be partly explained in that the plurality cites them to support the "important governmental objective" prong of the middle tier test. Statistics indicating a need for legislation are arguably more accurate than statistics used to support implementing schemes under the second prong of the test. Nevertheless, Justice Rehnquist primarily relied on the statistics in emphasizing the desirability of the goal, and failed to scrutinize them adequately in discerning the actual objective. *See infra* notes 73-79 and accompanying text.

58 450 U.S. at 469 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975)); *see infra* notes 97-101.

59 450 U.S. at 473.

60 *Id.* at 473-74.

61 *Id.* at 476 (quoting Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (emphasis omitted)). According to the Court in Reed v. Reed, 404 U.S. 71, 76-77 (1971), administrative convenience does not justify a gender-based classification, even under the rational basis test.

mittedly discriminatory statute is but "one part of a broad statutory scheme that protects all minors from the problems and risks attendant upon adolescent sexual activity."[62] He upheld the constitutionality of the gender-specific statutory rape law because other statutes in California's Penal Code subject women to criminal liability for certain sex-related acts involving minors.[63] Within this arguably more limited framework, Justice Stewart echoed the arguments of the plurality for the constitutionality of the statute.[64]

Justice Brennan, joined by Justices White and Marshall, dissented. The dissenters first questioned the validity of the asserted state goal. They argued that the historical context of the statute and California case law revealed that the actual purpose behind the statute was the protection of the chastity of young girls and that the drafters presumed them too naive to consent to sexual relations.[65] The dissenters also contended that, regardless of the validity of the statutory purpose, California did not sustain its burden of proving that a gender-neutral law would be less effective than the challenged gender-based statute. They noted that thirty-seven jurisdictions had enacted gender-neutral statutory rape laws,[66] and emphasized the lack of evidence for the plurality's view that a gender-neutral statute would frustrate enforcement.[67] They further pointed to California's gender-neutral statutes prohibiting sodomy and oral copulation, and to the state's failure to distinguish enforcement of these statutes from that of a gender-neutral statutory rape law.[68]

See also Kirchberg v. Feenstra, 450 U.S. 455 (1981); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980).

62 450 U.S. at 477.

63 *Id.*

64 In a second concurring opinion, Justice Blackmun suggested that the case of H.L. v. Matheson, 450 U.S. 398 (1981), a case decided the same day, influenced his decision in *Michael M.* *See infra* notes 109-10 and accompanying text.

65 450 U.S. at 494-96 (Brennan, J., dissenting); *see infra* note 78 and accompanying text.

66 450 U.S. at 492 (Brennan, J., dissenting).

67 *See id.* at 491 (Brennan, J., dissenting) ("To meet [its burden of showing that the gender classification is more effective than a gender-neutral law], the State must show that because its statutory rape law punishes only males, and not females, it more effectively deters minor females from having sexual intercourse."); *see infra* notes 90-95 and accompanying text.

68 450 U.S. at 493 (Brennan, J., dissenting). In a separate dissenting opinion, Justice Stevens attacked the plurality's argument that the risk of pregnancy justified exempting females from prosecution:

> [T]he fact that a class of persons is especially vulnerable to a risk that a statute is designed to avoid is a reason for making the statute applicable to that class. . . . Surely, if we examine the problem from the point of view of society's interest in preventing the risk creating conduct from occuring at all, it is irrational to exempt 50% of the potential violators.

Id. at 499 (Stevens, J., dissenting).

III

"HARD CASES MAKE BAD LAW"[69]

Despite its use of middle tier language, the plurality in *Michael M.* actually applied the less stringent "rational basis"[70] test in upholding California's statutory rape law. As the dissenters persuasively argued, the state established neither an "important governmental objective" nor an "substantial relationship" between the objective and the gender classification. The radically different conclusions that the plurality reached may signal a reevaluation by the Court of equal protection analysis in the context of gender classificaiton.

A. *The Middle Tier Test as Applied in* Michael M.

1. *Important Governmental Objective*

The state of California claimed that the important governmental objective underlying section 261 of the California Penal Code was the prevention of illegitimate teenage pregnancies. According to prior case law, the Court should have demanded some showing that prevention of pregnancy was in fact a goal of the legislation.[71] The plurality in *Michael M.* did not inquire meaningfully into the actual purposes of section 261.[72] Rather, the plurality focused on the desirability of the asserted goal,[73] and gave only perfunctory treatment to the question of actual objective.[74] The Court's failure to demand that California prove

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69 Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

70 *See supra* note 3.

71 *See supra* notes 23-26 and accompanying text.

72 In dissent, Justice Brennan went further to suggest that even if the asserted objective was valid, the means used to achieve that goal might be unconstitutional:

> Petitioner has not questioned the State's constitutional power to achieve its asserted objective by criminalizing consensual sexual activity. However, I note that our cases would not foreclose such a privacy challenge . . . . [I]t is not settled that a State may rely on a pregnancy-prevention justification to make consensual sexual intercourse among minors a criminal act.

450 U.S. at 491 n.5 (Brennan, J., dissenting).

73 *Id.* at 470-72. The plurality emphasized the frequency and risks of teenage pregnancy. *Id.* It ignored significant legislative history indicating that the legislature did not in fact crcate the challenged classification to combat the problem of teenage pregnancy. *See supra* note 57; *infra* notes 75-77 and accompanying text.

74 450 U.S. at 470. Justice Rehnquist merely stated that "although our cases establish that the state's asserted reason for the enactment of a statute may be rejected, if it 'could not have been the goal of the legislation,' this is not such a case." *Id.* (quoting Weinberger v. Wiesenfeld, 420 U.S. at 648). The quoted langnage, however, referred to an examination of legislative history to determine whether the asserted state purpose could have been a goal of the challenged legislation. *See supra* note 25. When legislative history is unavailable, the legislative purpose must be ascertained by other means. Although speculation may be warranted in the absence of legislative history, such speculation is inappropriate in *Michael M.* Remarkably, California had preserved the notes of the drafter of the 1872 statute. These notes clearly reveal the legislative intent in enacting the statutory rape provision. *See infra* note 75 and accompanying text.

In *Michael M.,* Justice Rehnquist refused to address the historical context and legislative

its asserted purpose for the law assumes special significance because "[u]ntil very recently, no California court or commentator had suggested that the purpose of California's statutory rape law was to protect young women from the risk of pregnancy."[75] In earlier gender-classification cases, the Court had explicitly rejected discriminatory schemes supported by the state's "mere recitation"[76] of a permissible purpose in the face of significant contradictory history.[77] The plurality's extraordinary deference to the state's claimed statutory purpose in *Michael M.* is characteristic of the "rational relationship" test traditionally applied in cases in which suspect classes, fundamental rights, or gender classifications are absent.[78]

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history of the California statute in determining the validity of the asserted purpose of pregnancy prevention. His willingness to accept an avowed purpose that conflicted with the legislative history of § 261 constitutes inadequate scrutiny under the middle tier test. A state's mere assertion of purpose does not suffice to discharge its burden. The state must produce evidence to persuade the court that its assertions are true. When legislative history is available, the court should inquire "into the actual purposes" of the discriminatory statute to determine the validity of the asserted purpose. Weinberger v. Wiesenfeld, 420 U.S. at 648.

75 450 U.S. at 494 (Brennan, J., dissenting).

> The only legislative history available, the draftsmen's notes to the Penal Code of 1872, supports the view that the purpose of California's statutory rape law was to protect those who were too young to give consent. The draftsmen explained that the "[statutory rape] provision embodies the well settled rule of the existing law; that a girl under ten years of age is incapable of giving any consent to an act of intercourse . . ." There was no mention whatever of pregnancy prevention.

Id. at 495 n.9. *See generally* Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape,* 64 MICH. L. REV. 105, 119-22 (1965); Note, *Forcible and Statutory Rape: An Explanation of the Operation and Objectives of the Consent Standard,* 62 YALE L.J. 55, 74-76 (1952). Recent case law in California confirms this understanding of the intent behind § 261.5:

> [The underage female] is presumed too innocent and naive to understand the implications and nature of her act. . . . The law's concern with her capacity or lack thereof to so understand is explained in part by a popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a young woman. An unwise disposition of her sexual favor is deemed to do harm both to herself and the social mores by which the community's conduct patterns are established. Hence the law of statutory rape intervenes in an effort to avoid such a disposition.

People v. Hernandez, 61 Cal. 2d 529, 531, 393 P.2d 673, 674, 39 Cal. Rptr. 361, 362 (1964).

76 Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

77 In Weinberger v. Wiesenfeld, *id.,* the Court rejected the government's asserted "benign" purpose because it conflicted with the legislative history. The Court determined that the statute providing Social Security benefits to surviving widows, but not to their male counterparts, resulted not from the asserted compensatory motives, but from assumptions about the role of women. *Id.* at 651; *see* Ginsburg, *supra* note 42, at 818-19; *supra* note 26 and accompanying text.

78 The plurality relied on Reitman v. Mulkey, 387 U.S. 369 (1967), to support the deference that it accorded the state court's acceptance of the asserted purpose. In *Reitman,* however, the Court deferred to the California court's determination that a clause in the California Constitution violated the equal protection clause of the United States Constitution. *Id.* at 376-79. The California court in *Reitman* based its determination on a clear historical trend, and did not endorse an unsupported *post hoc* rationalization offered to justify an admittedly discriminatory law. Mulkey v. Reitman, 64 Cal. 2d 529, 534-35, 413 P.2d 825, 829, 50 Cal. Rptr. 881, 884-85 *aff'd,* 387 U.S. 369 (1967). The plurality in *Michael M.* improperly relied on

Had the state adequately demonstrated that preventing pregnancy was actually a goal of California's statutory rape law, its showing of the goal's importance would have been adequate. The state did proffer statistics demonstrating the magnitude of the problem of illegitimate teenage pregnancy and the probability that children born to unmarried minors would become wards of the state. Although the Court has regarded statistics skeptically in other gender-discrimination cases,[79] the plurality appeared satisfied that these statistics proved the importance of the state's asserted goal. The Court, therefore, could reasonably have found that pregnancy prevention was an important purpose. The plurality's attention to statistics, however, obscured the question of *actual* purpose, and lent credence to a proposition that was otherwise without support.

2. *Substantial Relationships*

Assuming the validity of the asserted purpose, the dissenters properly concluded that the Court overemphasized the desirability of teenage pregnancy prevention and failed to consider adequately the relationship between the gender-based statutory rape statute and the achievement of the asserted goal. The plurality's contention that punishing only males who engage in consensual sexual intercourse with minor females " 'equalize[s]' the deterrents on the sexes"[80] cannot be a legitimate ground for upholding the statutory classification.[81] The plurality argned that the discrimination was justified because "young men and young women are not similarly situated with respect to the . . . risks of sexual intercourse"[82] but this revelation cannot justify differential treatment of "partners in crime." The Court failed to provide support for this rationale, perhaps because criminal statutes rarely, if ever,

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Reitman, and in doing so, effectively decided a point reserved by the Court in *Craig v. Boren:* "[We leave] for another day consideration of whether . . . the Court must determine if the litigant simply is selecting a convenient, but false, *post hoc* rationalization." 429 U.S. at 200 n.7. The extraordinary deference given to the state's asserted purpose in *Michael M.* is reminiscent of the Court's ruling in McGowan v. Maryland, 366 U.S. 420 (1960), that when applying the rational basis test a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426; *see supra* note 23 and accompanying text.

79 *See supra* note 57.

80 450 U.S. at 473.

81 A series of lower court cases rejected gender-based statutory rape statutes as unconstitutional. These courts failed to find a substantial relationship between the goals of protecting young women against injury or pregnancy and the gender-based means of reaching that goal. *See, e.g.,* Navedo v. Preisser, 630 F.2d 636, 640 (8th Cir. 1980); United States v. Hicks, 625 F.2d 216, 220 (9th Cir. 1980); Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977), *vacated,* 450 U.S. 1038 (1981); *see also* Note *Criminal Law—Equal Protection—Gender-Based Statutory Rape Provision Held Invalid,* 59 WASH. U.L.Q. 310 (1981) (advocating the approach taken in *United States v. Hicks). But see* Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976).

82 450 U.S. at 471.

predicate punishment on physical differences between participants.[83] Accomplices in crime may be punished less severely than primary actors, but the criminal law bases this determination on their relative culpability, rather than on the consequences each will suffer outside of the criminal law.[84]

The accomplice analogy exposes the real nature of the Court's decision in *Michael M.* In justifying the California statute, Justice Stewart argued that "females may be brought within the proscription of § 261.5 itself, since a female may be charged with aiding and abetting its violation."[85] If a female may be charged with aiding and abetting the act of statutory rape, however, the disproportionate impact of the prohibited behavior on her cannot be the rationale for exempting her from prosecution. If deterrent equalization really explains the different treatment afforded females under the statute, there would be no possibility of a charge of aiding and abetting. Furthermore, assuming that a charge of aiding and abetting was consistent with deterrent equalization, when would such a charge lie? Presumably, a woman would only be charged with aiding and abetting if she were deemed the culpable aggressor. The logical extension of Justice Stewart's argument that women are not in fact exempt from the proscription of the act contradicts the plurality's contention that deterrent equalization, and not the assumption that the male is the "culpable aggressor," justifies the gender classification. The Court thus appears to rely upon its own notions of relative responsibility for sexual activity in allowing the gender classification to stand. The Court developed the middle tier test to avoid precisely this kind of invidious discrimination based on discarded notions of the roles of women and men.

The Court also failed to support its second rationale for upholding the statutory means-ends nexus. The plurality's assumption that the statutory rape law is a significant deterrent is open to debate. Furthermore, the Court, in rejecting the petitioner's claim of underinclusiveness,[86] and by accepting the state's contention that a gender-neutral

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83 In support of this contention, Judge Mosk of the California Supreme Court wrote in his dissent in *Michael M.*: "In our system of justice, offenders are not deemed less culpable merely because they may suffer additional punishment from sources outside the legal system." Michael M. v. Superior Court, 25 Cal. 3d 608, 622, 601 P.2d 572, 581, 159 Cal. Rptr. 340, 349 (1979) (Mosk, J., dissenting) *aff'd,* 450 U.S. 464 (1981).

84 *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 507 (1972) ("[T]he accomplice may be convicted, on an accomplice liability theory, only for those crimes as to which he [or she] personally has the requisite mental state. . . ."). By consenting to sexual relations, the minor female necessarily possesses the requisite mental state for the crime of "unlawful sexual intercourse" under the California statute, unless the statute impermissibly presumes that she is incapable of consent.

85 450 U.S. at 477 (Stewart, J., concurring). The plurality, in contrast, vehemently denied that the statute "presumes that as between two persons under 18, the male is the culpable aggressor." *Id.* at 475.

86 *Id.* at 473.

statute would present significant enforcement problems,[87] neglected to recognize that at the time of the opinion, thirty-seven jurisdictions had gender-neutral statutory rape laws. By accepting the state's speculation as to possible enforcement problems,[88] the Court ignored the experience of the majority of American jurisdictions.[89] Instead, the Court should have demanded, as the dissenters did, that the substantial relationship be demonstrated in light of available data.

The case law supports the dissenters' demand that the state prove the superiority of the gender-based classification for its statutory scheme. In *Wengler v. Druggists Mutual Insurance Co.*,[90] the Court noted that "[t]he burden . . . is on those defending the discrimination to make out the claimed justification. . . ."[91] The Court reaffirmed this principle in *Kirchberg v. Feenstra*,[92] a case decided the same day as *Michael M.* In *Kirchberg*, the Court unanimously struck down a Louisiana statute that granted exclusive control over the disposition of community property. "[T]he burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an 'exceedingly persuasive justification' for the challenged classification."[93] The plurality apparently had an "exceedingly" short memory. Rather than relying on this clear precedent from recent cases, the Court in *Michael M.* reverted to the more deferential approach articulated in *Kahn v. Shevin*,[94] the original "benign" classification case: "The issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen by the Florida Legislature are within constitutional limitations."[95]

The rule that emerges from these confusing precedents is that a gender classification, unless "benign" and enacted for a compensatory purpose, must be narrowly drawn, and the state has the burden of justifying the statutory classification. The statute challenged in *Michael M.*, however, cannot be considered "benign" when judged under previous Supreme Court standards. The Court has consistently defined "benign"

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87 *Id.* at 473-74.

88 *Id.* The dissenters speculated more persuasively than did the state as to the effect of a gender-neutral statutory rape law:

> Common sense, however, suggests that a gender-neutral statutory rape law is potentially a *greater* deterrent of sexual activity than a gender-based law, for the simple reason that a gender-neutral law subjects both men and women to criminal sanctions and thus arguably has a deterrent effect on twice as many potential violators.

Id. at 493-94 (emphasis in original).

89 *Id.* at 492-93.

90 446 U.S. 142 (1980).

91 *Id.* at 151.

92 450 U.S. 455 (1981).

93 *Id.* at 461 (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979)).

94 416 U.S. 351 (1974).

95 *Id.* at 356 n.10.

statutory purposes as those designed to compensate women for past discrimination. Although section 261 is argnably "benign" in the sense that it protects rather than burdens women, this broad definition of a "benign" purpose is inconsistent with the Court's equation of "benign" and "compensatory." The dissenters, therefore, appropriately placed the burden on the state to show the statute's constitutionality, for California did not enact the statute challenged in *Michael M.* for compensatory purposes. California's failure to show the superiority of a gender-based statutory scheme should have invalidated the statute.[96]

B. Michael M. *and the Equal Protection Doctrine*

In the plurality opinion, Justice Rehnquist correctly observed that the Supreme Court has stated that "a legislature may 'provide for the special problems of women.' "[97] Indeed, the Court has upheld gender classifications in "spheres"[98] in which women and men are not similarly situated.[99] Until now, however, the Court has limited these "spheres" to situations in which gender differences resulted from different historical roles and opportunities.[100] *Michael M.* seems to broaden the definition of "not similarly situated" to include biological differences as well. In *Michael M.,* the Court appears to supplement the "invidious" and "benign" categories of cases with a third category based on the physiological differences between men and women.[101] This third category could

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96 The petitioner argued that the statute was overinclusive, but this argument received only perfunctory treatment from the Court. 450 U.S. at 475. In the California Supreme Court, the petitioner argued that if the statute were trnly designed to discourage illegitimate teenage pregnancy, it would "remov[e] from the ambit of the statute, either as female victims or male offenders, all those who use birth control devices or teehniques and all those otherwise incapable of procreation." 25 Cal. 3d at 612-13, 601 P.2d at 575, 159 Cal. Rptr. at 343. The United States Supreme Court altogether iguored the existence of birth control, and dismissed as "ludicrous" the notion that a statute supposedly concerned with preguancy would be limited in its application to those old enough to become pregnant. 450 U.S. at 475. The overinclusiveness argument is important because it challenges not only the purpose asserted by the State, but also the discriminatory means employed. *See* Comment, *Gender Based Statutory Rape Legislation and the Equal Protection Clause:* Michael M. v. Superior Court of Sonoma County, 19 AM. CRIM. L. REV. 99, 113-14 (1981).

97 450 U.S. at 469 (quoting Weinberger v. Wiesenfeld, 420 U.S. at 653).

98 Orr v. Orr, 440 U.S. 268, 280 (1979).

99 *See supra* notes 42-47 and accompanying text.

100 *See* Ginsburg, *supra* note 42.

101 Ironically, in diseussing the limited propriety of "benign" legislation in the gender context, Professor (now Judge) Ginsburg argues that "[i]f benign sex classification ever had a place, it is in this arca [of women's childbearing capacity]." *Id.* at 825. She cites a number of inconsistent cases dealing with the protection of pregnant women from gender-based discrimination. *See* Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (women entitled to aceumulated job seniority during pregnancy leave); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (Title VII permits exclusion of pregnant employees from employers' nonoccupational disability benefit plan); Turner v. Department of Employment Sec., 423 U.S. 44 (1975) (women cannot be automatically denied unemployment benefits during the period extending from 12 weeks before childbirth until six weeks after birth); Geduldig v. Aiello, 417 U.S. 484 (1974) (the Constitution does not require the legislature to provide income security for pregnant women

serve as a ground for upholding virtually all gender classifications, and thus could destroy the effectiveness of the equal protection doctrine in the gender context.

Once a woman's capacity to conceive becomes a valid reason for upholding a gender classification, a state might justify any gender classification on this ground, assuming it articulated an "important state purpose." After the Court's extraordinary deference to the state's asserted rationale in *Michael M.,* the requirement that the state provide an important purpose is substantially diminished. For example, consider a hypothetical case based on the facts of *Muller v. Oregon.*[102] The 1908 Oregon statute challenged in *Muller* provided:

> That no female [shall] be employed in any mechanical establishment, or factory, or laundry in this State more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day.[103]

The law applied only to women.[104] Suppose a state enacted similar legislation today. Just as the *Michael M.* Court upheld the discriminatory statute because young men and young women are not similarly situated as to the risks of pregnancy, the hypothetical state could assert that men and women are not similarly situated because only women assume the risk to future childbearing of demanding work over long periods of time.[105] The state could rely, as did California in *Michael M.,* on statistics showing the effect of the regulated behavior on some women's childbearing capacities. Therefore, just as the court in *Michael M.* upheld the classification even though the impact of the prohibited behavior on any given woman might be negligible, a Court could uphold the reincarnated 1903 Oregon statute regardless of the impact of the work on any particular woman, or her desire to have children. The failure of the Court in *Michael M.* to articulate when and how a "gender for its own sake" classification may lie thus allows statutes, heretofore inexcusable because invidious, to be recast in terms of biological differences be-

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when it provides such security for other temporarily disabled employees); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (pregnant school teachers may not be involuntarily dismissed at an arbitrarily fixed stage of pregnancy). Professor Ginsburg persuasively argues that women's capacity to give birth should be judicially recognized, and that employers should not be allowed to treat it as a liability. She limits her argument, however, to the employment sphere; her approach is thus not susceptible to the abuse invited by the broad biological rule of *Michael M.*

102 208 U.S. 412 (1908).

103 *Id.* at 416-17.

104 *Id.*

105 This hypothetical, admittedly far-fetched, suggests the abuses that *Michael M.* invites. A more plausible hypothetical case, and consequently a more difficult one, would be a statute excluding all women from certain kinds of employment because the work requires exposure to substances particularly harmful to a developing fetus.

tween men and women, obliterating the vitality of the equal protection clause for women.

It is not surprising that the Court's creation of this potential third category of gender-discrimination cases arises in the context of statutory rape legislation. Historically, the Court has ruled inconsistently on questions relating to procreation, contraception, pregnancy, and abortion.[106] The Court's vacillation between the rights of women to self-determination and the interest of the state in women's procreative affairs increases when minor females are concerned.[107] The Court's acceptance of California's pregnancy-prevention rationale and of the state's tenuous showing of the required means-ends nexus may reflect the Court's attempt to harmonize the the holding of *Michael M.* with *H.L. v. Matheson,*[108] another case decided that day, rather than the Court's genuine belief in California's assertions. In *Matheson,* the Court upheld a Utah statute requiring physicians to "notify, if possible" the parents of an unmarried dependent minor female before performing an abortion. The Court was probably reluctant to rule that young women may consent freely to intercourse, but may not have an abortion without parental notification. Justice Blackmun's concurring opinion in *Michael M.* demonstrates his concern with harmonizing the results in the two cases:

> Some might conclude that the two uses of the criminal sanction—here flatly to forbid intercourse in order to forestall teenage pregnancies, and in *Matheson* to prohibit a physician's abortion procedure except upon notice to the parents of the pregnant minor—are vastly different proscriptions. But the basic social and privacy problems are much the same. Both Utah's statute in *Matheson* and California's statute in this case are legislatively created tools intended to achieve similar ends and addressed to the same societal concerns: the control and direction of young people's sexual activities.[109]

An interest in consistency in one area of substantive law, however,

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106 On the one hand, the Court has consistently protected the privacy rights of individuals to choose whether and when to have children, regardless of their marital status and age. *See* Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (statute proscribing the distribution of contraceptives to persons under 16 unconstitutional); Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute proscribing distribution of contraceptives to unmarried people unconstitutional); Griswold v. Connecticut, 381 U.S. 479 (1965) (statute prohibiting the use and distribution of contraceptives unconstitutional). On the other hand, the court has not been consistent in cases involving the rights of women once they have become pregnant, *see supra* note 101, or in cases involving abortion. *Compare* Roe v. Wade, 410 U.S. 113 (1973) (woman has right to privacy that precludes state intervention in her choice to have an abortion during the early stages of her pregnancy) *with* H.L. v. Matheson, 450 U.S. 398 (1981) (dependent minor female's right to privacy allows her to choose to have an abortion, but a state may require parental notification against her wishes, effectively negating the privacy of her choice).

107 *See supra* note 106 and accompanying text; *infra* note 110 and accompanying text.

108 450 U.S. 398 (1981); *see supra* note 106.

109 450 U.S. at 482 (Blackmun, J., concurring).

should not serve as an excuse to undermine a sound doctrine of far broader application. The Court could easily have distinguished the two holdings,[110] thus obviating the possibility of creating a rule that may swallow up the entire equal protection doctrine in the gender context.

The precise holding in *Michael M.* remains unclear, partly because of the substantive questions it leaves unanswered, and partly because of the inherently limited precedential value of plurality opinions. Arguably, the case may be limited to its facts. In his concurring opinion, Justice Stewart suggested that the statute in question was constitutional in the context of all the California legislation that protects minors from the risks of sexual activity.[111] The constitutionality of a statute, however, should not depend merely on the existence of other statutes. The repeal of the other statutes would leave a discriminatory law whose constitutionality might be incapable of determination because of res judicata principles. Thus, although limiting the holding in *Michael M.* might be attractive, the presence of other statutes in California's Penal Code cannot serve as a solid basis for such a narrow reading of the case.

In addition, because the Court in *Michael M.* explicitly endorses the middle tier test, but neglects to apply that standard properly, *Michael M.* may be used to support contradictory legal arguments based on different standards of review and on an unwieldy "biology" test. Opponents of gender equality may use the decision to justify statutes prohibited in the past because they were invidious. The decision may serve as a signal to those opponents that the Court is willing to reconsider the use of the fourteenth amendment to secure women's equality, especially in light of the recent failure to ratify the Equal Rights Amendment.[112] The Court

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110 The Court could have distinguished *Michael M.* from *H.L. v. Matheson* on the ground that the statute challenged in *H.L. v. Matheson* arguably did not deprive young women of the right to choose an abortion. The statute required parental notification, but did not bar her decision altogether. On the other hand, the statute in *Michael M.* gave no minor female, regardless of her maturity, a right to consent to sexual relations without subjecting her partner to criminal liability.

111 450 U.S. at 476-77 (Stewart, J., concurring).

112 The Equal Rights Amendment has already affected equal protection cases in the gender-discrimination context. In *Frontiero v. Richardson,* Justice Powell's concurring opinion demonstrated the reluctance of certain members of the Court to preempt the ERA ratification process by declaring gender a suspect class. The concurring Justices were afraid to interfere with a "political" process and, as a result, refused to expand the fourteenth amendment to encompass gender equality at a time when an explicit amendment appeared imminent.

> The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress. . . . By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment.

411 U.S. at 692 (Powell, J., concurring). By adopting the middle tier scrutiny, the Court appears to have balanced the demands of women for immediate protection under the Constitution against the needs of some of the Justices for the clearer mandate that seemed forthcoming. In the wake of the failure to ratify the ERA, the Supreme Court should reaffirm the already-existing rights of women under the Constitution. The Court has consistently refused

could not have intended *Michael M.* to mark so radical and underhanded a departure from an analysis it explicitly continues to support. One can only hope that *Michael M.* is merely an instance of judicial shortsightedness, and an anomaly in the equal protection doctrine. In future cases, the Court will have to clarify its doctrinal intent in the *Michael M.* decision.

CONCLUSION

In an effort to sidestep an emotionally-charged issue, the Court in *Michael M.* appears to have created a bizarre exception to the invidious-benign dichotomy; the statute at issue in *Michael M.* exemplifies the worst attributes of both kinds of gender classification. The Court upholds a statute that is "protective" in its effect, without the historical demand for a concurrent compensatory purpose. The Court, while purporting to apply the middle tier level of scrutiny, actually applied the rational basis test. *Michael M.* can thus be used to justify contradictory constitutional arguments in gender-discrimination cases. *Michael M.,* however, is not merely an instance of improper scrutiny. The case also suggests a third category of gender classification statutes based on physiology to supplement the invidious-benign dichotomy previously developed by the Court. A rule that justifies classifications predicated on the biological differences between men and women might be used to justify gender discrimination that was unconstitutional in the past. The Court should limit and clarify its holding in *Michael M.,* rather than use the case to undermine the equal protection doctrine that has permitted important advances towards gender equality.

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to allow constitutional rights to expand and contract with changes in public sentiment. The Court must make clear that existing constitutional rights will not dissolve merely because state legislators failed to enact a constitutional amendment that would make those rights explicit.