The Burger Court Opinion Writing Database

Michael M. v. Superior Court, Sonoma County

450 U.S. 464 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 7, 1981

Re: 79-1344 - Michael M. v. Superior Court of Sonoma County

Dear Bill:

I join.

Regards,

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 17, 1980

RE: No. 79-1344 Michael M. v. Superior Court of Sonoma County

TO: Mr. Justice White
Mr. Justice Marshall
Mr. Justice Stevens

We four are in dissent in the above. I'll be happy to undertake the dissent.

W.J.B.Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 15, 1980

RE: No. 79-1344 Michael M. v. Superior Court of Sonoma County

Dear Bill:

In due course I shall circulate a dissent in the above.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner, *v.* Superior Court of Sonoma County (California, Real Party in Interest).	On Writ of Certiorari to the Supreme Court of California.

[January —, 1981]

JUSTICE BRENNAN, dissenting.

I cannot agree that the gender-based classification in Cal. Penal Code § 261.5 is "sufficiently related" to the State's asserted goal of preventing teenage pregnancies to "pass constitutional muster." *Ante,* at 8. The classification demonstrably fails to survive the "mid-level" constitutional scrutiny mandated by *Craig* v. *Boren,* 429 U. S. 190 (1976).

Although the Court acknowledges that § 261.5 on its face discriminates on the basis of sex, it concludes that the statutory discrimination, rather than being invidious, actually ensures equality of treatment. In the view of the Court, since only females are subject to a risk of pregnancy, "[a] criminal sanction imposed solely on males . . . serves to roughly 'equalize' the deterrents on the sexes." *Ante,* at 8.

But this focus on an obvious biological fact causes the Court to overlook the State's failure to meet its burden of proving that the gender discrimination in § 261.5 is *substantially* related to the achievement of the State's asserted statutory goal. The obvious flaw in the Court's analysis lies in its failure to recognize that California has the burden, which it has not met, of proving that a gender-neutral statutory rape law would be less effective than § 261.5 in deterring sexual activity leading to teenage pregnancy.

The California Supreme Court acknowledged, and indeed

2,6

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner,
v.
Superior Court of Sonoma County (California, Real Party in Interest).

On Writ of Certiorari to the Supreme Court of California.

[January —, 1981]

JUSTICE BRENNAN, dissenting.

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But this focus on an obvious biological fact causes the Court to overlook the State's failure to meet its burden of proving that the gender discrimination in § 261.5 is *substantially* related to the achievement of the State's asserted statutory goal. The obvious flaw in the Court's analysis lies in its failure to recognize that California has the burden, which it has not met, of proving that a gender-neutral statutory rape law would be less effective than § 261.5 in deterring sexual activity leading to teenage pregnancy.

The California Supreme Court acknowledged, and indeed

1, 2, 3, 4

3rd DRAFT

FEB 6 1981

SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner,
v.
Superior Court of Sonoma County (California, Real Party in Interest).

On Writ of Certiorari to the Supreme Court of California.

[February —, 1981]

JUSTICE BRENNAN, with whom JUSTICES WHITE and MARSHALL join, dissenting.

I

It is disturbing to find the Court so splintered on a case that presents such a straightforward issue: whether the admittedly gender-based classification in Cal. Penal Code § 261.5 bears a sufficient relationship to the State's asserted goal of preventing teenage pregnancies to survive the "mid-level" constitutional scrutiny mandated by *Craig* v. *Boren*, 429 U. S. 190 (1976).[1] Applying the analytical framework provided by our precedents, I am convinced that there is only one

[1] The California Supreme Court acknowledged, and indeed the parties do not dispute, that Cal. Penal Code § 261.5 discriminates on the basis of sex. *Ante*, at 2. Because petitioner is male, he faces criminal felony charges and a possible prison term while his female partner remains immune from prosecution. The gender of the participants, not their relative responsibility, determines which of them is subject to criminal sanctions under § 261.5.

As the California Supreme Court stated in *People* v. *Hernandez*, 61 Cal. 2d 529, 531, 39 Cal. Rptr. 361, 362, 393 P. 2d 673, 674 (1964) (footnote omitted):

"Even in circumstances where a girl's actual comprehension contradicts the law's presumption [that a minor female is too innocent and naive to understand the implications and nature of her act], the male is deemed criminally responsible for the act, although himself young and naive and responding to advances which may have been made to him."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 11, 1980

Re: No. 79-1344, Michael M. V.
Sonoma County Superior Court

Dear Bill,

I am glad to join your opinion for the Court. It is quite possible that I shall file a concurring opinion. If so, it will be circulated sometime in the next few days.

Sincerely yours,

P.S.

Justice Rehnquist

Copies to the Conference

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner,
v.
Superior Court of Sonoma County (California, Real Party in Interest).

On Writ of Certiorari to the Supreme Court of California.

[January —, 1981]

JUSTICE STEWART, concurring.

Section 261.5, on its face, classifies on the basis of sex. A male who engages in sexual intercourse with an underage female who is not his wife violates the statute; a female who engages in sexual intercourse with an underage male who is not her husband does not.[1] The petitioner contends that this state law, which punishes only males for the conduct in question, violates his Fourteenth Amendment right to the equal protection of the law. The Court today correctly rejects that contention.

A

First of all, the statutory discrimination, when viewed as part of the wider scheme of California law, is not as clearcut as might at first appear. Females are not freed from criminal liability in California for engaging in sexual activity that may be harmful. It is unlawful, for example, for any person, of either sex, to molest, annoy, or contribute to the delinquency of anyone under 18 years of age.[2] All persons are prohibited from committing "any lewd or lascivious act," including consensual intercourse, with a child under 14.[3] And members of

[1] But see n. 5 and accompanying text, *infra*.

[2] See Cal. Penal Code §§ 272, 647 (a) (West Supp. 1979 and 1980).

[3] Cal. Penal Code § 288 (West Supp. 1979). See *People* v. *Dontanville*, 10 Cal. App. 3d 783, 796, 89 Cal. Rptr. 172, 180 (2d Dist.).

Stylistic Changes Only

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

2nd DRAFT

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 19 DEC 1980

SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner,
v.
Superior Court of Sonoma County (California, Real Party in Interest).

On Writ of Certiorari to the Supreme Court of California.

[January —, 1981]

JUSTICE STEWART, concurring.

Section 261.5, on its face, classifies on the basis of sex. A male who engages in sexual intercourse with an underage female who is not his wife violates the statute; a female who engages in sexual intercourse with an underage male who is not her husband does not.[1] The petitioner contends that this state law, which punishes only males for the conduct in question, violates his Fourteenth Amendment right to the equal protection of the law. The Court today correctly rejects that contention.

A

At the outset, it should be noted that the statutory discrimination, when viewed as part of the wider scheme of California law, is not as clearcut as might at first appear. Females are not freed from criminal liability in California for engaging in sexual activity that may be harmful. It is unlawful, for example, for any person, of either sex, to molest, annoy, or contribute to the delinquency of anyone under 18 years of age.[2] All persons are prohibited from committing "any lewd or lascivious act," including consensual intercourse, with a child under 14.[3] And members of both sexes may be con-

[1] But see n. 5 and accompanying text, *infra*.

[2] See Cal. Penal Code §§ 272, 647 (a) (West Supp. 1979 and 1980).

[3] Cal. Penal Code § 288 (West Supp. 1979). See *People* v. *Dontanville*, 10 Cal. App. 3d 783, 796, 89 Cal. Rptr. 172, 180 (2d Dist.).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 11, 1980

Re: 79-1344 - Michael M. v.
Superior Court of Sonoma County

Dear Bill,

I shall await the dissent.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 5, 1981

Re: 79-1344 - Michael M. v.
Superior Court of Sonoma County, CA

Dear Bill,

Please join me.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 11, 1980

Re: No. 79-1344 - Michael M. v. Superior Court of Sonoma County

Dear Bill:

I await the dissent.

Sincerely,

T.M.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 31, 1980

Re: No. 79-1344 - Michael M. v. Superior Court of Sonoma County

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 17, 1980

Re: No. 79-1344 - Michael M. v. Superior Court

Dear Bill:

I have read your proposed opinion with great care. It is a matter of regret for me that I am unable to join it in its present form. For now, I shall await the dissent. Whether I shall write separately, concurring in the judgment, or merely concur in the result, or even join the dissent, will depend on what else is forthcoming.

My problems center in: (1) a concern that the opinion does not follow the analysis of Craig v. Boren, but has substituted a lower level of scrutiny (Craig itself also involved a statute that burdened males disproportionately to females); (2) petitioner's companion's eager participation, at least initially, in the intimacies of June 3, 1978; (3) a concern about the validity of the opinion's reliance on Washington v. Davis, Palmer v. Thompson, and Arlington Heights, all racial cases, in the present context; (4) concern with footnote 8, particularly its reliance on Lewis' statement in Bellotti v. Baird which I did not join (incidentally, the volume citation is in error) (I also think that the extent to which the States can legislate in this area is still an open question, which prompts me to conclude that footnote 8 is unnecessary); and (5) a feeling that the opinion is somewhat at odds with my steadfast positions on abortion and privacy rights, and with what I thought was the Court's acknowledged commitment to privacy rights.

I say again that I regret to give you this response. I am fully aware of the fact, and am somewhat burdened by it, that my vote may well be the controlling one for this case. I had thought that the California statute was sustainable and, because I did, I voted to affirm. As of now, I am still of that view, but for the reasons stated above could not join your opinion. I shall see what the dissent has to say and then shall come down one way or the other.

Sincerely,

Harry

Mr. Justice Rehnquist
cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 4 FEB 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner, *v.* Superior Court of Sonoma County (California, Real Party in Interest). | On Writ of Certiorari to the Supreme Court of California.

[February —, 1981]

JUSTICE BLACKMUN, concurring in the judgment.

It is gratifying that the plurality recognizes that "[a]t the risk of stating the obvious, teenage pregnancies . . . have increased dramatically over the last two decades" and "have significant social, medical and economic consequences for both the mother and her child, and the State." *Ante*, at 5. There have been times when I have wondered whether the Court was capable of this perception, particularly when it has struggled with the different but not unrelated problems that attend abortion issues. See, for example, the opinions (and the dissenting opinions) in *Beal* v. *Doe*, 432 U. S. 438 (1977); *Maher* v. *Roe*, 432 U. S. 464 (1977); *Poelker* v. *Doe*, 432 432 U. S. 519 (1977); *Harris* v. *McRae*, — U. S. — (1980); *Williams* v. *Zbaraz*, — U. S. — (1980); and today's opinion in *H. L.* v. *Matheson*, *ante*.

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

fp. 3, 5, 6, 7

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: FEB 6 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner,
v.
Superior Court of Sonoma County (California, Real Party in Interest).

On Writ of Certiorari to the Supreme Court of California.

[February —, 1981]

JUSTICE BLACKMUN, concurring in the judgment.

It is gratifying that the plurality recognizes that "[a]t the risk of stating the obvious, teenage pregnancies . . . have increased dramatically over the last two decades" and "have significant social, medical and economic consequences for both the mother and her child, and the State." *Ante*, at 5. There have been times when I have wondered whether the Court was capable of this perception, particularly when it has struggled with the different but not unrelated problems that attend abortion issues. See, for example, the opinions (and the dissenting opinions) in *Beal* v. *Doe*, 432 U. S. 438 (1977); *Maher* v. *Roe*, 432 U. S. 464 (1977); *Poelker* v. *Doe*, 432 432 U. S. 519 (1977); *Harris* v. *McRae*, — U. S. — (1980); *Williams* v. *Zbaraz*, — U. S. — (1980); and today's opinion in *H. L.* v. *Matheson*, *ante*.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 15, 1980

79-1344 Michael M v. Superior Court

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: DEC 9 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner,
v.
Superior Court of Sonoma County (California, Real Party in Interest).

On Writ of Certiorari to the Supreme Court of California.

[January —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented in this case is whether California's "statutory rape" law, § 261.5 of the California Penal Code, violates the Equal Protection Clause of the Fourteenth Amendment. Section 261.5 defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." The statute thus makes men alone criminally liable for the act of sexual intercourse.

In July 1978, a complaint was filed in the Municipal Court of Sonoma County, Cal., alleging that petitioner, then a 17½ year old male, had had unlawful sexual intercourse with a female under the age of 18, in violation of § 261.5. The evidence adduced at a preliminary hearing showed that at approximately midnight on June 3, 1978, petitioner and two friends approached Sharon, a 16½ year old female, and her sister as they waited at a bus stop. Petitioner and Sharon, who had already been drinking, moved away from the others and began to kiss. After being struck in the face for rebuffing petitioner's initial advances, Sharon submitted to sexual intercourse with petitioner. Prior to trial, petitioner sought to set aside the information on both state and federal constitutional grounds, asserting that § 261.5 unlawfully dis-

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner,
v.
Superior Court of Sonoma County (California, Real Party in Interest).

On Writ of Certiorari to the Supreme Court of California.

[January —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

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In July 1978, a complaint was filed in the Municipal Court of Sonoma County, Cal., alleging that petitioner, then a 17½ year old male, had had unlawful sexual intercourse with a female under the age of 18, in violation of § 261.5. The evidence adduced at a preliminary hearing showed that at approximately midnight on June 3, 1978, petitioner and two friends approached Sharon, a 16½ year old female, and her sister as they waited at a bus stop. Petitioner and Sharon, who had already been drinking, moved away from the others and began to kiss. After being struck in the face for rebuffing petitioner's initial advances, Sharon submitted to sexual intercourse with petitioner. Prior to trial, petitioner sought to set aside the information on both state and federal constitutional grounds, asserting that § 261.5 unlawfully dis-

PP 3, -5, 7-9

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner,
v.
Superior Court of Sonoma County (California, Real Party in Interest).

On Writ of Certiorari to the Supreme Court of California.

[January —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

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STYLISTIC CHANGES THROUGHOUT

p. 1, 4 & 6

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: MAR 20 1981

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner,
v.
Superior Court of Sonoma County (California, Real Party in Interest).

On Writ of Certiorari to the Supreme Court of California.

[January —, 1981]

JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, JUSTICE STEWART, and JUSTICE POWELL joined.

The question presented in this case is whether California's "statutory rape" law, § 261.5 of the California Penal Code, violates the Equal Protection Clause of the Fourteenth Amendment. Section 261.5 defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." The statute thus makes men alone criminally liable for the act of sexual intercourse.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 1, 1981

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 79-1344 Michael M. v. Sonoma County

No. 79-6716, Fear v. Virginia. Petitioner was tried and convicted on two of three counts of forcible rape under § 18.2-61 of Virginia law. That law makes it a crime for "any person" to "carnally know a female of thirteen years of age or more against her will by force, or carnally know a female child under that age". Petitioner was sentenced to a term of 7-1/2 years on each count. The trial court held that the statute was not unconstitutional and the state appellate court affirmed the convictions without opinion. The Virginia Supreme Court denied appeal. Because I believe that the decision in Michael M. v. Sonoma County controls this case, I will vote to DENY. In addition, the fact that this case involves forcible rape, as opposed to "statutory" rape, arguably makes Fear's claim less meritorious on its facts than Michael M.

No. 80-602, United States v. Hicks. The question in this case is whether the federal carnal knowledge statutes, 18 U.S.C. §§ 1153 and 2032 violate the equal protection component of the Due Process Clause. The two respondents, age 21 and 28 were indicted for violating both statutory provisions in having carnal knowledge of a 14 year old and a 15 year old female. They moved to dismiss the complaint prior to trial on the grounds that the statutes impermissibly classified on the basis of gender. The DC granted the motion and the CA 8 affirmed. It acknowledged that prevention of illegitimate teenage pregnancies and physical injuries to young females are important governmental interests, but concluded that the government had failed to demonstrate that these objectives are "substantially furthered by punishment only of the male." Because the decision in Michael M. rejects this line of

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

79-1344 - Michael M. v. Superior Ct. of Sonoma County

From: Mr. Justice Stevens

Circulated: JAN 12 '81

Recirculated: _____

JUSTICE STEVENS, dissenting.

Local custom and belief--rather than statutory laws of venerable but doubtful ancestry--will determine the volume of sexual activity among unmarried teenagers.[1] The empirical evidence cited by the Court demonstrates the futility of the notion that a statutory prohibition will significantly affect the volume of that activity or provide a meaningful solution to the problems created by it.[2] Nevertheless, as a matter of constitutional power, unlike my Brother BRENNAN, see ante, at 3-4, n. 4, I would have no doubt about the validity of a state law prohibiting all unmarried teenagers from engaging in sexual

---

1

> "Common sense indicates that many young people will engage in sexual activity regardless of what the New York Legislature does; and further, that the incidence of venereal disease and premarital pregnancy is affected by the availability or unavailability of contraceptives. Although young persons theoretically may avoid those harms by practicing total abstention, inevitably many will not." Carey v. Population Services International, 431 U.S. 678, 714 (1977) (STEVENS, J., concurring).

2 If a million teenagers became pregnant in 1976, see ante, at 5, n. 3, there must be countless violations of the California statute. The statistics cited by Justice BRENNAN also indicate, as he correctly observes, that the statute "seems to be an ineffective deterrent of sexual activity." See ante, at 6-7, n. 7.

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner, *v.* Superior Court of Sonoma County (California, Real Party in Interest). | On Writ of Certiorari to the Supreme Court of California.

[January —, 1981]

JUSTICE STEVENS, dissenting.

Local custom and belief—rather than statutory laws of venerable but doubtful ancestry—will determine the volume of sexual activity among unmarried teenagers.[1] The empirical evidence cited by the Court demonstrates the futility of the notion that a statutory prohibition will significantly affect the volume of that activity or provide a meaningful solution to the problems created by it.[2] Nevertheless, as a matter of constitutional power, unlike my Brother BRENNAN, see *ante*, at 3–4, n. 4, I would have no doubt about the validity of a state law prohibiting all unmarried teenagers from engaging in sexual intercourse. The societal interests in reducing the incidence of venereal disease and teenage pregnancy are suffi-

[1] "Common sense indicates that many young people will engage in sexual activity regardless of what the New York Legislature does; and further, that the incidence of venereal disease and premarital pregnancy is affected by the availability or unavailability of contraceptives. Although young persons theoretically may avoid those harms by practicing total abstention, inevitably many will not." *Carey* v. *Population Services International*, 431 U. S. 678, 714 (1977) (STEVENS, J., concurring).

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pp. 1-4, 6 + renumbered footnote

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1344

Michael M., Petitioner,
v.
Superior Court of Sonoma County (California, Real Party in Interest).

On Writ of Certiorari to the Supreme Court of California.

[January —, 1981]

JUSTICE STEVENS, dissenting.

Local custom and belief—rather than statutory laws of venerable but doubtful ancestry—will determine the volume of sexual activity among unmarried teenagers.[1] The empirical evidence cited by the plurality demonstrates the futility of the notion that a statutory prohibition will significantly affect the volume of that activity or provide a meaningful solution to the problems created by it.[2] Nevertheless, as a matter of constitutional power, unlike my Brother BRENNAN, see *ante*, at 4–5, n. 5, I would have no doubt about the validity of a state law prohibiting all unmarried teenagers from engaging in sexual intercourse. The societal interests in reducing the incidence of venereal disease and teenage pregnancy are suffi-

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