FEMINIST LEGAL ANALYSIS AND SEXUAL AUTONOMY: USING STATUTORY RAPE LAWS AS AN ILLUSTRATION

I. INTRODUCTION

Feminist scholars have become deeply divided over the appropriate direction of the feminist movement.[1] Current debate centers around the meaning of equality and its corollary implications. One camp of feminists endorses formal equality while the other advocates substantive equality. Feminists who endorse formal equality assert that similarly situated people of either sex should be treated alike.[2] Although this camp acknowledges fundamental biological differences between the sexes, it fears that the legal establishment will confuse these differences with socially constructed differences and use them to justify discriminatory treatment.[3] Such treatment could in turn lead to restriction of women's freedom and access to social resources, and to reinforcement of gender stereotypes.[4] Feminists who support substantive equality, however, would permit different treatment of the sexes as long as such treatment did not perpetuate or exacerbate gender inequalities.[5] Given the deeply entrenched inequalities in key social institutions,[6] supporters of substantive equality view identical treatment of

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[1] Wendy Williams observes:

> [W]e (feminists) are at a crisis point in our evaluation of equality and women and . . . perhaps one of the reasons for the crisis is that, having dealt with the easy cases, we (feminists and courts) are now trying to cope with issues that touch the hidden nerves of our most profoundly embedded cultural values.

Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 176 (1982).

[2] *See* Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, *in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 81, 81–82 (Katharine Bartlett & Rosanne Kennedy eds., 1991) [hereinafter FEMINIST LEGAL THEORY] (arguing that formal equality treats women as "the same as" men).

[3] Nadine Taub and Elizabeth Schneider note that "the Court has developed a new and more subtle view of 'realistically based differences,' which encompasses underlying physical distinctions between the sexes, distinctions created by law, and socially imposed differences in situation, and frequently confuses the three." Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW 328, 345–46 (Clare Dalton & David Kairys eds., 1998).

[4] *See* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1008 (1984) ("[E]ven when the sex generalization is accurate in the aggregate, these generalizations tend to be self-fulfilling and oppressive to the individual who fails to fit the mold.").

[5] *See, e.g.*, MacKinnon, *supra* note 2, at 87; Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 397 (1984).

[6] In the labor market, for example, women earn seventy-four cents for every dollar earned by men in comparable positions. Over the course of thirty-five years ending in 1996, the average woman's earnings have fallen short of the average man's earnings by $440,047, which translates into a gap of more than $10,000 per year. *See* Christina Sciammacco, *Feminists Call for Closing of Wage Gap: Equal Pay Day Shows Women Still Behind* (visited Nov. 18, 1998) <http://

women and men as an institutionalized arrangement in which women are measured against norms that, although facially neutral, actually reflect male values and standards.[7] Thus, to these feminists, the formal equality approach ignores the current reality of gender inequality by pretending that no discrimination exists within the present socio-legal institutions.[8] Such distortion of reality would leave societal problems unresolved. Because ideas and arrangements that reflect gender inequality remain within our collective consciousness and within our socio-legal institutions, granting different treatment to women is justified under certain circumstances.[9]

In the area of sexual autonomy, the tension between formal equality and substantive equality expresses itself as a conflict between the right to sexual freedom and the right to security from sexual aggression. The central problem is that women are oppressed by "moralistic controls . . . on [their] sexual expression," yet they are also "oppressed by violence and sexual aggression that society allows in the name of sexual freedom."[10] Women who suppress their sexuality to avoid male domination are disadvantaged by their socially imposed inability to appreciate fully a central aspect of human relations.[11] Women who seek sexual freedom, by contrast, are susceptible to exploitation by men who have sexual relationships with them.[12] A difference in the incentives of women and men contemplating sexual activities could explain this potential exploitation. Underlying this difference are the disproportionate social and emotional consequences facing women who engage in sex, given that sexual activity is seen as a gain to men and a

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www.now.org/nnt/05-98/wagegap.html> (citing U.S. CENSUS BUREAU, U.S. COMMERCE DEP'T, CURRENT POPULATION REPORTS (1996)).

7 *See* Olsen, *supra* note 5, at 398 ("The idea that conflict should be resolved by a system of neutral rules was itself formulated in a male-dominated society and reflects male needs, male concerns, and male experience."). The method for calculating the gross domestic product (GDP) is one example of a seemingly neutral norm that actually reflects male values. Although household chores, which are largely performed by women, are not intrinsically any less valuable than tasks performed in the wage markets, they are routinely excluded from the calculation of the GDP. *See* ROBERT E. HALL & JOHN B. TAYLOR, MACROECONOMICS 31–49 (4th ed. 1993). As a result, services that are more often performed by men receive more economic recognition than tasks that are more often performed by women. Although economic valuation of household chores can be difficult because an economic exchange does not normally occur upon completion of such chores, the very relegation of women to the private sphere of domestic chores that are untouched by economic regulation raises issues of equity. *Cf.* Taub & Schneider, *supra* note 3, at 331–35.

8 *See, e.g.*, Law, *supra* note 4, at 965 n.29 ("One way in which oppression is perpetuated is to assume falsely that equality has been achieved, when it has not.").

9 *Cf.* Olsen, *supra* note 5, at 398–99 ("Those who claim that feminists cannot have it 'both ways' fail to recognize the male supremacy built into the 'neutral' rights doctrine. The crucial issue is how both ways is defined.").

10 *Id.* at 388.

11 *See id.* at 430 (noting that female sexuality is "created out of social conditions of oppression").

12 *See id.* at 390 ("[One group of] feminists focus[es] on the sexist nature of sexual freedom and point[s] out that freedom means freedom for men to exploit women.").

loss to women.[13] Accordingly, the formal equality school focuses on women's right to sexual freedom, endorsing a level of sexual expression equal to that enjoyed by men, whereas the substantive equality school stresses women's lack of security, pointing out women's need to be protected from unwanted sexual activities.[14] The former school criticizes the latter for perpetuating the derogatory stereotype of women as victims, and the latter critiques the former for perpetuating oppression by falsely assuming that equality has been fully achieved.[15]

Whether in the broader socio-legal context or in the narrower sexuality context, as long as existing social arrangements reflect the male viewpoint,[16] the tension between formal equality and substantive equality will persist. The simultaneous achievement of both formal and substantive equality requires "social movement for transformation of the family, child rearing arrangements, the economy, the wage labor market, and human consciousness."[17] The subordination of women is so deeply embedded in the present social, economic, and political structures that achieving equality will be a difficult process.[18] On the one hand, pretending that women and men have achieved substantive equality and proceeding to grant them identical treatment may only exacerbate the effects of current inequalities.[19] On the other hand, treating women differently than men may perpetuate stereotypes of female inferiority. Thus, given the present state of gender inequality, improving the treatment of women, particularly in the context of sexuality, requires careful balancing of considerations based on both approaches.

Part II explores the debate between formal and substantive equality on a macro-level. First, this Part presents the case for each approach. Second, it surveys the Supreme Court's "real difference" doctrinal framework[20] and describes the feminist criticisms of that framework. Third, this Part delineates Catharine MacKinnon's dominance approach, an example of the substantive equality doctrine.

Part III analyzes the central tension between sexual freedom and security in feminist legal thought. First, this Part explores the tension between formal and substantive equality in the context of sexuality.

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[13] *See id.* at 405. This description may not be as accurate in religious and conservative communities in which both men and women are dissuaded from engaging in pre-marital sex; the social dynamics studied in this Note, however, reflect the conditions and beliefs prevalent in mainstream society.

[14] *See, e.g., id.* at 429–30.

[15] *See* Law, *supra* note 4, at 965 n.29.

[16] *See* Olsen, *supra* note 5, at 432.

[17] Law, *supra* note 4, at 956.

[18] *See* Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 965 (1983).

[19] *See* Olsen, *supra* note 5, at 412.

[20] This jurisprudence endorses the same treatment for women and men except when biology plays a role in creating gender differences.

Second, it describes the double standard of sexual morality and attempts to identify its origin. Third, it suggests a response to this problem.

To provide an illustration of this theoretical debate, Part IV presents the feminist perspective on statutory rape laws. First, this Part summarizes existing feminist critiques of *Michael M. v. Superior Court*,[21] a Supreme Court case about statutory rape laws. Second, this Part explores why the formal equality approach opposes statutory rape laws. Third, it explains why the substantive equality approach defends statutory rape laws. Part V concludes this Note by summarizing the problem and offering a potential solution.

II. The Meaning of Equality

A. *The Case for Formal Equality*

Feminists who endorse the formal equality approach find support on several grounds. First, the special treatment of women has often degenerated into oppressive mechanisms that force women and men into separate spheres.[22] Some have sensed in contemporary ideas of substantive equality a danger of reverting to the separate-spheres ideology. For example, by treating women differently because of divergent reproductive roles, the substantive equality approach tends to restrict women to the roles of wife and mother.

Proponents of formal equality also argue that acknowledging "the actual difference between the present situation of males and females stigmatizes females and perpetuates discrimination."[23] Such treatment focuses society's attention on *difference* (albeit real) rather than *sameness*, thereby dichotomizing our sensitivity toward gender into a simplistic binary mode of "male versus female." Such dichotomization leads to generalizations about sex that may be "accurate in the aggregate" but "oppressive to the individual who fails to fit the mold."[24] Not only does special protection reinforce stereotypes, but it can also be divisive both among women and between women and men.[25] Women may disagree about the nature of the benefits derived from

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[21] 450 U.S. 464 (1981).

[22] *See* Law, *supra* note 4, at 957 ("'[P]rotection' of women — construction of the pedestal/cage — was a core mechanism for oppression of women."). For example, protective legislation enacted earlier in this century turned out to be a double-edged sword. *See* Williams, *supra* note 1, at 196. Such legislation found its root in the ideology of separate spheres developed in the nineteenth century. In *Bradwell v. Illinois*, 83 U.S. 130 (1837), the concurrence observed that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman." *Id.* at 141 (Bradley, J., concurring). Accordingly, the "paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." *Id.*

[23] Olsen, *supra* note 5, at 412.

[24] Law, *supra* note 4, at 1008.

[25] *See* Williams, *supra* note 1, at 196.

different treatment and about the extent of the danger associated with reinforcing stereotypes. Men may simply view any dissimilar treatment as unfair.

Furthermore, formal equality pragmatically recognizes women's need to be heard by the dominant male establishment. To effect a change in power distribution, women must use the theories, arguments, and proofs of the dominant group to communicate their messages.[26] This adoption process necessarily involves assimilation into male-created social and intellectual constructs.

B. The Case for Substantive Equality

The substantive equality approach justifies differential treatment as recognizing simultaneously women's uniqueness and society's fundamental inequalities. In areas in which gender differences exist, the formal equality approach confuses recognition of difference with conceding a "lack of entitlement to equality under law."[27] According to the substantive equality school, a demand for change is a call to end the subordination of women and should not be equated with special protection. Moreover, an equality doctrine that ignores gender differences hinders the legal system from "reconcil[ing] the ideal of equality with the reality of difference."[28] A corollary to the recognition of uniqueness is an awareness that the formal equality approach is inappropriate in a society that fails to "recognize the male supremacy built into the 'neutral' rights doctrine."[29] In this way, when feminists ignore power differences and pretend that women and men are similarly situated, they can perpetuate discrimination by disempowering themselves from effecting change.[30]

C. Real Difference Jurisprudence

The Supreme Court's jurisprudence in the area of sex-based classifications reflects the "differences" doctrine, which justifies gender classifications on the basis of "real" differences between men and

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[26] *See* Martha Minow, *Feminist Reason: Getting It and Losing It* (1988), *reprinted in* FEMINIST LEGAL THEORY, *supra* note 2, at 357, 360.

[27] MacKinnon, *supra* note 2, at 89 ("[I]f you try to see real inequality through a lens that has difficulty seeing an inequality as an inequality if it also appears as a difference — you see demands for change in the distribution of power as demands for special protection.").

[28] Law, *supra* note 4, at 966.

[29] Olsen, *supra* note 5, at 398–99.

[30] *See id.* at 412. Admittedly, just because special treatment that seeks to remedy gender inequalities *should* not be viewed as a reflection of women's inferiority does not mean that it *will* not be viewed as such. The formal equality approach therefore offers a valid criticism of substantive equality in this respect. Nonetheless, the belief in women's intrinsic inferiority is also grounded in the formal approach's failure to recognize the male norms entrenched in social institutions. Once society recognizes that many social arrangements were designed with the average male, but not the average female, in mind, this erroneous belief in female inferiority should dissipate.

women.[31] Under this doctrinal framework, in situations in which women and men are similarly situated, differential treatment cannot be justified. In situations in which women and men are not similarly situated, however, the existence of "real" differences justifies differential treatment. This doctrinal framework therefore reflects the formal equality approach in areas in which a real difference (as defined by the Court) is not at issue, but reflects the substantive equality approach because it allows differential treatment in other contexts. Feminists of both camps have criticized this jurisprudence.

Feminists raise two primary criticisms of the Court's real difference jurisprudence. First, the Supreme Court appears confused about the nature and breadth of real sex differences. For example, the Court has used reproduction-related differences to justify sex-based classifications that do not reflect any real differences between women and men.[32] Confusing biological differences with cultural arrangements further perpetuates women's inferior status.[33] Specifically, a doctrine based on broadly defined "real" differences between women and men cannot correct the deepest problems of sex inequality because these problems often occur in contexts in which differential treatment of women and men is at least tangentially related to a biological difference.[34]

Second, the real difference jurisprudence fails to recognize the bias ingrained in facially neutral rules developed in a male-dominated society. The confusion between biological differences and socially imposed differences reflects such a failure.[35] Thus, the Court fails to examine the validity of the requirement that the sexes be similarly situated "when different situations may be the essence of, as well as the excuse for, social inequality."[36]

D. The Dominance Approach

One of the best-known substantive equality theories is Catharine MacKinnon's dominance approach. Under this approach, the key question with respect to an allegedly discriminatory legal measure is whether it empowers women to participate as full members of society.[37] A sex-based classification that tends to reinforce the subordina-

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31 *See* Law, *supra* note 4, at 962.

32 *See id.* at 969; *see also* Olsen, *supra* note 5, at 396.

33 *See* Olsen, *supra* note 5, at 396.

34 *Cf.* MacKinnon, *supra* note 2, at 91 (observing that "the deepest problems of sex inequality will not find women 'similarly situated' to men").

35 Wendy Williams observes that in areas concerning real gender differences, the Supreme Court has "foundered upon the culturally instilled limits of its ability to dismantle male preserves." Williams, *supra* note 1, at 176.

36 Catharine A. MacKinnon, *Introduction*, 10 CAP. U. L. REV. i, vi (1981).

37 *See* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 117 (1979).

tion of women would fail MacKinnon's test. Under the dominance approach, sex-based classifications are unconstitutional insofar as they create and maintain a sexual hierarchy that systematically disadvantages women.[38] This framework criticizes the pervasive use of neutral principles and recognizes that their use preserves the status quo of gender inequality.[39]

Other feminists have criticized the dominance approach on both theoretical and practical fronts. Nadine Taub, a strong proponent of the formal equality approach, warns that the dominance approach is likely to deteriorate into a new form of detrimental protectionism reminiscent of the separate spheres ideology.[40] To Taub, women's uniqueness in relation to men is the "cornerstone of that separate-but-equal logic of complementarity that has assigned [women] those pursuits and those qualities that are glorified as female but denigrated as human."[41]

The dominance approach also faces difficulties in its practical implementation. Specifically, the invisibility of sex discrimination in a context of pervasive male-dominated neutrality may render the approach infeasible for litigators who currently appear before the judiciary.[42] If sex discrimination cannot be detected in the first place, then the operative question under the dominance approach — whether the practice in question integrally contributes to the maintenance of a sexual underclass — is unhelpful. Moreover, determining which factors perpetuate a sexual underclass is extremely difficult.[43] Sylvia Law argues that MacKinnon may have overestimated the judiciary's ability to identify and avoid socially imposed inequalities.[44] Worse yet, MacKinnon's proposed approach may reinforce a false belief that a

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[38] The dominance approach is based on the definition of sex discrimination as a systematic construct that defines women as inferior to men and that both "cumulatively disadvantages women for their differences from men, as well as ignores their similiarities." Law, *supra* note 4, at 1005 (citing MACKINNON, *supra* note 37, at 116).

[39] *See* Olsen, *supra* note 5, at 397; *see also* MacKinnon, *supra* note 2, at 82 ("Concealed is the substantive way in which man has become the measure of all things."). MacKinnon attacks the Supreme Court's focus on real differences and points out the pervasiveness of the male norms underlying the Court's approach:

> All I am saying is that the damage of sexism is real, and reifying that into differences is an insult to our possibilities.
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> So long as these issues are framed this way, demands for equality will always appear to be asking to have it both ways: the same when we are the same, different when we are different.

Id. at 87.

[40] *See* Nadine Taub, Book Review, 80 COLUM. L. REV. 1686, 1691 (1980) (reviewing CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979))

[41] *Id.* at 1691. Sylvia Law has similarly criticized MacKinnon for disregarding a history in which "laws justified as protecting women have been a central means of oppressing them." Law, *supra* note 4, at 1005.

[42] *See* Taub, *supra* note 40, at 1691.

[43] *See* Law, *supra* note 4, at 1005.

[44] *See id.*

judicially enforced constitutional standard would itself be sufficient to dismantle the structures integral to continued sex discrimination.[45]

III. SEXUAL AUTONOMY

A. *Doctrinal Tension Within Feminist Legal Theory*

The tension within feminist legal thought increases in the context of sexual autonomy because the difference is so pervasive in that context. In our society, sexuality has different implications for women and men. First, biological reality dictates that only women can become pregnant as a result of sexual intercourse. Second, social constructs regarding this biological difference have expanded and intensified its effect.[46] For example, child rearing arrangements cause the burden of child care to fall upon women, whether they are willing or not to assume such responsibilities.[47]

Moreover, society imposes the role of sexual victim on women and the role of sexual aggressor on men.[48] A higher level of sexual activity tends to decrease a woman's perceived social worth, while increasing that of a man.[49] Women's freedom of sexual expression is therefore circumscribed by a fear of diminished social worth. These factors create a social reality in which women face disparately severe consequences for engaging in sexual activities.[50]

Feminists have sought to overturn the various sexist assumptions underlying social reality. For example, there is no biological basis for imposing the burden of child care exclusively on women.[51] Similarly, the roles of sexual aggressor and sexual victim are merely sexist stereo-

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[45] *See id.*

[46] *See* Freedman, *supra* note 18, at 946 ("People may . . . think . . . that existing social arrangements that give [gender] differences a particular significance do not involve sex discrimination, but merely reflect the biological differences to which they are related. When these propositions are examined more carefully, however, their deficiencies become apparent.").

[47] *See* Law, *supra* note 4, at 965 n.29 ("For all the changes in attitudes toward women since 1970, there has been little increase in male responsibility for nurturing or in the development of other forms of child care that would free women for the intense work that exercising political power demands.").

[48] According to 1997 Department of Justice statistics, 94.5% of rape victims and 84.8% of sexual assault victims were female. Correspondingly, 99.6% of rape offenders and 98.8% of sexual assault offenders were male. *See* BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT: SEX OFFENSES AND OFFENDERS 21, 24 (1997) [hereinafter AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT], *available at* <http://www.ojp.usdoj/gov/bjs/pub/pdf/soo.pdf> (visited Feb. 4, 1999).

[49] Of course, this increase in male social worth generally results from their legal sexual activities only.

[50] *See* Olsen, *supra* note 5, at 432.

[51] *Cf.* Law, *supra* note 4, at 1016 ("Nature demands that women alone bear the physical burdens of pregnancy, but society, through the law, can either mitigate or exaggerate the cost of these burdens.").

types that pigeonhole individuals of widely ranging traits and qualities into two categories.[52]

Conflict within the feminist movement arises because of the tension between social reality and social norms. Some feminists focus on the gap between the two while others focus on the degree of semblance between the reality and the ideal.[53] Framed in another way, some feminists equate the sexist element of social control with the effective social control of women, but other feminists emphasize the sexist element found in sexual freedom and equate this freedom with men's freedom to exploit women.[54] Frances Olsen notes that both schools ultimately redefine the fundamental issue — "the nature of sexuality and [women's] ability to reconstruct it" — as a debate about where to draw the line between social control and sexual freedom.[55] Thus, the two schools of feminists that should collectively challenge the male construction of sexuality instead come to perceive themselves as opponents.[56] Feminists who oppose social control of women's sexuality accuse the rival school of being anti-sex, whereas feminists who oppose sexual freedom in the form of male exploitation criticize the other school for exacerbating the oppression of women through "false consciousness."[57] Women's right to sexual freedom therefore conflicts with their right to security from sexual exploitation.[58] On a macro-level, then, their substantive equality correspondingly conflicts with their formal equality.[59]

The double standard of sexual morality illustrates this doctrinal tension. Such a standard creates different roles and expectations for men and women. Men face social pressure to be sexually aggressive,[60] whereas women face social pressure to eliminate their sexual drive.[61] Under such a standard, women face a binary choice between fulfilling the assigned role of the revered and protected asexual being, or con-

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[52] *See id.* at 1008.

[53] Olsen writes:

> One group of feminists focuses on women's ability to be independent sexual actors and to achieve a degree of autonomy; like other oppressed groups, women can and do make the best of what is available to them. Other feminists point out that women's sexuality exists as it does because it is created out of social conditions of oppression. It is wrong, these feminists argue, to interpret women's sexuality as self-expression or autonomy, as though sexism did not exist.

Olsen, *supra* note 5, at 429–30.

[54] *See id.* at 390.

[55] *Id.*

[56] *See id.*

[57] *Id.*

[58] *See id.* at 391.

[59] *See id.*

[60] Sexist societal views impose a cost on men as well as women. However, as this Note illustrates, women generally appear to be more disadvantaged by these views. *See supra* p. 1072; *infra* p. 1074.

[61] *See* Law, *supra* note 4, at 960 n.19.

fronting their sexuality and facing society's consequent condemnation.[62]

During the latter part of the century, the complete prohibition of women's sexuality eroded, but whether this sexual liberation was truly liberating for women is doubtful:[63]

> These new permissive standards and practices remain fundamentally deformed by male-supremacist practices and attitudes and a heightened instrumentalism .... As men once took advantage of the sexual double standard and the enforced chastity of their wives, now they often take advantage of the mythical single standard to belittle and pressure women who resist their sexual preferences.[64]

As this passage indicates, the existence of a single standard for female and male sexuality remains only a myth because liberation actually creates additional pressure for women to engage in sex with men under the newly found guise of sexual freedom. Whereas in the past, women bore the burden of maintaining a sexually conservative society by repelling men's sexual overtures, in the present, men can exploit women sexually in the name of liberation. Underlying the persistent double standard of sexual morality is male pride in the exclusive ownership of the female as a sexual object.[65] Winning the consent of a woman to sexual intercourse is seen as a personal prize for a man, but the analogous is not true for a woman.[66]

B. The Root of the Problem

This division among feminists arises because "in conditions of sexual inequality, women are oppressed by both sexual freedom and societal control of sexuality."[67] Taub observes that "rules formulated in a male-dominated society reflect male needs, male concerns, and male experience."[68] For example, the legal system will "do no more than measure women's claim to equality against legal benefits and burdens that are an expression of white male middle-class interests and values."[69] As long as social arrangements are built upon male assumptions about gender roles, even allegedly neutral rules will continue to

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62 *See id.* In the past, sexually active young women were punished through the juvenile justice system. A 1974 study of the New York system found that allegations of "promiscuity, prostitution, cohabitation, and general sexual innuendo" were made only against females. *Id.*

63 *See id.* at 961 n.19.

64 LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT 413–14 (1976).

65 *See* Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 72–73 (1952) ("The consent of a woman to sexual intercourse awards the man a privilege of bodily access, a personal 'prize' whose value is enhanced by sole ownership.").

66 *See id.*

67 Olsen, *supra* note 5, at 430.

68 Taub, *supra* note 40, at 1694.

69 Williams, *supra* note 1, at 175.

have unequal effects on women and men.[70] To achieve full equality, feminists must effect a major transformation of social arrangements[71] and human consciousness, including "radically increasing the options available to each individual" and "allowing the human personality to break out of the present dichotomized system."[72]

C. *Balancing Analysis: A Possible Response to the Problem*

Although fundamental social changes are imperative if women are ever to achieve full equality with men, "reexamining sex differentiation" throughout society is "extremely threatening" because inequalities are deeply entrenched in society and in each individual's sense of self and relations with others.[73] As MacKinnon acknowledges, male dominance "is perhaps the most pervasive and tenacious system of power in history" and "is metaphysically nearly perfect."[74] Given the difficulty inherent in achieving full gender equality, society can expect a long period of continued inequality. Achieving equality is difficult not only because male norms are entrenched, but also because equal treatment is actually a less coherent concept than most feminist scholars would like to admit; in fact, the choice between formal equality and substantive equality may only be meaningful "on a case-by-case basis."[75]

Applying neutral rules in the interim to areas in which gender differences matter ignores the realities of biological difference and socially constructed inequality.[76] Paradoxically, superimposing different treatment of women upon the rules constructed on male norms also tends to perpetuate substantive gender inequality. Because neither approach to gender equality is perfect, and because exclusively adopting one approach would ignore the validity of the other approach's criticisms of that approach, this Note proposes a case-by-case decisional process pursuant to which society adopts an approach only after carefully balancing the costs and benefits of each alternative.

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[70] *See* Freedman, *supra* note 18, at 948.

[71] *See* Olsen, *supra* note 5, at 431 ("It is not enough to empower women to resist male coercion in all its forms; we must also create new choices for women.").

[72] Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1578 (1983); *see also* Olsen, *supra* note 5, at 430 ("[R]egarding sexuality we should recognize the problems with both social control and sexual freedom and call for a reconstruction of sexuality altogether.").

[73] Freedman, *supra* note 18, at 965.

[74] Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, *in* FEMINIST LEGAL THEORY, *supra* note 2, at 181, 182.

[75] Olsen, *supra* note 5, at 400.

[76] To try to "fit women's experiences into categories forged with men in mind reinstates gender differences by treating the male standard as unproblematic." Minow, *supra* note 26, at 361.

IV. *MICHAEL M.* AND STATUTORY RAPE LAWS

Statutory rape laws aptly illustrate the tension between women's right to freedom and their right to security in the area of sexual autonomy: although they "restrict the sexual activity of young women and reinforce the double standard of sexual morality,"[77] these laws also tend to protect young females from unwanted or premature sex. This Part focuses primarily on the nature and implications of statutory rape protection for young women, which remains different from facially similar protection for young men. The "social context of gender inequality that situates women and men nonsimilarly in the sexual arena" leads to young women's "lack of access to meaningful consent," a condition that does not apply to young men.[78] In other words, the harm ensuing specifically from the social context of gender inequality — which creates extra emotional and biological costs — applies to young women only.

A. *Feminist Critiques of* Michael M. v. Superior Court

In a 1981 case, *Michael M. v. Superior Court*,[79] the appellant, a seventeen-year-old man, engaged in sexual intercourse with a sixteen-year-old woman after a group outing.[80] Michael M. was prosecuted under California's statutory rape law, which criminalized intercourse for men who engaged in intercourse with an under-aged woman, but not for women who engaged in intercourse with an under-aged man.[81] He attacked the rape statute as a denial of equal protection because he, but not his female partner, was criminally liable for their joint act.[82] A divided Court upheld the rape statute under the "real difference" approach, which permits differential gender treatment in situations in which women and men are not similarly situated because of a biological difference.[83] According to the *Michael M.* Court, the fact that only young women can become pregnant as a result of underage sexual intercourse constituted a real difference that justified the differential statutory treatment.[84]

1. The Plurality Opinion. — In the plurality opinion, Justice Rehnquist applied a deferential standard of review and argued that,

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[77] Olsen, *supra* note 5, at 402. Thus, the laws both "protect and undermine women's rights." *Id.* Williams sees the general dilemma in *all* types of statutory rape laws as a choice between either protecting young females only, thereby recognizing the gender-specific harms of sexual offenses, or protecting all victims of sexual offenses, thereby de-emphasizing the more severe consequences faced by women. *See* Williams, *supra* note 1, at 187.

[78] MacKinnon, *supra* note 36, at vi n.21.

[79] 450 U.S. 464 (1981).

[80] *See id.* at 466–67.

[81] *See id.* at 466 (citing CAL. PENAL CODE § 261.5 (West 1981)).

[82] *See id.*

[83] *See supra* p. 1070.

[84] *See Michael M.*, 450 U.S. at 463–76.

because pregnancy served as a natural deterrent to sexual intercourse for under-aged women, the legislature could reasonably impose penalties on men only — such a measure would accordingly equalize the deterrent to sexual intercourse for each gender.[85]

Feminists from both schools have criticized the plurality opinion. First, in holding that pregnancy constituted a real difference for women engaged in sexual intercourse, the Court confused biology with social arrangements.[86] Although biology determines the sex of the party who gives birth, social patterns, not biology, determine who cares for a child after birth.[87] Thus, the plurality failed to recognize that cultural and political choices, rather than biology, are the primary determinants of the extent of sexual equality.[88] The Court's confusion of sociology and biology led it to agree erroneously with the empirically unsupported finding of a close link between the prevention of teenage pregnancy and the criminalization of sexual intercourse.[89]

Second, the Court's opinion was based on outmoded stereotypes of male aggressiveness and female passivity.[90] Williams sees the decision as reflecting the Court's "apparently uncontrollable urge to use ancient canards about the sexuality of men and women to resolve cases that come before [it]."[91] To feminists who support the formal equality approach, the decision is dangerously reminiscent of *Bradwell v. Illi-*

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[85] *See id.* at 473. The plurality in *Michael M.* observed:

> Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. . . . Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct.

Id. at 471–73.

[86] *See* Law, *supra* note 4, at 999–1000.

[87] The Court appears to accept socially constructed child-rearing arrangements and consequently reinforces stereotypical gender roles. *See id.* at 997 ("When the Court upholds a statutory scheme because it considers fatherhood solely in terms of 'opportunity,' and motherhood in terms of 'unshakable responsibility,' it reinforces stereotypes and perpetuates male irresponsibility.").

[88] *See* Freedman, *supra* note 18, at 918.

[89] Taub and Schneider explain: "No legislative history was produced in California or elsewhere to show that the purpose of the sex-based classification was to eliminate teenage pregnancy. Moreover, the experience of other jurisdictions showed that criminalization of male, but not female, conduct bore little relation to the goal of eliminating teenage pregnancy." Taub & Schneider, *supra* note 3, at 347.

[90] *See id.*

[91] Williams, *supra* note 1, at 188–89 n.75. Williams rejects entirely the Court's adoption and application of the real difference approach in the case:

> The Justices . . . have chosen to validate and reinforce gender differences. They, like the sociobiologists, are not careful to distinguish between physical differences on the one hand and the social significance of those differences on the other. By refusing or neglecting to do so, they smuggle immense normative content into what purport to be decisions based on "real" differences between the sexes. . . .
>
> From this perspective, we have not progressed far from . . . [the intellectual climate of the early twentieth century].

Id. at 185 n.58.

nois,[92] in which women's position as the "weaker sex" in society justified women-only protective legislation.[93] According to Williams, *Michael M.* therefore reflects the belief that "man is the measure against which the anatomical features of women are counted and assigned value, and when the addition or subtraction is complete, woman come[s] out behind."[94]

Feminists who support the substantive equality approach agree with the above criticisms of the plurality opinion, but would nevertheless uphold statutory rape laws because laws must remedy the inequalities created by social arrangements. To these feminists, substitution of the biologically based rationale implies that existing inequalities reflect an injustice, rather than the inherent inferiority of women.[95]

2. Justice Blackmun's Concurrence. — Feminists have criticized Justice Blackmun's concurrence[96] in *Michael M.* because it manifests approval of the double standard of sexual morality.[97] Justice Blackmun seemed to suggest that the young woman in the case did not deserve the protection of statutory rape laws because she did not fit the stereotype of the chaste girl that such laws were designed to protect.[98] Thus, under Justice Blackmun's approach, men possess tacit permission to be sexually aggressive toward females in the lower class and to leave only the "higher" class chaste.[99]

3. Justice Stevens's Dissent. — Justice Stevens dissented,[100] critiquing the Court's perfunctory review of the relationship between the sex-based classification and the asserted goal of pregnancy deterrence. He thought that the statute discriminated against men and granted women "a license to use [their] own judgment."[101] Moreover, according to Taub and Schneider, Justice Stevens believed that if criminal sanctions were believed to "deter the conduct leading to pregnancy, a

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92 83 U.S. 130 (1837).

93 *See, e.g.*, Williams, *supra* note 1, at 181–82 n.49. Williams notes that in those days, the "premise underlying statutory rape laws was that young women's chastity was precious and their naiveté enormous." *Id.* at 186.

94 *Id.* at 192.

95 MacKinnon supports this approach. She criticizes the Court for upholding the California statutory rape laws on biological instead of social grounds. *See* MacKinnon, *supra* note 36, at vi n.21 ("[T]he *Michael M.* case . . . strengthens the notion that women's and mens's [sic] sexuality make the sexes 'not similarly situated' with regard to sexual intercourse. Doing this on a purportedly biological ground, such as pregnancy potential in *Micha[e]l M.* . . . suggests that nothing that makes this true can be changed.").

96 *See Michael M.*, 450 U.S. at 481–87 (Blackmun, J., concurring in the judgment).

97 *See* Olsen, *supra* note 5, at 417.

98 *See Michael M.*, 450 U.S. at 483–86 (Blackmun, J., concurring in the judgment).

99 *See id.*

100 *See id.* at 496–502 (Stevens, J., dissenting). Justice Brennan also dissented, *see id.* at 488–96 (Brennan, J., dissenting), but feminist critique has focused on Justice Stevens's opinion.

101 *Id.* at 499 (Stevens, J., dissenting); *see id.* at 500–01.

young woman's greater risk of harm . . . is . . . a reason to subject her to sanctions" as well.[102]

Although the formal equality school agrees with Justice Stevens's dissent,[103] the substantive equality school believes that Justice Stevens's dissent erroneously assumes that the "subordination of women is largely a problem of the past and that sex discrimination is an aberrant event, rather than a pervasive aspect of our society."[104] Furthermore, according to these feminists, the statute that Justice Stevens's dissent would uphold — one that would prosecute both partners for engaging in sexual intercourse when the woman is under-aged — is actually the worst alternative from a practical standpoint.[105] This statute would increase the statutory rape law's coercive elements by restricting the sexual freedom of all parties; yet, at the same time, it would diminish the protection to the female party because, fearing criminal liability, she would be reluctant to initiate prosecution.[106]

4. Feminist Critiques of the Entire Michael M. *Court.* — All of the *Michael M.* opinions, plurality and dissents, reinforce sexual stereotypes, in part because the framework of their debate is restricted to the issue whether the man who engages in sexual intercourse with an under-aged woman should be criminally liable, creating a focus on sexual access to the young woman.[107]

B. Feminist Arguments Against Statutory Rape Laws

The formal equality school has argued against single-sex statutory rape laws on two major grounds. First, these laws restrict the sexual freedom of young women.[108] The restrictive aspects of these laws are objectionable because they "exalt female chastity and treat women as lacking in sexual autonomy."[109] The state restricts women's sexual

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102 Taub & Schneider, *supra* note 3, at 348 (analyzing Justice Stevens's opinion).

103 *See, e.g.,* Williams, *supra* note 1, at 182–83 n.50.

104 *Id.* at 420. For example, Olsen states:

> The terms of debate set in the case, the areas of agreement that seem too well settled even to question, the tacit assumptions — these speak volumes about our culture. Unless we challenge these premises and ask the unasked questions, we will tend to defeat our own interests. In our zeal to discredit the worse of two bad opinions, we may inadvertently lend legitimacy to the other one.

Olsen, *supra* note 5, at 424 n.173 (citation omitted). Further, the dissent suggests that the discrimination can strike both males and females equally, whereas feminists contend that women are more often the victims of such discrimination. *See id.*

105 *See* Olsen, *supra* note 5, at 419–20.

106 *See id.*

107 *Cf.* Law, *supra* note 4, at 1001 (stating that *Michael M.* reinforces sexual stereotypes, but providing other justifications for this observation).

108 *See* Olsen, *supra* note 5, at 405.

109 *Id.*

freedom because it treats their sexuality as a thing of intrinsic value that must be guarded.[110]

Second, single-sex statutory rape laws reinforce the stereotype of young women as sexual victims[111] and thereby tend to perpetuate the double standard of sexual morality. Statutory rape laws originated in the legal fiction that young women do not possess the capacity to consent to sex.[112] Thus, such laws conjure up the image of a vulnerable female who must be protected against a man's sexual aggression.[113] Williams notes that, ultimately, these laws impede the goal of gender equality[114] because they may lead society to give credence to the very social constructs and behaviors that social reformers are striving to eradicate.[115]

C. *Feminist Arguments for Statutory Rape Laws*

Feminists from the substantive equality school favor statutory rape laws under existing conditions because these laws at least protect the most vulnerable women from the harms of sexual activities. Young females would benefit from more protection against sexual coercion and exploitation than forcible rape and incest laws currently provide because the present consent standard is based on a male point of view.[116] Thus, statutory rape laws justifiably offer protection to prevent the continued oppression of women.[117] Had the *Michael M.* Court reached the same decision on a social ground, recognizing socially imposed inequality and distinguishing it from the false perception of biologically ingrained inequality, the Court's decision could have indicted the socio-legal environment that makes women's sexuality a disadvantage.[118]

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110 *See id.* at 406 ("By refusing to grant women autonomy and by protecting them in ways that men are not protected, the state treats women's bodies — and therefore women themselves — as objects.").

111 *See id.*

112 *See* Taub & Schneider, *supra* note 3, at 347.

113 *See id.*

114 *See* Williams, *supra* note 1, at 180 n.35.

115 *See id.* at 187.

116 *See* Olsen, *supra* note 5, at 405. Young women need extra protection because they have been "socialized to passive receptivity" and may therefore engage in non-consensual sex in instances in which forcible rape laws do not offer sufficient protection. MacKinnon, *supra* note 74, at 189 ("Sexual intercourse may be deeply unwanted — the women would never have initiated it — yet no force may be present .... [B]ut absence of force does not ensure the presence of that control.").

117 *See* Olsen, *supra* note 5, at 421.

118 *See* MacKinnon, *supra* note 36, at vi n.21. MacKinnon notes:

> Arguably, the practice of coercive male sexual initiation toward women, particularly those perceived as vulnerable, targets young girls, even more than it does all women. This, together with women's lack of access to meaningful consent ... would criticize the social context of gender inequality that situates women and men nonsimilarly in the sexual arena. Such an argument would produce a very different conception of the injury or rape upon

D. *Applying a Balancing Analysis to Statutory Rape Laws*

The substantive equality approach and the formal equality approach offer a compelling case both for and against statutory rape laws. The formal equality approach correctly recognizes that statutory rape laws tend to restrict young women's sexual freedom and to reinforce the stereotype of woman as sexual victim. Alternatively, the substantive equality approach offers support for statutory rape laws on social policy grounds: protecting young women's bodily integrity and emotional well-being is undoubtedly an important societal interest.

In the case of statutory rape laws, restricting young women's sexual freedom can be justified as a temporary, though real, cost that disappears as a young woman reaches majority. Moreover, emphasizing the social reality of gender equality and the falsity of women's inherent inferiority can at least somewhat alleviate the danger of stereotype reinforcement. By contrast, the consequences of premature, possibly forced, sexual activities pose significant costs that cannot — and should not — be ignored by society. Thus, the balancing approach would advocate adopting the substantive equality approach in the case of statutory rape laws.

V. CONCLUSION

The tension in feminist legal theory between women's right to security and their right to freedom will probably persist for quite some time before complete equality is achieved. Until then, the choice between recognizing one right or the other will be a difficult one. The formal equality school forcefully criticizes the substantive equality approach for perpetuating sexist stereotypes and for wrongfully restoring women to the pedestal of the olden days. The substantive equality school, by contrast, directly confronts the reality of gender inequality and actively attempts to correct this problem. Properly balancing the policy considerations emphasized under each approach would offer some assurance that more weight will be given to the policy considerations that are more important in a given context. By recognizing the domination of male norms in fundamental social arrangements, society can learn to distinguish the reality of inequality from the myth of women's inferiority, thereby allowing different treatment to be seen as a potential corrective measure, rather than as special protection for an intrinsically inferior sex.

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which to support a sex-specific statutory prohibition than the ones used by . . . the Court in [the *Michael M.*] case.

Id.