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Differentiating Sex from Sex: The Male Irresistible Impulse

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DIFFERENTIATING SEX FROM *SEX*: THE MALE IRRESISTIBLE IMPULSE

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I

INTRODUCTION

The courts have not wholeheartedly embraced the idea of equality of the sexes, and therefore do not attack sex discrimination with the same vigor as they attack racism. Rather, the courts are equivocal about sexual equality and weigh equality less carefully for sex than for race. Color is thought an arbitrary distinction; gender, however, is assumed to be something of substance.

When courts sustain sex discrimination, they generally do not characterize it as such. Rather, differences between the sexes, both real and imagined, are used to justify the gender distinction.[1] It is easy to be hypnotized by the purported differences between the sexes: to never question how oppressive sexual stereotypes weave themselves inextricably into the fabric of our society.

To confront the sexism embedded in our society by the use of such stereotypes, we must challenge even the most common assumptions and prevent the perpetuation of false and damaging myths about the differences between men and women. This is what the courts have failed to do.

One of the most insidious assumptions about differences between the sexes has to do with the male sex drive. It is presumed to be stronger than the female sex drive, easily provoked and irresistible. This assumption has been incorporated into the law in several ways. The idea that women need protection from that male impulse has been used as a means of upholding statutes and practices that discriminate against women. This idea can be

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1. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973). This case struck down regulations requiring that a female member of the uniformed services prove that her spouse was dependent in order to get increased benefits. Male uniformed servicemen, however, could claim their wives as dependents without any proof of actual dependency. The court used a "strict scrutiny" analysis proclaiming sex as a suspect classification. The use of the analysis in this case has proven to be a fluke since the court has since applied a "middle-tier" analysis or a rational relationship test when analyzing sex-based classifications.

found in Supreme Court decisions as well as in lower federal and state court cases.[2]

The failure of the courts to question this myth is a symptom of the general blindness of the judiciary to the depth of sexual discrimination. Generally, the courts have not been willing to scrutinize sexual stereotypes on the basis of the inequality and damage which these stereotypes create. The courts only seem willing to challenge stereotypes after they have become outdated.[3] The failure to ratify the Equal Rights Amendment has eliminated the possibility of a speedy legislative solution to the intransigence of the courts.[4]

The courts fail to address the fact that the burden of sex discrimination always falls on women. Any real differences are equal differences: women are as different from men as men are from women. Yet in the legal system, when the court notes "real" differences between the sexes as a reason for discrimination, women consistently lose.

This phenomenon reveals how the law assumes a male point of view. Male behavior is assumed to define the norm. Therefore, any departure from that norm is treated as a "defect." Women are expected to bear the burden of that "defect" and behave in such a way as to fit within the male norm. Surely if the law saw the world through women's eyes, the burdens derived from the differences between the sexes would be distributed equally.

Equal protection analysis rests upon the legal principle that people "similarly situated" must be treated similarly by the law.[5] The Court has found that all races are similarly situated[6] and thus has invoked "strict scrutiny" when the law creates racial classifications.[7] However the Court has been unwilling to find that the sexes are completely "similarly situated."[8] In some cases, the Court found that the difference between the sexes justifies the sex-based classifications.[9] Therefore, the Court developed a lower standard of review for classifications based on sex—as opposed to race—discrimination.

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2. See, e.g., Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969).

3. See, e.g., Reed v. Reed, 404 U.S. 71 (1971), which struck down an Idaho statute that preferred males to females as estate administrators. The Court refused to find that generalizations about women's business experience *vis-à-vis* men's warranted such a preference.

4. See *Frontiero*, 411 U.S. at 692. The concurrence refuses to apply a strict scrutiny standard, noting that the issue is before the legislature, and stating that the Court should await a legislative decision.

5. See, e.g., *Reed,* 404 U.S. at 77.

6. See Karst, Foreward: Equal Citizenship under the Fourteenth Amendment, 91 Harv. L. Rev. 1 (1977).

7. See, e.g., Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Brown v. Board of Education, 347 U.S. 483 (1954).

8. See, e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977). This is but one example. Other specific instances of the Court finding the sexes not similarly situated are discussed infra.

9. Id.

The courts persistently find the sexes not similarly situated when sex becomes *sex*—when men and women mingle, when sex means more than mere gender.[10] The courts have assumed that men's sexual urges are greater than those of women.[11] Therefore, the law has incorporated this "physical" difference[12] with two results: women are protected from these urges, and men are excused from their "animal nature."[13] The judicial solution to the difference between sex and *sex* has been the doctrine that, until proven otherwise, separate will be presumed to be equal in the context of sex.[14]

"Separate but equal" was rejected in the area of race because the Supreme Court found that this rationale perpetuated the racial distinctions on which it was based and resulted in a society which was separate but unequal.[15] In so holding, the Court was not hindered by the idea that blacks needed protection from whites.

In contrast, the Court has not considered whether women's inferior status is perpetuated as a result of courts excusing behavior by men under the rubric of men's "uncontrollable urges" and courts proclaiming that women need protection from men.[16] This article discusses the courts' articu-

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10. This issue arises when men and women must deal with each other, often under close and unstructured conditions, in the workplace, in the home, and in public places. See Parts II & III infra.

11. Such an intuitive knowledge of men's greater sexual appetite is most clearly revealed and discussed in *Dothard*. Popular descriptions of the supposed distinctions are more normative than descriptive. This is shown by the myth-exploding effect of recent pioneering studies of human sexual functioning. See A. Kinsey, Sexual Behavior in the Human Male (1948); A. Kinsey, Sexual Behavior in the Human Female (1953); W. Masters & V. Johnson, Human Sexual Response (1966). The lack of a clear ground for these distinctions in biological science may explain why the notion of the male irresistible impulse has been the subject of judicial notice and not evidentiary proof.

12. See, e.g. Annot., Constitutionality of Rape Laws Limited to Protection of Females Only, 99 A.L.R. 3d 129 (1980). This concept is further examined in the text accompanying notes 127-75 infra.

13. See text accompanying notes 127-75 infra.

14. Although not called separate but equal, the result is just that. See, e.g., Vorcheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976), aff'd by an equally divided court, 430 U.S. 703 (1977). But see Newberg v. Philadelphia Bd. of Public Educ., No. 5822 (1st Dist. Pa. Ct. Common Pleas Aug. 30, 1983) (invalidating sex segregation in schools on federal and state grounds; the court criticizes *Vorchheimer*).

15. Brown v. Board of Education, 347 U.S. 483 (1954). In the area of sex, however, the Court's position has been ambivalent. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) ("Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.") However, in *Hogan*, the Supreme Court condoned discrimination when used to assist "the sex that is disproportionately burdened." Id. at 728. While this language permits affirmative action where appropriate, it also would permit a court to perpetuate unequal treatment where unproven assumptions about sexual differences and roles are used to justify a finding of disproportionate burdens.

16. See, e.g., Goesart v. Cleary, 335 U.S. 464, 466 (1948).

lation of the assumed hazards of integrating the sexes and analyzes the severe obstacles such reasoning imposes on the struggle for women's rights.

The judiciary avoids squarely addressing sexuality issues. Instead, it alludes darkly to an inherent problem in mixing the sexes.[17] Phrases such as "moral and social problems,"[18] "risks,"[19] and "womanhood,"[20] are intended to evoke a sense of recognition in the reader that needs no more explication.

Consistently, courts have held that the threat of arousing deep urges in men justifies the finding that men and women are not similarly situated.[21] Once this threat is introduced, women lose: they lose jobs,[22] they lose educational opportunity,[23] they lose credibility as complainants in rape cases,[24] they lose the ability to take sexual initiative,[25] and they lose liberty through incarceration. [26] Men have corresponding gains from these assumptions. Men gain the jobs women lose,[27] men gain seniority in the work environment,[28] men are granted excuses for their crime.[29] Generally men have access to the world without fear.

This article is divided into two parts. It will first examine the judicial history of the assumption of the male irresistible impulse and then focus on its present application in employment, education, and criminal areas.[30]

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17. Rostker v. Goldberg, 453 U.S. 57, 68, 76-78 (1981).
18. *Goesart*, 335 U.S. at 466.
19. *Dothard,* 433 U.S. at 335.
20. Id. at 335-36. Personnel Admin. of Mass. v. Feeny, 422 U.S. 256 (1979).
21. See, e.g., *Dothard v. Rawlinson,* 433 U.S. 321 (1977); Long v. Cal. State Personnel Bd., 41 Cal. App. 3d 1000, 116 Cal. Rptr. 562 (1974).
22. See, e.g., Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). But see Bundy v. Jackson, 19 F.E.P. Cas. 828 (D.D.C. 1979), rev'd and remanded, 641 F.2d 934 (D.C. Cir. 1981).
23. Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976).
24. See, e.g., Note, The Rape Corroboration Requirement: Repeal Not Reform, 81 Yale L.J. 1365 (1972).
25. Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981).
26. See, e.g., State v. Devall, 302 So.2d 909 (La. 1974).
27. When women are totally precluded from jobs as in *Dothard,* that increases the number of jobs for men.
28. See C. MacKinnon, Sexual Harassment of Working Women 40 (1979). MacKinnon discusses the fundamental impact of sexual harrassment on women in the workplace. Characterized by some as petty flirtation, such treatment hinders women's ability to function and progress in work hierarchy.
29. See text accompanying notes 146-75 infra.
30. See text accompanying notes 31-51 infra for the judicial history and text accompanying notes 52-182 infra for current court decisions.

II

HISTORY

The idea of protecting women from men can be found in the Supreme Court's first decisions on the rights of women. Over a century ago, in *Bradwell v. Illinois,*[31] Justice Bradley noted:

> [T]he Civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of men and women. Man is, or should be, woman's protector and defender. 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 paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.[32]

In *Bradwell,* the Court justified upholding laws that prohibited women from practicing as attorneys, through a narrow reading of the "privileges and immunities" clause of the Constitution.[33] The assumption in Justice Bradley's concurrence was not based on any physiological data, but merely on the prevailing religious and social stereotype of women's roles. The determination that women were inherently delicate, combined with the corresponding determination of a need to protect women from men who may take advantage of women's delicate nature, made a decision adverse to women inevitable.

In 1908 the Supreme Court, in *Muller v. Oregon,*[34] upheld an Oregon protective labor law that prohibited women from being employed in any "mechanical establishment, factory, or laundry" more than ten hours a day.[35] An employer's violation of that law resulted in a misdemeanor conviction and a ten to twenty-five dollar fine.[36] The defendant invoked *Lochner v. New York,*[37] the well known substantive due process case that prohibited protective labor laws for bakers. The Court acknowledged that *Lochner* was relevant but found that the difference between the sexes justified a different rule.[38] The Court took judicial notice of the innate nature of women,[39] and speculated:

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31. 83 U.S. 130 (1872).
32. Id. at 141 (Bradley, J., concurring, joined by Swayne, J. & Field, J.).
33. Id. at 139.
34. 208 U.S. 412 (1908).
35. Id. at 416.
36. Id. at 417.
37. Lochner v. New York, 198 U.S. 45 (1905). *Lochner* had struck down a law prohibiting bakers from working more than ten hours a day or sixty hours a week. The Court found that such a law was an unconstitutional hindrance on the right to contract and an invalid exercise of the state's police powers.
38. 208 U.S. at 412, 423.
39. Id. at 421.

> Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.[40]

Thus the Court assumed that, due to the nature of a woman's body and her social function, women must be protected from men. This protection took the form of restrictive labor laws for women. Upholding labor laws that protected only women may have relieved women of the burden those hours imposed. But such action also made women less marketable in the work force since employers had to make special provisions and shifts for them.[41]

Goesart v. Cleary[42] cemented the notion that men have impulses which women are physically and morally unable to reject.[43] *Goesart* denied an equal protection challenge to a Michigan law prohibiting women from being bartenders unless they were the wives or daughters of the bar owners.[44] The Court noted that Michigan could prohibit all women from working as bartenders,[45] but questioned whether Michigan could make a distinction between wives and daughters and all other women.[46] It upheld the distinction and, consequently, the prohibition because of the "moral and social problems" inherent in the mixing of the sexes.[47]

> [S]ince bartending by women may . . . give rise to moral and social problems against which [the legislature] 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.[48]

Despite the Court's recognition that this prohibition may have been a ruse for maintaining the male monopoly in bartending, it accepted the preven-

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40. Id. at 422.

41. See Ross, Sex Discrimination and "Protective" Labor Legislation, supplemental material in Hearings on H.J. Resolution 35,208 and Related Bills Before Subcomm. No. 4 of the House Comm. on the Judiciary, 92nd Cong., 1st Sess. 175 (1971) and in Hearings on § 805 of H.R. 16,098 Before Subcomm. on Education of the House Comm. on Education and Labor, 91st Cong., 2d. Sess. 592 (1970).

42. 335 U.S. 464 (1948).

43. Id. at 466.

44. Id. at 465.

45. Id. at 466.

46. Id.

47. Id.

48. Id.

tion of "moral and social problems" as a reasonable ground for a legislative distinction.[49] The Court did not define these problems, nor was it clear whether the bar owner was to protect the women from the men, or the men from the women. The Court did conclude, however, that it was acceptable to exclude women from employment because of these problems.[50] This paradox emerges again in the recent cases.[51]

These older cases reveal the blatant stereotypes that were used to keep women from competing with men as attorneys, as bartenders and in the workplace generally. The recent cases rely on the same notion that women need protection from the passions of men. Now the idea is carefully phrased and more subtly refined, yet its impact on the struggle for women's rights is no less devastating today than it was in the past.

III

CURRENT COURT DECISIONS

A. Employment

Women have been denied employment to "protect them" from men.[52] When faced with problems involving the mixing of sexes in the workplace, courts are quick to find that excluding women will solve the problem. For example, in some circumstances, being male is considered by the courts a "bona fide occupational qualification" under Title VII[53] because women's nature creates temptation that is best avoided by hiring only men.[54]

For example, in 1974, Louise Long, a Methodist minister, applied for a position as chaplain at a juvenile detention center for males (the average age was 19½).[55] Her application was rejected due to a "male-only" certification

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49. Id. at 467.

50. Id. *Goesart* probably would not be good law today. See Sail'er Inn Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). This case found a law, similar to the one in *Goesart,* unconstitutional under the California constitution. In a footnote the court noted that "no judge today would justify classification based on sex by resort to such openly biased and wholly chauvinistic statements . . . ." 5 Cal. 3d at 17, 485 P.2d at 539, 95 Cal. Rptr. at 339. The California constitution, however, includes an equal rights amendment which requires the courts to apply strict scrutiny when dealing with sex-based classifications. The United States Supreme Court has not gone so far as to require strict scrutiny, and *Goesart* has yet to be overruled with "mid-level scrutiny."

51. See notes 66-78 infra and accompanying text (e.g., *Dothard*).

52. See text accompanying notes 55-82 infra.

53. See, e.g., *Dothard*, 433 U.S. at 334.

54. Id. at 335.

55. Long v. California State Personnel Bd., 41 Cal. App. 3d 1000, 116 Cal. Rptr. 562 (1974).

given that position by the California State Personnel Board.[56] After Long brought a suit against the Personnel Board, the appellate court affirmed the trial court's finding that a sex-based classification was warranted by the fact that the juvenile detention center housed 400 males, some of whom had been convicted of sex offenses.[57]

The court assumed that a woman is only safe from men if under the protection of men.[58] The court noted that there were female employees but that they "all work in locations where male staff members [can] see them at all times and [are] readily available for immediate assistance in case of emergency."[59] The court reasoned that since a female chaplain would be alone with 400 young male offenders, sexual attack was "not only a possibility but a probability."[60] The male impulse was assumed to be so strong that it would necessarily emerge in this setting.

That difference between men and women, unproven by any evidence, allowed the court to approve of discrimination in hiring. The court did not require evidence of the inevitability of sexual attack, nor did it consider the possibility of additional security in the facility. This would have placed the burden on the employer, rather than on the woman.

The court admitted that whether or not a female chaplain chooses to encounter such danger must be left to the applicant seeking the specific employment.[61] The court made clear that it did not reach its decision solely on the basis of protection of women. The court's holding was based primarily on the need to protect the male wards from the "temptation" of women.

From the point of view of the ward, the court found a compelling state interest in a male-only classification.[62] The court concluded:

> At best it is foolish to put temptation of this sort in the path of such wards when it can reasonably be avoided. And the effect upon the ward who succumbs to temptations and commits the sexual offense is disastrous. He has committed a separate crime for which he can and probably will be independently punished. He has interrupted his course of rehabilitation, and very possibly rehabilitation in his case has been utterly thwarted with a result that a youthful of-

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56. Id. at 1002, 116 Cal. Rptr. at 563. The "male-only" certification was obtained only after Long's application for the position, so the court also considered the due process issue of whether Long was entitled to notice and participation in the hearing on certification. Id. at 1005-06, 116 Cal. Rptr. at 566-67.

57. Id. at 1011, 116 Cal. Rptr. at 570.

58. Id., 116 Cal. Rptr. at 570. The Court assumes that a facility which houses male juvenile delinquents poses problems for all women but not for any men, even those who are small or weak.

59. Id. at 1004, 116 Cal. Rptr. at 565.

60. Id. at 1011, 116 Cal. Rptr. at 570.

61. Id. at 1013, 116 Cal. Rptr. at 571.

62. Id., 116 Cal. Rptr. at 571.

> fender who might have returned to society as a law-abiding, productive citizen does precisely the opposite and becomes a perennial outlaw.[63]

Thus women become a "temptation" that can easily be avoided—simply deny them employment.[64] The males, by contrast, were excused from their anticipated bad behavior (sexual assault) because it was viewed as a "probable" reaction to temptation.[65] The court saw male sexual impulses as uncontrollable. The court did not consider that such acts are illegal and not condoned. Women were required to bear the responsibility of preventing such illegal acts by giving up job opportunities. Therefore, due to male (mis)behavior, women are denied jobs. Such a paradox of law is the result of viewing the world from a male point of view.

The Supreme Court adopted similar reasoning three years later in *Dothard v. Rawlinson*.[66] Diane Rawlinson, an applicant for a position as a prison guard in an Alabama men's prison, successfully challenged the height/weight requirements as a violation of Title VII.[67] While the suit was pending, the Alabama Board of Corrections passed Administrative Regulation 204 which established a gender criterion for assigning prison guards to maximum security institutions for positions requiring continuous close physical proximity to inmates.[68] The state defended the rule under the bona fide occupational qualification (BFOQ) exception to Title VII.[69] The Court upheld the BFOQ determination of the district court.[70]

The reasons for sustaining Administrative Regulation 204 were based on the notion of "protection." The Court mingled the ideas that women should be protected from men, and that men should be protected from temptation. The Court noted that because the prison housed violent men and in particular because twenty percent of its population were sex offenders[71] it was an unsafe place for women as guards.[72] Furthermore, the mere fact of a guard's "womanhood" would create problems for the prison.[73] The Court wrote:

> A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs

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63. Id., 116 Cal. Rptr. at 571.
64. Id., 116 Cal. Rptr. at 571.
65. Id., 116 Cal. Rptr. at 571.
66. 433 U.S. 321 (1977).
67. Id. at 331.
68. Id. at 324-25.
69. For a full discussion of the bona fide occupational qualification exception to Title VII, see Note, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971).
70. 433 U.S. at 334.
71. Id.
72. Id.
73. Id. at 335-36.

> could be directly reduced by her womanhood. There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of normal heterosexual environment, would assault women guards because they were women. . . .
>
> The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and other security personnel. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.[74]

Here the Court assumed that the biological fact of being a woman made it impossible to perform the duties of a correctional officer, since that biological fact would necessarily create violent reactions in men and undermine their self-control.

In addition to its own speculation about the nature of the male sex drive, the dissent points out that the Court considered the testimony of the State Commissioner of Corrections who analyzed the difference between the effectiveness of men and women as prison guards on the basis of:

> the innate intention between male and female. The physical capabilities, the emotions that go into the psychic make-up of a female vs. the psychic make-up of a male. The attitude of the rural type inmate we have vs. that of a woman. The superior feeling a man has, historically, over that of a female.[75]

In considering the testimony, the dissent charges that the Court drew on another sex-based reason for prohibiting women from employment as guards: since the men in the area considered themselves superior to women, they were likely to respond violently to a woman in a position of power over them.[76] Because of the difference in social status of men and women, the Court was willing to condone the men's potential violent acts and exclude women from employment.

The Court would not treat similarly a parallel situation involving race. For example, even though some of the inmates in an Alabama prison were convicted of Ku Klux Klan-type crimes and were actively involved in "white

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74. Id.
75. Id. at 344 n.2 (Marshall, J., dissenting).
76. Id. at 345.

gangs,"[77] there were no administrative regulations preventing blacks from being correction officers. Using the *Dothard* logic, such regulations could be supported because both the immutable biological fact of race and these rural whites' sense of white superiority might lead to violence. Despite such reasoning, in a race case, such an administrative ruling would not withstand judicial scrutiny.

The clear message of the majority opinion in *Dothard* was that women prison guards' mere presence would provoke both sexual and superiority feelings in male inmates. The inmates could not be blamed or held accountable for these impulses. These impulses would be uncontrollable and thus threaten prison security. In his dissent, Marshall criticized this assumption:

> In short, the fundamental justification for the decision is that women as guards will generate sexual assaults.With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women—that women, wittingly or not, are seductive sexual objects. The effect of the decision, made I am sure with the best of intentions, is to punish women because their very presence might provoke sexual assaults.[78]

The *Dothard* opinion incorporates a companion myth about men. Men are helpless actors who cannot control their libidinous impulses. To be safe, women can only stay out of men's way—anything else risks rape.

This myth shows that rejecting the role of sexual object is only half the battle of combatting sex discrimination. The complementary depiction of males as a source of danger to women, and not responsible for their acts, instills fear in women and thereby restricts mobility. It provides an independent rationale for discrimination against women in employment. The Court's failure to challenge this assumption, even in dissent, perpetuates the fear created by this myth, as well as the discrimination the myth provokes.

In *Warshafsky v. The Journal Company,*[79] the Supreme Court of Wisconsin denied an equal protection challenge to a *parens patriae*[80] law prohibiting minor females from working as paper route carriers. The Wisconsin court's reasoning shows an acceptance of the idea that women must be protected, even if this protection excludes women from jobs. It noted that minor male paper carriers had been physically attacked and robbed, but

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77. See J. Fox, Organizational and Racial Conflict in Maximum Security Prisons (1982).

78. 433 U.S. at 345 (Marshall, J., dissenting).

79. 63 Wis. 2d 130, 216 N.W. 2d 197 (1974).

80. *Parens patriae* is the legal fiction that the state functions as the "father" of all children and consequently safeguards their interests; see Websters' Third Int'l Dictionary, 1641 (P. Gove, ed. 1968).

that no male paper carrier had ever reported sexual molestation.[81] The court reasoned: "If, however, minor girls were permitted to be employed as paper carriers, the results would undoubtedly not be so fortunate."[82] Thus, the court denied an employment opportunity to the minor female, because the court assumed the inevitability of sexual assault.

In their treatment of sexual harassment cases, courts have frequently confronted the mixing of the sexes in the employment area. Catherine MacKinnon has documented the impact of sexual harassment on women's employment mobility.[83] She suggests in her book, *Sexual Harassment of Working Women,* that sexual harassment is one of the major reasons women leave jobs and lose the seniority needed to advance.[84] Yet, until the late 1970's, the courts refused to redress this victimization. The courts preferred to characterize such claims as over-reactions to normal male attention occurring when the sexes mingle.[85]

The sexual harassment cases highlight the distinction courts make between sex and *sex*. Torn by whether the term "sex" in Title VII covered the mixing of sexes, the courts ultimately restricted the term to mean gender rather than the interaction of the sexes.[86]

With one or two recent exceptions, the courts have also narrowed the issue by limiting the kinds of claims which will be recognized as sexual harassment to the "exaction of a condition [upon employment opportunities] which but for his or her sex, the employee would not have faced."[87] By reducing the claims to those incidences of sexual harassment that are clearly conditions upon employment, the courts avoid the larger part of the problem of sexual harassment.[88] Even though it appears that there is a broad standard for challenging sexually harassing conditions, the cases demonstrate that, for most judges, the boundaries are restricted.[89]

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81. 63 Wis. 2d at 141, 216 N.W. 2d at 202. The Court's view that minor males were not at risk should be seen in light of recent mass murders of young males in Atlanta and Los Angeles; see, e.g., N.Y. Times, Jan. 7, 1982, at A14, col. 1; N.Y. Times, May 27, 1981, at A14, col. 1.

82. 63 Wis. 2d at 141, 216 N.W.2d at 202.

83. C. MacKinnon, supra note 28.

84. Id.

85. See, e.g., Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), vacated and remanded, 562 F.2d 55 (9th Cir. 1977). See also Vermeulen, Employer Liability Under Title VII for Sexual Harassment by Supervisory Employees, 10 Cap. U.L. Rev. 499, 517-18 (1981); Note, Employer Liability for Coworker Sexual Harassment under Title VII (unpublished manuscript to appear in 13 N.Y.U. Rev. L. & Soc. Change).

86. Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977).

87. Id. at 990 n.5.

88. See Note, Employer Liability for Coworker Sexual Harassment Under Title VII, supra note 85. Courts will sometimes accept that sexual harassment is a condition of employment, see Bundy v. Jackson, 19 F.E.P. Cas. 828 (D.D.C. 1979), rev'd, 641 F.2d 934 (D.C. Cir. 1981). But courts often require that such harassment be "pervasive"; thus the question is transformed into a burdensome element of proof which can discourage litigation.

89. See text accompanying notes 90-104 infra. The language of these decisions indicates the judiciary's high tolerance for "sexual misbehavior" in the workplace.

In 1975, a plaintiff charged sex discrimination for sexual harassment under Title VII in *Corne v. Bausch & Lomb, Inc.*[90] The plaintiff alleged that her supervisor, Mr. Price, subjected her to verbal and physical sexual advances. The issue before the court was whether the plaintiff stated a claim for relief under Title VII.[91] The district court found that the behavior did not represent a company policy: "Mr. Price's conduct appears to be nothing more than a personal proclivity, peculiarity, or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge."[92] The claim, the court found, was therefore not actionable under Title VII. The Court explained: "[a]n outgrowth of holding such an activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually-oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual."[93]

In *Miller v. Bank of America,*[94] the Northern District Court of California reaffirmed the *Corne* court's interpretation of Title VII.[95] A female employee of Bank of America, whose performance had been rated superior and who had been given a salary raise, claimed sexual harassment under Title VII.[96] She alleged that she had been fired shortly after her promotion because she had refused her supervisor's demands for sexual favors from her.[97] The district court refused to find a cause of action under Title VII, stating:

> It is conceivable under plaintiff's theory, that flirtations of the smallest order would give rise to liability. The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions. Such being the case, it would seem wise for the courts to refrain from delving into these matters short of specific factual allegations describing an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-based discrimination on a definable employee group.[98]

The Ninth Circuit reversed the district court in 1979, after other circuits had supported claims under Title VII for sexual harassment.[99]

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90. 390 F. Supp. 161 (D. Ariz. 1975), vacated and remanded, 562 F.2d 55 (9th Cir. 1977).
91. Id. at 162.
92. Id. at 163.
93. Id.
94. 418 F. Supp. 233 (N.D. Cal. 1976), rev'd, 600 F.2d 211 (9th Cir. 1979).
95. 418 F. Supp. at 235-36.
96. Id. at 234.
97. 600 F.2d at 211.
98. 418 F. Supp. at 236.
99. 600 F.2d 211.

A cause of action for sexual harassment was finally found under Title VII in *Barnes v. Costle.*[100] It is disturbing, however, that the D.C. Circuit interpreted the issue as gender discrimination, and thus failed to address the implied assumptions about sexual interaction.[101] It was this same court that held that a "discriminatory environment" of sexual harassment may give rise to a Title VII violation.[102] Nevertheless, the tone of the former cases indicates that courts will tolerate a considerable amount of "personal urges"[103] resulting in "mere [sic] amorous or sexually-oriented advances"[104] before finding a sexually harassing environment.

Cases such as *Barnes* distinguish sexual harassment from such discriminatory treatment as requirements that women flirt with customers or look provocative as receptionists, to the passing over of women for promotion—or even firing them—because they become less valuable as a decoration as they get older. None of these fundamental problems are considered sexual harassment, perhaps because they have more of a connection with sexual behavior.[105] When sex discrimination has an element of sexual behavior, and is more than mere gender, it becomes unactionable.[106]

The employment cases reveal the "heads I win, tails you lose" nature of the application of the assumption of a male irresistible impulse. Women are denied jobs to protect them from sexual assault in *Dothard.* Women are denied jobs in *Long* so that young boys can be protected from the temptation of women. The common thread which emerges is that women are denied employment.

In sexual harassment cases, the balance between the need to protect women from men and the need to protect men from women determines whether the claim is actionable. The courts act suspiciously toward claims of sexual harassment. The thinly veiled but unarticulated burden of proof falls on the woman to show that she did not provoke the behavior or that she is not maliciously prosecuting a defenseless male for "petty flirtation." In either case, the woman is seen as somehow causing the behavior in men.

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100. 561 F.2d 983 (D.C. Cir. 1977).

101. Id. at 990.

102. Bundy v. Jackson, 19 F.E.P. Cas. 828 (D.D.C. 1979), rev'd, 641 F.2d 934 (D.C. Cir. 1981).

103. See text accompanying note 92 supra.

104. Id.

105. In *Barnes,* the court makes clear that the action is a form of gender discrimination, and that the case might be different if the sexual harassment had not been an extraordinary burden placed on women. 561 F.2d at 990. This suggests that sexual harassment or discrimination is acceptable if not based on gender, but on sexuality.

106. But see Carroll v. Talman Federal Sav. & Loan Ass'n, 604 F.2d 1028, 1032-38 (7th Cir. 1979) (bank requirement that female tellers, but not male tellers, wear uniforms held discriminatory condition of employment).

B. Education

Prohibiting women's access to education has been a significant element in discrimination against women.[107] Today, most of these restrictions, but not all, have been lifted and women have the recognized right to equal opportunity for a full education.[108] Nevertheless, occasionally a sex-based classification is brought before the courts.[109] The rationale for upholding sex-based discrimination in the face of a challenge is often the presumption of the male irresistible impulse.

Sexual tension that results from the mingling of the sexes was relied upon by the Third Circuit in *Vorchheimer v. School District of Philadelphia*[110] to sustain single-sex public high schools. The District Court for the Eastern District of Pennsylvania found an inherent educational value in sex segregation.[111] However, the District Court still enjoined the segregation stating that there was no "fair and substantial" justification for the discriminatory treatment.[112]

The Court of Appeals for the Third Circuit reversed this decision, noting that "there are differences between the sexes which may, in limited circumstances, justify disparity in law."[113] The sex-based classification in this case was not based on gender-specialized educational opportunity,[114] but rather on the "adolescent energies"[115] that hinder learning when the sexes are mixed. The court presumed that these energies, or urges, are uncontrollable and therefore that sex-segregation is a legitimate educational remedy for curbing the impulses. The result was that Ms. Vorchheimer was prohibited from attending the school of her choice.

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107. See generally E. Flexner, A Century of Struggle (rev. ed. 1975).

108. But see Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), aff'd mem., 401 U.S. 951 (1971). In this case, the male plaintiffs sought admission to Winthrop College, a South Carolina state school for women. This district court upheld the college's single sex status because it was "a school for young ladies, which, though offering a liberal arts program, gave special attention to many courses thought to be specifically helpful to female students." Id. at 136. In a footnote, the court detailed such course offerings: stenography, typewriting, telegraphy, bookkeeping, drawing, designing, engraving, sewing, dress-making, millinery, art, needlework, cooking, housekeeping, and "such other industrial arts as may be suitable to their sex and conducive to their support and usefulness." Id. at 136 n.3.

109. See, e.g., *Williams*, 316 F. Supp. at 136.

110. 400 F. Supp. 326 (E.D. Pa. 1975), rev'd, 532 F.2d 880 (3d Cir.1976), aff'd per curiam, 430 U.S. 703 (1977).

111. 400 F. Supp. at 335. ("This Court would probably have felt compelled to validate the sex-segregated school on the basis of Dr. Jones' hypothesis concerning the competition for adolescent energies in a coed school and its detrimental effect on student learning and achievement.")

112. Id. at 343.

113. 532 F.2d at 888.

114. Id. at 882. The court states, "The academic facilities are comparable, with the exception of those in the scientific field, where [the male school's] . . . are superior." But see Newberg v. Bd. of Public Educ., No. 5822 (1st Dist. Pa. Ct. Common Pleas, Aug. 30, 1983). In *Newberg*, the court reviewed the same schools and found significant differences.

115. 532 F.2d at 882.

Such an outcome is inconsistent with the Supreme Court's attitude toward racial segregation on the basis of "separate but equal" treatment. After having permitted such segregation for more than half a century,[116] the courts finally recognized that that doctrine had been used to perpetuate race discrimination. Apparently the analysis of race discrimination that the Court used in *Brown v. Board of Education*[117] is not transferable to the sex discrimination arena.

In August of 1983, the sex segregation in Philadelphia schools was invalidated by the state court in *Newberg v. Philadelphia Board of Public Education.*[118] This class action suit involved the same school as the *Vorchheimer* case. Unlike the *Vorchheimer* court, the court in *Newberg* examined the relative quality of the male high school and the female high school, and found the male institution to be superior.[119] In its analysis, the state court applied the Pennsylvania state constitution's equal rights amendment and concluded: "the separate-but-equal concept under the equal protection clause of the Fourteenth Amendment (as applied in *Vorchheimer, supra*) does not have currency."[120] Nevertheless, as a matter of federal law, the separate but equal rationale still is the dominant federal rule.

C. Rape

The court's treatment of "sexual urge" is most fully revealed in the common and statutory law on rape. The probability of sexual assault is used to justify denying women access to employment.[121] The presence of natural sexual feelings leads the courts to be suspicious of claims of sexual harassment.[122] Sex segregation in education cases is sometimes justified by the belief that it is impossible to control sexual energies.[123] In the area of rape, differential treatment is based on all of these grounds: assumptions about male sexual urges, the probability of sexual assault, and the presence of natural sexual feelings.

The law distinguishes three kinds of rape, and in each women suffer from the application of the grounds described above. First, in statutory rape cases the underage female's consent is not recognized as valid under the

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116. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896).

117. 347 U.S. 483 (1954).

118. No. 5822 (1st Dist. Pa. Ct. Common Pleas, Aug. 30, 1983).

119. Id.

120. Id. at 49. However, the United States Supreme Court, in Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), noted that *Hogan* did not address the issue of "separate but equal" allowing the doctrine to stand as approved in *Vorchheimer.* Id. at 720 n.1.

121. See, e.g., Long v. California State Personnel Bd., 41 Cal. App. 3d 1000, 116 Cal. Rptr. 562 (1974). See text accompanying notes 52-82 supra.

122. See text accompanying notes 83-106 supra.

123. See text accompanying notes 107-120 supra.

law.[124] Second, in forcible rape cases, a bevy of procedural requirements protect the accused from being prosecuted.[125] Third, in cases of forcible intercourse within marriage, this act is not considered a crime in most states, but rather an enforcement of "a wifely duty."[126]

1. Statutory Rape

Thirty-seven states have gender neutral statutory rape laws which impose sanctions on persons who engage in sexual intercourse with male or female children below a certain age.[127] Many of these statutes require a significant age-differential between the partners.[128] Although these statutes are gender neutral in language, they are not always applied to the sexes equally.[129]

Facially discriminatory statutes still exist in many states, and in *Michael M. v. Sonoma County Superior Court,*[130] the Supreme Court upheld a California statute which penalized only the male. In *Michael M.* the age difference between the parties was small: the boy was 17½ and the girl was 16½ years of age.[131] The statute in question defined statutory rape as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years."[132]

The Supreme Court validated the statute's gender-based distinction upon a rationale developed by the California Supreme Court: the need to

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124. See, e.g., Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981); see also Edison, The Constitutionality of Statutory Rape Laws, 27 U.C.L.A. L. Rev. 757 (1980).

125. See, e.g., Robin, Forcible Rape: Institutional Sexism in the Criminal Justice System, in The Criminal Justice System and Women 241 (B. Price & N. Sokoloff eds. 1982) [hereinafter Forcible Rape].

126. See, e.g., State v. Smith, 148 N.J. Super. 219, 372 A.2d 386 (Essex County Ct. 1977).

127. See *Michael M.,* 450 U.S. at 492 (Brennan, J., dissenting).

128. See, e.g., Weiner, Shifting the Communications Burden: A Meaningful Consent Standard in Rape, 6 Harv. Women's L.J. 143 (1983). There is probably some age at which boys and girls are incapable of giving consent to sexual intercourse. This is particularly true when one partner is significantly older than the other partner. However, such laws should be carefully drawn so that they are not sex-specific nor do they penalize genuinely consenting parties who are close in age.

129. See generally Chesney-Lind, Guilty by Reason of Sex: Young Women and the Criminal Justice System, in The Criminal Justice System and Women 77 (B. Price & N. Sokoloff eds. 1982).

130. 450 U.S. at 466.

131. Id. at 406. The facts revealed that Michael M. and two friends approached Sharon and her sister at a bus stop around midnight. After some talk, Sharon and Michael walked off together to kiss. When Sharon refused Michael's request that she remove her pants, Michael struck her. Presumably this did not rise to the level of forcible rape. It appears that somewhat later Sharon agreed to have intercourse with him. Michael M. was convicted of statutory rape. These facts are particularly compelling for a conviction in *Michael M.* Nevertheless, under the California statute had Sharon been older than Michael or had she approached Michael, Michael would still be culpable for the crime of statutory rape.

132. Cal. Penal Code Ann. § 261.5 (West Supp. 1981).

prevent teenage pregnancies.[133] Neither court, however, made an independent inquiry into the legislative intent. Instead both accepted without investigation the prosecutor's uncontested assertion that the purpose was to protect young women from risks of pregnancy.[134]

Despite the requirement that the government show a substantial relationship between a gender-specific statute and the legislative goal,[135] the Court failed to address the relationship between the statute and the ostensible legislative goal. The pregnancy deterrence rationale ignores the fact that a gender-neutral statute would achieve the same goal,[136] and that, if preventing pregnancy were the statute's only rationale, the statute could only apply to prepubescent girls through juridicial extension.[137]

Clearly, the Court in *Michael M.* inferred the pregnancy deterrence rationale to uphold the statute; in doing so, the Court reinforced discriminatory stereotypes. The Court punishes men for engaging in sexual activity to which both parties consent.[138] This legislative scheme characterizes females as victims of sexual activity and views males always as "aggressors." Males are seen as the initiators who need criminal sanctions to deter them.

Rather than focus on a deterrence rationale, the Court's inquiry should have been whether the ostensible victim had the capacity to give meaningful consent.[139] Surely, both men and women of a given age have the same ability to give meaningful consent to sexual intercourse. And, such an inquiry could have considered the age difference between the parties in order to protect the young, whether male or female, from abuse from older persons.

In theory, the Court's refusal to consider the ability of young women to consent to sexual activity harms men and not women. In the context of all statutes governing juvenile sexual activity, however, the inability of the law to admit that girls are capable of consenting to sexual activity harms girls. Girls are far more likely to face legal sanctions and longer confinements for engaging in sexual intercourse than are boys.[140] The juvenile courts have broad discretionary powers giving them jurisdiction over a wide variety of juvenile activity.[141] More than fifty percent of the girls who are sent to

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133. 450 U.S. at 470.

134. Id. at 494 (Brennan, J., dissenting).

135. This is the burden established by the Supreme Court for gender based classifications. See Craig v. Boren, 429 U.S. 190 (1976).

136. *Michael M.*, 450 U.S. at 493 (Brennan, J., dissenting).

137. Furthermore, under the pregnancy deterrence rationale, a girl/woman who uses birth control has little disincentive to have sex. Nevertheless, the state will still have the opportunity to prosecute the male. This logic is inconsistent with the legislative intent behind the other rape statutes discussed infra.

138. *Michael M.*, 450 U.S. at 499 (Stevens, J., dissenting).

139. See Casenote, *Michael M. v. Sonoma County*, 25 How. L.J. 341, 365 (1982).

140. See, e.g., Armstrong, Females Under the Law: "Protected" but Unequal, in The Criminal Justice System and Women (B. Price & N. Sokoloff eds. 1982).

141. Id. at 68.

institutions by juvenile courts are sent for noncriminal offenses. In contrast, only twenty percent of the boys sent to institutions are sent for noncriminal offenses.[142] Most of these status offenses are for non-prostitutional sexual activity of the female.[143] Institutionalization is imposed for punishment and as a protective safeguard.[144] Furthermore, despite the higher incidence of noncriminal offenses, female delinquents receive longer sentences than their male counterparts.[145]

Thus, the "protection" offered by statutory rape and other laws actually may harm a young woman's freedom to act. In this area, as well as other areas discussed in this article, the assumption that women need protection from men is used to limit and control women's activities.

2. Forcible Rape

The courts perpetuate sex discrimination by justifying rape with the assumption that the mixing of the sexes inherently causes strong and sometimes uncontrollable impulses in men. Consistent with this assumption are the views that unscrupulous and non-virtuous women can take advantage of these impulses and that men are "victims" of their own urges. Therefore the courts have imposed a host of procedural rules and evidentiary requirements that give alleged rapists more legal protection than other accused felons.[146]

Consent is one defense to rape. Consequently, in some states the prosecution must show some corroborating evidence of the rape and evidence of resistance.[147] This requirement strongly discourages prosecution of rapists, and is only justified by a popular conception that false accusations of rape are common, a misconception which has not been supported by any hard facts.[148]

Although the law does not recognize precipitation or provocation as a defense to a charge of rape, jurors do consider this "defense." Studies of rape have included the category of "victim-precipitated rape."[149] Menachem Amir conducted such a study in the Philadelphia Police Department from 1958-1960.[150] Amir defined victim-precipitated rape as

> (a) situations where the woman actually or apparently agreed to intercourse "but retracted before the actual act or did not react

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142. Id. at 69.
143. Id. at 68.
144. See To Be A Minor and Female, Ms. Mag. Aug. 1972, at 70, 74.
145. Armstrong, supra note 140, at 69.
146. See generally Beinen, Rape III, 6 Women's Rights L. Rep. 3, 187 (1980); Forcible Rape, supra note 125.
147. Note, The Rape Corroboration Requirement: Repeal Not Reform, 81 Yale L.J. 1365 (1972).
148. Id. at 1368.
149. Forcible Rape, supra note 125, at 255.
150. Id. (citing M. Amir, Patterns in Forcible Rape 155 (1971)).

> strongly enough when the suggestion was first made by the offender" and (b) risky or vulnerable situations "marred with sexuality"—e.g. the woman uses indecent language and makes gestures that can be interpreted by the man as an invitation to sexual relations. Thus, where the woman aroused the defendant without intention of intercourse, agreed to have a drink or go for a ride with a stranger, or didn't resist her assailant's sexual advances strongly enough, victim precipitation was considered present.[151]

Courts have found an implied consent from evidence of what the victim was wearing and what she was doing. Courts apply the rationale that a virtuous woman does not get into situations that open her to sexual assault. In 1977, a California Court of Appeals judge commented that a woman who hitchhikes asks to be raped.[152] He asserted that by entering a stranger's car a woman "advertises that she has less concern for the consequences than the average female."[153]

A similar comment resulted in the successful recall election of a judge in Madison, Wisconsin.[154] The judge found a fifteen-year-old defendant guilty of rape but rejected the prosecutor's suggestion that the defendant be placed in a residential school or group home. Rather, he sentenced the boy to a year at home under court supervision.[155] The judge justified such a lenient sentence, saying that Madison's sexually permissive climate and the provocative clothing worn by modern women made rape a normal reaction for young men.[156]

As one commentator put it:

> These attitudes often encouraged a stance of easy tolerance toward rapists, resting on beliefs that rape was only a mildly aberrational form of normal male behavior, that most women wanted to be raped; that a rape accusation was commonly the product of a woman's over-active fantasy life or a distorted expression of shame about her voluntary sexual activity; or that rape was the more or less ineluctable consequence of a woman's communication of her sexual desires, subtly or otherwise, to a hapless male.[157]

One judge recently asserted in southwestern Wisconsin that even children can take sexual advantage of the "hapless male." The case involved a

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151. Id.

152. Time Mag., Sept. 12, 1977, at 41. The defendant's conviction for rape was reversed, although on different grounds. See People v. Hunt, 72 Cal. App. 3d 190, 139 Cal. Rptr. 675 (1977).

153. Time Mag., Sept. 12, 1977, at 41.

154. Washington Post, Sept. 8, 1977, at A11, col. 4.

155. Washington Post, Aug. 26, 1977, at A7, col. 1.

156. Id.

157. Letwin, Unchaste Character, Ideology and the California Rape Evidence Laws, 54 S. Cal. L. Rev. 35, at 35-36 (1980).

five-year-old girl who was sexually assaulted by her mother's boyfriend.[158] Allegedly, the child jumped on the man while he was sleeping in the nude. She was later found to have been sexually assaulted.[159] The judge sentenced the girl's assailant to ninety days on a work release program and three years probation. During sentencing, the judge noted that he was giving the offender a light sentence because he found the five-year-old victim to be "an unusually sexually promiscuous young lady."[160] He stated that he did not exactly blame the child, because "she is only five years old," but, he added, "I do believe that she was the aggressor. I have no concern that he is a threat to other children in the community."[161] The outrageousness of the judge's remarks caused a great deal of anger in the Wisconsin community.[162] Equally disturbing is the judge's assumption that if the girl aroused the defendant, he was unable to control himself.

The assumption that a male has sexual needs that are greater or more easily aroused than a female's was challenged by Margaret Mead in *Sex and Temperament.*[163] Mead described the Arapesh society in which the crime of rape is unknown:

> The Arapesh do not have any conception of the male nature that might make rape understandable to them. Our interpretation of rape is a product of our conception of the nature of male sexuality. A common retort to the question, why don't women rape men, is the myth that men have greater sexual needs, that their sexuality is more urgent than women's.[164]

Despite such anthropological observations, that "myth" is seldom challenged in American society. Men are judged by a lenient standard while rape victims are harshly scrutinized. Perhaps the courts will not go so far as to openly admire the male primitive instinct, but the courts seem to accept as a mitigating factor the assumption that men must fight off their dominant sexual impulses in order to obey the law.[165]

3. Marital Rape

As of 1983, at least thirty states did not allow a wife living with her husband to charge him with the crime of rape.[166] These rules are either

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158. Mitchard, Judge Says Girl, 5, Invited Sex Assault, Capital Times, Jan. 8, 1982.
159. Id.
160. Id.
161. Allegretti, Wisconsin Judge's Rape Ruling Angers Residents, Washington Post, Jan. 21, 1982.
162. Id.
163. M. Mead, Sex and Temperament in Three Primitive Societies (1935).
164. Id.
165. Letwin, supra note 157.
166. Note, Abolishing the Marital Exemption for Rape: A Statutory Proposal, U. Ill. L. Rev. 201 (1983); see also Freeman, "But If You Can't Rape Your Wife, Who[m] Can You Rape?": The Marital Rape Exemption Re-examined, 15 Fam. L. Q. 1 (1981).

codified in statutes or presumed under common law.[167] The marital rape exception has been expanded in ten states to apply to unmarried cohabitants.[168] Three states have created a "voluntary social companion" exemption which prohibits a charge of first degree rape if the victim was a voluntary social companion of the accused rapist at the time of the rape and had allowed the defendant sexual contact within a fixed period of time prior to the alleged rape[169] or, in some states, at any time prior to the alleged rape.[170] By accompanying a man on a date and/or voluntarily engaging in sexual contact, a woman is presumed to have consented to any further contact, and is barred from charging first degree rape.

The marital rape exemption reinforces the stereotype that a woman's proper role is to provide sex for men.[171] Sex is considered a way to calm the male's impulses; the wife's obligation is to always be available to provide the outlet for her husband's sexual impulses. As John Haller, Jr. and Robin Haller noted in their study of Victorian America:

> in marrying, [women] have simply captured a wild animal and staked their chances for future happiness on the capacity to tame him. . . . The duty imposed upon her by high heaven, to reduce all the grand, untamed life forces to order . . . to make them subservient to the behests of her nature, and to those vast, undying interests which to these two and to their posterity, center in the home.[172]

The stereotype outlived Victorian society, as George Gilder's recent book *Sexual Suicide* reveals.[173] Gilder's image of the ideal society is one in which women serve men's physical needs and bear children.[174] "Women domesticate and civilize male nature. They can destroy civilized male identity merely by giving up that role."[175]

Rape laws reflect the idea of a male irresistible impulse by incorporating the implicit notion that a woman should be on notice. The statutory rape sanctions are to "protect" young women who are unprepared to deal with

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167. Note, supra note 166, at 203 (list of 34 states with statutory provisions for a marital rape exemption); Gonning, Spousal Rape Exemption, 65 Marq. L. Rev. 120, 133-35 (1981); see also State v. Smith, 148 N.J. Super. 219, 372 A.2d 386 (Essex County Ct. 1977).

168. Morris, Marital Rape Exemption, 27 Loy. L. Rev. 597, 608 (1977).

169. See, e.g., Hawaii Rev. Stat. § 707-730(1)(a)(i) (Supp. 1980). See also Me. Rev. Stat. Ann., Tit. 17-A, § 252(3) (West Supp. 1980).

170. See, e.g., Del. Code Ann., Tit. 11, § 764 (1978).

171. See *Smith*, 148 N.J. Super. at 227-28, 372 A.2d at 390.

172. J. Haller & R. Haller, The Physician and Sexuality in Victorian America 90 (1974).

173. G. Gilder, Sexual Suicide (1973).

174. Id.

175. Id. at 25.

sexuality. But the law's protection changes when the woman is an adult. A mature woman is considered to be on notice about male sexuality and should conform her behavior to it. If she marries or even dates the man, she may have no remedy should he rape her. If she does charge him with rape, her actions are suspect—did she assume the risk since she exposed herself to a wild animal?

The underlying assumption in the criminal justice system is that somehow women are responsible for rape. That assumption is veiled in the rape setting. In the arena of prostitution, it is baldly asserted.

D. Prostitution

The concept of the uncontrollable male sexual impulse, which is used to reduce a man's culpability for rape, is also used to justify disparate prosecution of customer and prostitute, and of male and female prostitutes. It is often observed that the demand for prostitutes creates the supply.[176] Men create the demand; yet women are the parties who are consistently prosecuted.[177]

Among the many policies cited to justify criminal sanctions against prostitution is the need to protect the customer. In 1915, a New York court in *People v. Draper*[178] referred to legislative intent in enacting the prostitution statute:

> It must be entirely obvious that the purpose of the Legislature was not to place in the hands of two or more prostitutes, voluntarily accompanying one or more men upon a night's debauch, the power to blackmail these erring brothers, under the threat of a term in State prison, but rather to reach and punish those conscienceless vampires who make merchandise of the passions of men.[179]

Such legislative attitudes explain the continued selective enforcement of prostitution laws by city police departments. Prostitutes are consistently arrested, while their male "johns" are released. Some prostitution statutes do not cover the customer, others make frequenting a prostitute a lesser charge. This "selective enforcement" has not been held unconstitutional: upholding this selective enforcement supports the idea that protection of customers continues to be the underlying intent for prostitution laws.[180]

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176. See, e.g., S. DeBeauvoir, The Second Sex (1949).

177. See People v. Superior Court (Hartway), 19 Cal. 3d 338, 138 Cal. Rptr. 66, 562 P.2d 1315 (1977).

178. 169 A.D. 479, 154 N.Y.S. 1034 (3d Dept. 1915).

179. 169 A.D. at 484, 154 N.Y.S. at 1038.

180. See, e.g., Sumpter v. State, 261 Ind. 471, 306 N.E.2d 95, appeal dismissed, 419 U.S. 811 (1974), appeal after remand, 340 N.E.2d 764, cert. denied, 425 U.S. 952 (1975).

The "differences between the sexes" was used to justify a gender specific statute in a 1974 equal protection challenge to a Louisiana statute that defined prostitution as a "practice by a female of indiscriminate sexual intercourse with males for compensation."[181] The defendant challenged the statute as violative of equal protection because it punished female but not male prostitutes. The court found: "[w]hen an activity by women may, in the allowable legislative judgment, give rise to moral and social problems against which it should devise deterrents, the legislature may enact laws to accomplish such a purpose."[182] After finding the female-specific statute constitutional, the Louisiana court noted: "Differences between the sexes does [sic] bear a rational relationship to the prohibition of prostitution by females."[183]

The court assumed that the logic behind the argument supporting the sex-based distinction was self-evident. It argued that there was no need to explain the "differences between the sexes"; rather the court assumed that everyone knew what they were. The court saw prostitution by women as a greater moral and social problem than male prostitution. Men's passions can be excited and used against women; yet women's use of power creates a moral problem that justifies legislative action.

IV

DISCUSSION

The willingness of courts to perpetuate the notion of the male uncontrollable urge through the guise of protectionism obfuscates the real sexism involved. The decisions discussed in this article merely serve to maintain male power. They expect women to operate around men in a limited role and within the male-defined system. The notion of an uncontrollable urge, which is provoked by women, excuses men for their behavior and reinforces the social and political tendency to blame the victim.[184] It perpetuates the idea that men's violence against women is inevitable and thereby plays upon women's fear for their own physical safety.[185] The perceived threat of rape,

181. State v. Devall, 302 So. 2d 909, 910 (La. 1974).

182. Id. at 911.

183. Id. at 913.

184. The uncontrollable male urge reveals itself elsewhere in the criminal justice arena. Formerly such an urge could be the basis of a defense in Texas for a husband who kills when he sees his wife in bed with another. The correlative defense for the wife was unavailable. Prior to 1973, Texas Penal Code provided: "Homicide is justifiable when committed by the husband upon one taken in the act of adultery with the wife, provided the killing takes place before the parties to the act have separated." See Tex. Penal Code Ann. § 1220 (1973); Tex. Penal Code Ann. § 1220 (1961).

185. For a good discussion of women as victims see Klein, Violence Against Women: Some Considerations Regarding Its Causes and Elimination, in The Criminal Justice System and Women 203 (B. Price & N. Sokoloff eds. 1982).

and of invoking the male urge, functions much like a protection racket in which men protect their women from the abuse of other men.[186] Mae West once said, "Every man I meet wants to protect me. Can't figure out what from."[187]

Courts continue to differentiate sex from *sex*, treating this distinction as a genuine difference between the sexes. George Gilder notes such a response:

> Perhaps the most quixotic of all female demands is that men at work treat women first as 'human beings'. Male psychology is in large part a reaction formation, shaped in relation to women. As women invade further realms conventionally regarded as masculine—and as modern technology transforms other male roles—men will increasingly define themselves as not women. Their response will be increasingly sexual.[188]

Differences between the sexes are just that—a man is as different from a woman as a woman is from a man. Therefore, logically, there should be no disproportionate impact on a woman because she is "different." The social phenomenon of gender hierarchy defines the standard of normalcy as the male standard. The superior position of men in our current society infects the definition of these differences and expands their effects.

The law must begin to address the inherent sexism in the relationship between the sexes. Men are not "wild animals" and women are not their "tamers." The concept of the uncontrollable impulse is no reason to excuse a man from an abuse of male power. This does not suggest a neo-Victorian prudery. Catherine MacKinnon put it well:

> [W]e are not attempting to be objective about it, we're attempting to represent the point of view of women. It has been the point of view of men up to this time that has distinguished so sharply between rape on the one hand, intercourse on the other; sexual harrassment on the one hand, normal, ordinary sexual initiation on the other; pornography or obscenity on the one hand and eroticism on the other. The male point of view defines them by distinction. What women experience does not so clearly distinguish the normal everyday things from which those abuses have been defined, by distinction.[189]

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186. Despite the outrage that some of the recent rape opinions have provoked, such decisions continue to be made. The courts implicitly decide what is appropriate female behavior. These decisions have more than an immediate effect on the case at hand—they restrict women as a class.

187. Griffin, Rape: The All-American Crime, in The Criminal Justice System and Women 224 (B. Price & N. Sokoloff eds. 1982).

188. G. Gilder, supra note 173, at 108.

189. MacKinnon, Violence Against Women—A Perspective, Aegis 51, 52 (1982).

Gender domination pervades the entirety of women's existence. In order to understand sexism fully, women must recognize sexual intimidation. Such intimidation forces women to accept a male defined world and to function within those male definitions.

> Sex-neutral, objective formulations avoid asking *whose* expression, from whose point of view? Whose law and whose order? . . . [W]hat we do see, what we are allowed to experience, even in our own suffering, even in what we are allowed to complain about, is overwhelmingly constructed from the male point of view . . . . I think that when we fail to assert that we are fighting for the affirmative definition and control of our own sexuality, as women, and that these experiences violate that, we have already been bought.[190]

Legal analysis should challenge the male dominated perspectives on legal reasoning. Too often sexist reasoning masquerades as sex-neutral formulations. The law is incorporating assumptions about male impulses that affect women's employment, credibility, and criminality. This suggests an inevitability of women's inferior protected status.

If mixing the sexes is blindly assumed to be dangerous to women, the goal of equality of the sexes can be no more than the goal of separate but equal. But women want more than their place in the established order. Challenging the assumption about male urges and female provocation makes that clear. Women are seeking fundamental change in the relationship between the sexes.

V

CONCLUSION

This article traced a specific and narrow assumption, namely that there is a 'male irresistable impulse' which can be used as the basis for discrimination between the sexes, through a wide variety of situations and cases. On one hand it may appear that the assumption is too rare and trivial to merit serious consideration. On the other hand, it may seem that the scope of its application makes it too vague to be an instrument of meaningful legal change. What is a simple integral idea from a woman's experience is fragmented and disguised by traditional male legal assumptions and reasoning. If law is to be a tool in the struggle for women's freedom, however, women must be free to define their oppression as they see it.

For once the English language has become an ally of feminism: sex cannot be differentiated from *sex*. The attempt to differentiate only serves to obscure the clear line between freedom, right and women's dignity, and

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190. Id. at 57.

the continuation of the long history of oppression and degradation. Although the cases cited are only examples, and by no means the worst, of legal discrimination against women, they have been selected here to highlight the assumptions and logic. The job is less to overturn these specific decisions than to make female experience intelligible within the framework of legal reasoning. Until this happens, courts will continue to deliver unjust results and many women will find legal decisions alien and unrelated to their experience.