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Returned to the Pedestal--The Supreme Court and Gender Classification Cases: 1980 Term

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During the previous decade the Supreme Court rarely upheld gender-based classifications, holding that in general women were entitled to the same rights and duties as men. Two decisions from the Court's most recent term, Michael M. v. Superior Court and Rotsker v. Goldberg, appear to have reversed this trend. In Michael M. the Court upheld a statutory rape law that purported to protect women but not men. Rotsker sustained Congress' exemption of women from registration for the military draft. In this Article Professor Loewy examines these decisions in light of the discriminatory effect such "protective" legislation may have. Professor Loewy argues that both Michael M. and Rotsker have seriously impaired the move towards equal citizenship for women.

Prior to 1970, a rough summary of the Supreme Court's treatment of women was that their time should be divided between the home and the pedestal. The 1970s brought a series of decisions from which one could deduce that the right of equal citizenship or personhood could not be denied on the basis of gender unless that denial was substantially related to an important governmental objective. Indeed, no decision during this decade upheld a classification that on its face discriminated against women, and those that upheld discrimination against men appeared to be transient and compensatory. Consequently, many of us who preferred personhood to pedestals for women thought that the Equal Rights Amendment, while a desirable statement of principle for the nation's fundamental charter, was hardly necessary to reach this goal.

Now that the Court has empowered legislatures to deny a young woman...
the power to consent to sexual intercourse until she is substantially older than the age at which her brother could consent\footnote{See Michael M. v. Superior Court, 101 S. Ct. 1200 (1981).} and has empowered Congress to exempt women while registering men for the military draft,\footnote{See Rotsker v. Goldberg, 101 S. Ct. 2646 (1981).} the E.R.A. may indeed be a woman's only escape from the pedestal to personhood.

**PRE-1970**

Although many pre-1970 cases rejected claims for gender equality,\footnote{See, e.g., Muller v. Oregon, 208 U.S. 412 (1908) (upholding statute limiting women's work day to ten hours); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (holding that fourteenth amendment does not grant women the right to vote).} none illustrate the Court's view of womanhood as something different from personhood better than *Bradwell v. Illinois*,\footnote{83 U.S. (16 Wall.) 130 (1873).} *Goesaert v. Cleary*,\footnote{335 U.S. 464 (1948).} and *Hoyt v. Florida*.\footnote{368 U.S. 57 (1961).} *Bradwell* rejected a married woman's claim that the privileges and immunities clause entitled her to practice law on the same basis as a man.\footnote{Plaintiff relied on the privileges and immunities clause rather than the equal protection clause.}

Concurring, Justice Bradley (joined by Justices Field and Swayne), spoke of the role of women in no uncertain terms:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

\[\ldots\]

> In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny and mission of woman, it is within the province of the Legislature to ordain what offices, positions and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.\footnote{83 U.S. (16 Wall.) at 141-42 (Bradley, J., concurring).}

In *Goesaert* the Court upheld a statute allowing wives and daughters of *male* bar owners to serve as barmaids while denying that privilege to all other females including a *female* bar owner and *her* daughter. In its opinion, the Court rather casually commented:
Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. ... The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.\textsuperscript{15}

It then employed the following reasoning to uphold the classification:

Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition. Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. ... Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.\textsuperscript{16}

\textit{Hoyt} upheld the conviction of a woman for the murder of her husband returned by an all male jury from which a woman's opportunity to serve was systematically diminished. The Court described the system and justification for it:

In the selection of jurors Florida has differentiated between men and women in two respects. It has given women an absolute exemption from jury duty based solely on their sex, no similar exemption obtaining as to men. And it has provided for its effectuation in a manner less onerous than that governing exemptions exercisable by men: women are not to be put on the jury list unless they have voluntarily registered for such service; men, on the other hand, even if entitled to an exemption, are to be included on the list unless they have filed a written claim of exemption as provided by law.

In neither respect can we conclude that Florida's statute is not 'based on some reasonable classification,' and that it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude

\textsuperscript{15} 335 U.S. at 465-66.
\textsuperscript{16} Id. at 466-67.
that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.\textsuperscript{17}

Thus, as late as the 1960s, the Court's view of the woman as a homebody was sufficient to render the duty of citizenship, which was obligatory for men, something that a woman could accept or reject according to her fancy. The irony of this was that a woman, who was presumably one of the recipients of all this special legislative and judicial concern, could be convicted by an all male jury of murdering her husband during a domestic quarrel.\textsuperscript{18}

### The 1970s

The Supreme Court's version of the sexual revolution of the seventies began inauspiciously enough with Reed v. Reed,\textsuperscript{19} a case challenging an Idaho law that preferred men over women as administrators of estates when the contestants were equally related to the decedent.\textsuperscript{20} Though invalidating the law, the Court did not explicitly hold that special scrutiny was appropriate for gender classification. Yet, the opinion did contain harbingers of things to come. First, while citing several cases for the proposition that "the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways,"\textsuperscript{21} it cited neither Bradwell, Goesaert, Hoyt, nor any other case upholding a gender classification. Second, the Court employed some long disused language from the interventionist days of the 1920s to invalidate the statute:

A 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, so that all persons similarly circumstanced shall be treated alike."\textsuperscript{22}

Finally, the Court rejected the contention that the statute was rational because it eliminated disputes. In its rejection, the Court hinted that gender-based classifications might require special scrutiny.\textsuperscript{23} Idaho was undoubtedly correct in concluding that any method of resolving disputes of this nature without a hearing, such as choosing the older, the younger, the male, or the female would render a hearing unnecessary, thereby saving judicial time and minimizing intrafamilial squabbles. Furthermore, Idaho was probably safe in

\textsuperscript{17} 368 U.S. at 61.

\textsuperscript{18} Not only was the Hoyt jury all male, but under the Florida system the odds were that most juries would be all male.

\textsuperscript{19} 404 U.S. 71 (1971).


\textsuperscript{21} 404 U.S. at 75. The cases cited were McDonald v. Board of Election Comm’rs, 394 U.S. 802 (1969); Railway Express Agency v. New York, 336 U.S. 106 (1949); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Barbier v. Connolly, 113 U.S. 27 (1885).


\textsuperscript{23} 404 U.S. at 76-77.
assuming that men as a group, because of their having been exposed to business and/or law in greater numbers, were more likely to be qualified to administer estates than women as a group. Rejecting this argument, the Court opined:

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. 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; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

During the next term, in *Frontiero v. Richardson*, four Justices (Brennan, Douglas, White, and Marshall) read this language to support the conclusion that sex is a suspect classification. Three other Justices (Powell, Burger, and Blackmun) refused to so hold, but did invalidate the gender discrimination at issue—automatic dependency allowance for male but not female military officers—on the authority of *Reed*.

The next three cases appeared to reject the claim for gender equality. Two of them, *Kahn v. Shevin* and *Schlesinger v. Ballard*, upheld compensatory discrimination in favor of females. *Kahn* upheld a property tax exemption for widows, but not widowers, reasoning that "[t]here can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other state exceed those facing the man." *Ballard* sustained a federal statute that required discharge of a male naval officer who was twice denied promotion, thereby effectively mandating his discharge after nine years even though a female officer could not be discharged for thirteen years. The Court

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25. 404 U.S. at 76-77.
27. Id. at 691. Justice Stewart concurred separately. Justice Rehnquist dissented.
30. 416 U.S. at 353.
31. (a) Each officer on the active list of the Navy serving in the grade of lieutenant except an officer in the Nurse Corps, and each officer on the active list of the Marine Corps serving in the grade of captain shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander or major for the second time. However, if he so requests, he may be honorably discharged at any time during that fiscal year.

... 
(d) This section does not apply to women officers appointed under section 5590 of this title or to officers designated for limited duty.
thought that an earlier up or out time for a man was reasonable because he had more opportunities for promotion than a woman. When men and women were similarly situated (e.g., Judge Advocates Corp., Medical Services Corp. and Nurse’s Corp.), the up or out time was identical. Consequently, neither Kahn nor Ballard need be viewed as a serious retrenchment of the gender equality principle.

The third case, Geduldig v. Aiello, involved a California disability program that excluded normal pregnancy from its coverage. Concluding that the pregnancy exclusion was not gender based, the Court, including Justice White who had previously declared gender to be a suspect classification, had little difficulty sustaining the exclusion. While the correctness of this result is not so clear as the Court’s rather cavalier treatment of the issue would suggest, there is something to be said for eliminating some disabilities in order to minimize the cost to employees. Indeed, in view of the fact that even without pregnancy coverage, women were receiving proportionately more disability payments than they had contributed, it is possible that including pregnancy would have justified California’s charging women a higher premium than men for their disability coverage. Obviously some women would


(a) Each woman officer on the active list of the Navy, appointed under section 5590 of this title, who holds a permanent appointment in the grade of lieutenant and each woman officer on the active list of the Marine Corps who holds a permanent appointment in the grade of captain shall be honorably discharged on June 30 of the fiscal year in which—

(1) she is not on a promotion list, and

(2) she has completed 13 years of active commissioned service in the Navy or in the Marine Corps.

However, if she so requests, she may be honorably discharged at any time during that fiscal year.

Id. § 6401.

32. 419 U.S. at 509.

33. This is more clearly true of Ballard than Kahn since all women had less opportunity for promotion than those men who were subject to an earlier discharge. In Kahn, there were undoubtedly some widowed men whose financial difficulties exceeded those of some widowed women. Nevertheless, compensatory legislation, even if somewhat stereotypical, threatens the principle of gender equality less seriously than legislation that relegates women to second class citizenship. But see Kanowitz, “Benign” Sex Discrimination: Its Troubles and Their Cure, 31 Hast. L. Rev. 1379 (1980). The Court must, however, take care to invalidate legislation that on the surface appears to protect women, but in fact demeans them. See text accompanying notes 75-85 infra.


35. When this suit was originally filed, disabilities resulting from abnormal as well as normal pregnancies were excluded. In Rentzer v. Unemployment Ins. Appeals Bd., 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973), the California Court of Appeal held that disabilities resulting from abnormal pregnancies were covered. Thus, at the Supreme Court level, the case only involved exclusion for disabilities arising from normal pregnancies.

36. The Court’s entire analysis of the issue was contained in a single footnote. See 417 U.S. at 496-97 n.20.

37. Women contributed 28% of the fund and received 38% of the benefits. Id. at 497 n.21.

38. This assumes that actuarial experience can be considered when it results in a premium differential based on gender. But cf. City of Los Angeles v. Manhart, 435 U.S. 702 (1978); Laycock and Sullivan, Sex Discrimination As “Actuarial Equality”: A Rejoinder to Kimball, 1981 Am. Bar Foundation Research J. 221. Even if it could not, insuring an additional risk could result in a higher premium for both men and women.
prefer to pay a lower premium than have pregnancy coverage. Thus, while *Geduldig* was hardly a shot in the arm for those seeking to end gender discrimination, it was not a significant setback.

For the remainder of the Seventies, the Court’s commitment to sexual equality wavered very little.\(^{39}\) Two 1975 cases, *Taylor v. Louisiana*\(^{40}\) and *Stanton v. Stanton*,\(^{41}\) drained *Hoyt*, *Goeasert*, and *Bradwell*\(^{42}\) of whatever vitality they may have retained theretofore.

*Taylor* not only rejected *Hoyt*’s underlying premise, but did so on facts that were not nearly so compelling. Unlike *Hoyt*, where an all male jury may well have been unsympathetic to the defendant’s claim, *Taylor* involved a male defendant and a female victim. Nevertheless, the Court held that all defendants are entitled to a jury drawn from a fair cross section of the community and that this right was breached when women were systematically underrepresented.\(^{43}\) In response to Louisiana’s argument that women serve a distinctive role in society, the Court concluded:

> The States are free to grant exemptions from jury service to individuals in case of special hardship or incapacity and to those engaged in particular occupations the uninterrupted performance of which is critical to the community’s welfare. It would not appear that such exemptions would pose substantial threats that the remaining pool of jurors would not be representative of the community. A system excluding all women, however, is a wholly different matter. It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties. This may be the case with many, and it may be burdensome to sort out those who should be exempted from those who should serve. But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials.\(^{44}\)

*Stanton* invalidated a Utah requirement that a father support his son until age twenty-one, but his daughter only until age eighteen.\(^{45}\) The Utah Supreme Court had justified this dichotomy on the ground that “it is a salutary thing for [a male] to get a good education and/or training before he un-

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39. With three arguable exceptions: 1) compensatory female-favoring legislation, e.g., Califano v. Webster, 430 U.S. 313 (1977); 2) relationship to illegitimate children [a category, sufficiently sui generis that I have chosen to exclude it from the article], e.g., Parham v. Hughes, 441 U.S. 347 (1979); and 3) facially neutral legislation which has a disproportionately negative impact on women, Personnel Adm’r v. Feeney, 442 U.S. 256 (1979) (upholding a veteran’s preference for state employment, which in operation favored males since there were more male than female veterans).

41. 421 U.S. 7 (1975).
42. See text accompanying notes 9-18 supra.
43. The Louisiana system was substantially identical to that upheld in *Hoyt*. See text accompanying note 17 supra.
44. 419 U.S. at 534-35.
45. 421 U.S. at 14-15.
No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-tying society has long imposed. 47

Most assuredly, Bradwell's "women have no right to be attorneys" rationale could not withstand the force of Stanton's logic. Probably Goesaert's "women have no right to be barmaids" logic was gone also. In any event, that case was specifically rejected by Craig v. Boren, a case that invalidated an Oklahoma sex/age classification, allowing women to purchase 3.2% beer at age eighteen, but forbidding men from doing so until age twenty-one.

In some ways, Craig may be the most far reaching of the gender classification cases. It was the first case to announce "that classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 49 Although purporting to apply established principles rather than plow new ground, 50 the first official Supreme Court recognition of heightened scrutiny for gender classification is of considerable significance.

Furthermore, unlike the typical gender classification case, Craig did not involve a particularly invidious form of discrimination. The legislation was directed against males, who are in no sense a "discrete and insular minority." 51 More importantly, statistics indicated that young men were far more likely than young women to both drive while drunk and appear in public while drunk. 52 Thus when Oklahoma revised its age of majority laws to eliminate sex/age classifications, 53 it is not surprising that it chose to retain the...
discrepancy in the age for purchasing beer. The willingness of the Court to invalidate even so inoffensive a gender classification as this one surely suggested that few such classifications would be sustained.

1980 Term

Of the three gender classification cases decided during the 1980 term, only the least significant, *Kirchberg v. Feenstra*, invalidated the classification. *Kirchberg* involved a Louisiana law (since repealed) that empowered a husband, and only a husband, to alienate community property jointly owned by him and his wife. The invalidated statute provided:

The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

Since this provision was clearly more invidious than *Reed v. Reed* or any other case from the seventies, its invalidation was a foregone conclusion. Indeed, it was one of the few gender classification statutes to be unanimously invalidated.

The other two cases, *Rotsker v. Goldberg* and *Michael M. v. Superior Court*, upheld respectively a male-only draft registration and a statutory rape law under which only males could be perpetrators and only females could be victims. The remainder of this article will explore the extent to which these two decisions have departed from the precedent of the seventies and have indeed returned women to the pedestal, stripped of much of their personhood.

On the surface, the highly publicized *Rotsker* case appears to favor women—allowing them to volunteer for the military or not as they so choose, while subjecting men to involuntary registration and perhaps involuntary servitude in the military. This facile conclusion vanishes when one asks why males are subjected to this burden. The answer that our government gives the recalcitrant young man is: "It is your duty as a United States citizen." The message to young women is: "Your citizenship duty is optional, while your brother's (the real citizen) is mandatory." The analogy to the jury system, first upheld in *Hoyt v. Florida*, and later invalidated in *Taylor v. Louisiana*, is

54. I do not suggest that the statistics compel this sex/age differential, only that they make it appear noninvidious. See Loewy, supra note 51, at 16-17.

55. Another noteworthy case from the seventies, *Orr v. Orr*, 440 U.S. 268 (1979), invalidated Alabama's law granting alimony only to women. Refusing to justify the statute on the ground that it was designed to compensate women for past discrimination, the Court held that since individual hearings were always necessary to determine eligibility for alimony, Alabama was not justified in using gender as a proxy for either need or past discrimination.


Even second class citizenship might be constitutionally tolerable (at least according to prior decisions) if that status were substantially related to an important governmental objective. Were there proof that the registration of women precluded the smooth functioning of the military, that standard probably would have been met. Not only was such proof not adduced, but all of the military leaders testified that women contributed positively to the military. Indeed, these leaders, along with President Carter, advocated the inclusion of women in the registration. Why then, did the Court sustain this classification?

Perhaps the hallmark of Justice Rehnquist's opinion for the Court is its extraordinary deference towards Congress. Apart from the fact that the Court in general, and Rehnquist in particular, have not always been so deferential, one would have thought that prior decisions mandated governmental proof that the classification was substantially related to an important objective. Yet the Court, while explicitly refusing to accord to congressional military legislation "any further 'refinement' in the applicable [equal protection] tests," did uphold this classification largely on the ground that Congress enacted it.

Had Congress, contrary to the President and military leaders, determined that registering women was seriously detrimental to the military, the Court's decision to defer to Congress would have at least been relevant to its judgment of constitutionality. In fact, Congress made no such determination. Rather, Congress simply determined that there was no military necessity to draft women.

Drafting women is arguably less necessary than drafting men because women are ineligible to serve in combat positions. Accepting this, at least arguendo, it would seem clear that more men than women should be drafted. Indeed, if all members of the military were required to be combat eligible, no woman would be drafted or, for that matter, accepted as a volunteer. Of course, not all members of the military have to be combat eligible. Women volunteers have been accepted for years, and under prior drafts, male consci-

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60. See text accompanying notes 17-18 and 40-44 supra.
61. See Rostker v. Goldberg, 101 S. Ct. at 2650.
62. In summarizing the testimony presented at the congressional hearings, Senator Cohen stated:

[B]asically the evidence has come before this committee that participation of women in the All-Volunteer Force has worked well, has been praised by every military officer who has testified before the committee, and that the jobs are being performed with the same, if not in some cases, with superior skill.

63. The President had sought an allocation of funds to register both men and women. Congress allocated funds to register males only. 101 S. Ct. at 2655.
65. 101 S. Ct. at 2654. The Court purported to reject the government's argument that the rational basis test was more appropriate. Id.
66. As is apparent from such cases as Frontiero v. Richardson, 411 U.S. 677 (1973), and
entious objectors were required to perform noncombat duties. In fact, the military testimony indicated that in a draft of 650,000 persons, 80,000 women could be absorbed to perform noncombat duties.

More importantly, there was absolutely no evidence that it would have been harmful for the military to register, as opposed to draft, women. Indeed, whether vital or not, it is surely helpful to know how many women as well as men are available to be drafted, should an emergency break out. Obviously, registering men and women would cost more than just registering men, but cost, like administrative convenience, is not enough to justify a gender classification—even in the military.

Because Justice Marshall’s dissent so thoroughly exposes the Court's analytical flaws, further dissection seems a bit like the proverbial beating of a dead horse. Yet one cannot help but be disturbed by the Court’s willingness to accept needless congressional discrimination in this area. Indeed, one senses that gender stereotyping and discrimination is not a dead horse, but rather is a horse that won't die no matter how thoroughly beaten.

Disturbing as it is, Rotsker may not have as lasting or as brutal an impact on the drive for gender equality as Michael M. At least Rotsker involved the military, which is somewhat sacrosanct and at times sui generis. Further, it did involve a congressional judgment, however ill-advised. Michael M., on the other hand, upheld a blatantly sexist California statutory rape statute, which had been rejected by thirty-seven other state legislatures.

The statute punished sexual intercourse with a female under the age of eighteen. No comparable statute punished sexual intercourse with a male under eighteen. Indeed, Michael M. was such a male.

The plurality’s willingness to uphold Michael M.’s indictment rested largely on the following observations:

Underlying [Reed v. Reed and Craig v. Boren] is the principle that the legislature may not “make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected
In upholding the California statute we also recognize that this is not a case where a statute is being challenged on the grounds that it "invidiously discriminates" against females. To the contrary, the statute places a burden on males which is not shared by females. But we find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need or the special solicitude of the courts. Nor is this a case where the gender classification . . . rests on "the baggage of sexual stereotypes". . . .  

Obviously, the plurality viewed the challenged statute as one discriminating against males. In a certain and very obvious sense, it does. Michael M. may become a felon and suffer substantial imprisonment because he had the misfortune to be born a boy, while Sharon, his willing partner, remains free to press charges and perhaps become somebody else's voluntary "victim."

In a more global sense, however, the statute demeans all of California's young women by forbidding their sexual experimentation while allowing their younger brothers to experiment whenever they can find a willing older woman. These young women are protected only in the sense that Goesaert was protected from the evils of bartending in Goesaert v. Cleary. The reason California's statute does not seem as invidious as Michigan's barmaid statute is that it has been so sporadically enforced that it has not in fact precluded young women from being sexually active. Thus, it is only because of its ineffectiveness that the statute appears to discriminate against boys like Michael M. who are occasionally prosecuted, rather than girls like Sharon, who theoretically are not, but practically are, able to engage in sexual intercourse. Yet whatever else might be said about sporadic enforcement, it is hardly an argument for sustaining that which would otherwise constitute an invidious discrimination.

As a general proposition, I do not quarrel with the plurality's willingness to uphold noninvidious classifications, particularly against males. Indeed, as suggested earlier, had the Court upheld the sex/age classification for purchas-

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75. Id. at 1204 (Rehnquist, J., writing for a plurality) (quoting Parham v. Hughes, 441 U.S. 347, 354 (1979)).
76. Id. at 1207-08.
77. Factually there is some question regarding the degree of Sharon's willingness. Although she voluntarily kissed and hugged both the defendant and one of his friends, she claims that she did not consent to intercourse until he hit her. Id. at 1203 (Rehnquist, J., writing for a plurality), 1212 (Stewart, J., concurring). The crime, however, is predicated on the assumption that the parties voluntarily copulated. See Cal. Penal Code § 261.5 (West Supp. 1981). Thus, his lack of force or her eagerness would be no defense.
ing 3.2% beer in Oklahoma, no great harm would have been done.\textsuperscript{81} \textit{Michael M.}, however, illustrates that it is extremely easy to trip over a sexual stereotype without ever recognizing it. One reason for this is that burdens are often imposed upon men because of the perceived inferiority (or, if you prefer, delicacy) of the "fair sex." The classic example from English literature is Charles Dickens' Mr. Bumble who raised the defense that it was his wife and not he who had committed the crime, only to learn that if she had committed the crime in his presence that he was the more guilty because "the law supposes that you wife acts under you direction." Mr. Bumble responded: "If the law supposes that, the law is a ass—a idiot. If that's the eye of the law, the law's a bachelor; and... I wish... that his eye might be opened by experience."\textsuperscript{82} Indeed, as I have suggested elsewhere, "[I]f the law supposes that, it is worse than an ass—it is an unconstitutional ass."\textsuperscript{83}

Fortunately, the Court has not always been so insensitive to this subtle form of denigration. In \textit{Orr v. Orr}\textsuperscript{84} it recognized that alimony for women only "distribute[s] benefits and burdens on the basis of gender [thereby] carry[ing] the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection."\textsuperscript{85} Perhaps if the Court had been aware of the invidious stereotyping inherent in the California statutory rape law, it would have more closely scrutinized the justification proffered for the statute.

The justification accepted by the Court, in \textit{Michael M.}, was California's desire to prevent teenage pregnancies.\textsuperscript{86} Several difficulties inhere in this justification. The statute applies even when one or both of the parties use contraceptives, are sterile, or even when the girl is already pregnant. Thus, an eighteen year old boy who has had a vasectomy could be sent to the state's prison for creating an unjustifiable risk of impregnating an already pregnant seventeen year old girl.\textsuperscript{87} Upon informing the boy of this, one should not be too surprised to learn that he has adopted Mr. Bumble's opinion of the law.

Even assuming this purpose,\textsuperscript{88} it is not clear that it could not be equally or better served by punishing both male and female participants. To be sure, the plurality is correct in asserting that such a statute would deter young women

\textsuperscript{81} See text accompanying notes 48-54 supra. See also Loewy, supra note 51, at 16-17.
\textsuperscript{83} Loewy, supra note 51, at 9. Consider also the hypothetical suggested therein of a statute that makes a white employer liable for all thefts committed by his black employees against third persons. Although the white employer, like Michael M., would suffer under the discriminatory statute, the vice of both statutes is that they assume that those stereotyped as inferior are incapable of conducting themselves responsibly.
\textsuperscript{84} 440 U.S. 268 (1979). Discussed at note 55 supra.
\textsuperscript{85} Id. at 283.
\textsuperscript{86} 101 S. Ct. at 1205.
\textsuperscript{87} Justice Stewart suggests that recognizing no impregnating possibility as a defense would encounter difficult problems of proof. Id. at 1210 n.10 (Stewart, J., concurring). This sort of "administrative convenience," however, should never be permitted to justify such invidiously discriminatory legislation.
\textsuperscript{88} Which it almost assuredly was not. See id. at 1217-18 (Brennan, J., dissenting).
from reporting the "crime" to police. However, for very good reason, the crime is rarely reported anyway. Thus, it is at least arguable that the marginal gain in deterring female violators would equal or exceed the marginal loss in reported violations. After all, we are supposedly more concerned with reducing pregnancies than obtaining convictions.

Beyond this, a state's interest in deterring teenage motherhood may not be all that dramatically different from deterring teenage fatherhood. To be sure, it will not be pleasant for a teenage mother to face the choice of abortion, adoption, or eighteen years of motherhood, but at least she has the choice. Consider the following two possible scenarios following the sexual encounter between seventeen year old John and sixteen year old Mary:

I

Mary: I'm pregnant.
John: When will our baby be born.
Mary: It won't. I'm having an abortion.
John: Don't do that! I believe abortion is murder. Killing that child will have a profound effect on me.
Mary: Too bad, I don't want to have a child. The Supreme Court says I can abort if I want to. Your feelings are irrelevant.

or,

II

Mary: I'm pregnant.
John: Get an abortion. I'll scrape up the money to pay for it.
Mary: I don't want to.
John: Then give the child up for adoption.
Mary: No. I'm going to keep it, and raise it until it's eighteen.
John: Will I have to contribute to its support all those years even though I don't want it?
Mary: Yes.

This is not meant to minimize the brutal impact that an unwanted pregnancy can have on a teenage girl. It only suggests that the dichotomy between boys and girls may not be so great as the Court suggests.

Finally, the "possibility" of pregnancy rationale has the potential for all sorts of discrimination against women. For example, could women be prohib-

89. Id. at 1206-07. It would also deter them from blackmailing those boys whom they may have enticed into sexual intercourse for that very purpose. I do not suggest that this happens with great frequency and certainly do not suggest that females are more prone to engage in this sort of conduct than males. Nevertheless, whenever the law provides punishment for only one of two offenders to a voluntary transaction, it opens the door to blackmail possibilities.

90. A girl not desirous of blackmailing her lover is unlikely to report consensual intercourse to the police. See id. at 1216 n.7 (Brennan, J., dissenting).

91. The burden is on California to show that its gender classification is substantially related to its purpose. Justice Rehnquist seemed willing to defer to the California Supreme Court's determination that this gender classification met that standard. Id. at 1207 n.10. Under this reasoning it is questionable whether any gender classification upheld by a state court which is clever enough to incant the right words would be invalidated by the Supreme Court.

ited from working in a nuclear plant because of the possible risk to their babies should they get pregnant? What about an important government grant in which the risk of pregnancy might render completion of the grant less expeditious? Although this type of "slippery slope" argument probably would not justify refusing to take the first step when compelling reasons mandate it, here the compelling reasons cut the other way.

CONCLUSION

It is difficult to be sure whether Rotsker and Michael M. have permanently allowed women to be returned to the pedestal or merely slowed their march towards full personhood. Both the majority in Rotsker and the plurality in Michael M. accorded extraordinary deference to the respective legislative bodies. Indeed, Michael M. referred to the California Legislature’s recent decision to remain one of the few states retaining a gender based statutory rape law with an accolade worthy of Hoyt, Goesaert, or Bradwell: “Certainly this decision of the California Legislature is as good a source as is this Court in deciding what is ‘current’ and what is ‘outmoded’ in the perception of women.”

On the other hand, if the demeaning character of this discrimination really was not made apparent to the Court, maybe the Court quite simply did not realize what it was doing. If so, one can hope that in future cases, a majority of the Justices will return to women the equal citizenship accorded them by the decisions of the seventies.

93. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (pregnant teachers cannot be discharged early in their pregnancy without an individual determination that they are unfit to serve), certainly does not resolve this question.

94. 101 S. Ct. at 1205 n.6.

95. The Court necessarily includes Justice Blackmun's rather enigmatic concurring opinion, which was necessary to make a majority. Blackmun describes this case as "an unattractive one to prosecute" for the following reasons:

I think, too, that it is only fair, with respect to this particular petitioner, to point out that his partner, Sharon, appears not to have been an unwilling participant in at least the initial stages of the intimacies that took place the night of June 3, 1978. Petitioner's and Sharon's nonacquaintance with each other before the incident; their drinking; their withdrawal from the others of the group; their foreplay, in which she willingly participated and seems to have encouraged; and the closeness of their ages (a difference of only one year and 18 days) are factors that should make this case an unattractive one to prosecute at all, and especially to prosecute as a felony, rather than as a misdemeanor chargeable under § 261.5. But the State has chosen to prosecute in that manner, and the facts, I reluctantly conclude, may fit the crime.

Id. at 1212-13 (Blackmun, J., concurring). Yet it one seriously believes that the purpose of the statute is to prevent teenage pregnancies rather than to protect sweet young maidens, this seems like an ideal case to prosecute. Certainly the casual nature of the encounter would suggest the unlikelihood of contraception.