The Limits of Sexual Autonomy for Minors: Debating Age of Consent Laws

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Abstract

Sexual freedom is regarded as a fundamental right that is essential for the development of personal autonomy. Yet, when it comes to childhood sexuality, this freedom seems to become less clear-cut. While the Convention of the Rights of the Child affirms children's negative freedom (protection from sexual abuse and exploitation), it does not address their positive freedom (the freedom to engage in sexual activity). The reservation stems from the belief that children, not fully developed, lack the capacity to make informed decisions and can be easily influenced by older individuals who possess greater knowledge and power.

This paper explores the debates surrounding age of consent laws and legal cases involving 'child sexual abuse', particularly those cases where the minor party appears to be consenting. These limitations on adolescents' sexual freedom are often justified based on the concept of harm, which is identified either as collective harm or foreseeable harm in the future. This paper provides evidence of a moralistic tendency to punish 'deviant' behavior that violates prevailing moral norms, even when harm is not evident.

Introduction

In 1978, a radio conversation took place between Michel Foucault, playwright/lawyer Jean Danet, and novelist/gay activist Guy Hocquenghem, in which they debated the idea of abolishing age of consent laws in France. During the conversation, Foucault asserted that "Consent is a contractual notion". Hocquenghem agreed with this perspective and continued:

> Everybody – judges, doctors, the defendant – knows that the child was consenting – but nobody says anything, because, apart from anything else, there's no way it can be introduced. It's simply the effect of a prohibition by law: it's really impossible to express a very complete relationship between a child and an adult […] In any case, if one listens to what a child says and if he says "I didn't mind", that doesn't have the legal value of "I consent". But I'm also very mistrustful of that formal recognition of consent on the part of a minor, because I know it will never be obtained and is meaningless in any case.[1]

During their conversation, they proposed an alternative approach to setting a legal age limit for sexual consent, suggesting we should "listen to what the child says and give it a certain credence", as "the child may be trusted to say whether or not he was subjected to violence".

However, over the past several decades, the global trend has moved in the opposite direction, with age of consent increasing in many countries. The standard age of consent is now 16.[2] These legal

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[1] Lawrence D Kritzman, ed, "Sexuality Morality and the Law" in *Michel Foucault: politics, philosophy, culture: interviews and other writings* (New York: Routledge, 1988).

[2] Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (Basingstoke; New York: Palgrave Macmillan UK, 2005).

reforms are reflective of shifting societal ideas about children's capacity for autonomous decision-making, a topic that is complex and multifaceted, involving scientific research, politics, and considerations of children's rights and citizenship.

One of the most important principles guiding the UN Convention on the Rights of the Child (CRC) is the principle of evolving capacity (Article 5 and Article 14(2)). The principle seeks to enable children to exercise increasing agency over their lives as they grow and develop their decision-making abilities. The CRC also recognizes children's right to express their views on matters that affect them and to have their opinions given due weight in accordance with their age and maturity (Article 12).

Numerous studies have explored children's capacity to consent, participate, and make decisions. Research has examined topics such as children's capacity to provide informed consent to medical treatment[3][4], to participate in research[5][6], to participation in the digital world[7], to receive child welfare service[8], and to express their views in family law proceedings.[9] The application of the evolving capacity principle has also been tested in juvenile justice systems.[10] These studies suggest that children's capacity for decision-making is intricate and involves a range of factors.

While the use of a biological age limit as a cutoff for legal capacity to consent has practical advantages as an administrative and normative gauge,[11] it also has disadvantages. One such disadvantage is that it does not allow for individual assessment of each child's competence and a differentiated approach to each case. This can result in laws and policies that are paternalistic and diminish children's agency.

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[3] Priscilla Alderson, Katy Sutcliffe & Katherine Curtis, "Children's Competence to Consent to Medical Treatment" (2006) 36:6 The Hastings Center Report 25–34; Elvis Fokala & Annika Rudman, "Age or Maturity? African Children's Right to Participate in Medical Decision-Making Processes Special Focus: The African Children's Charter at 30: Reflections on Its Past and Future Contribution to the Rights of Children in Africa" (2020) 20:2 Afr Hum Rts LJ 667–687.

[4] Alderson, Sutcliffe & Curtis, *supra* note 3.

[5] Perpetua Kirby, "'It's never okay to say no to teachers': Children's research consent and dissent in conforming schools contexts" (2020) 46:4 British Educational Research Journal 811–828; Irma M Hein et al, "Informed consent instead of assent is appropriate in children from the age of twelve: Policy implications of new findings on children's competence to consent to clinical research" (2015) 16:1 BMC Medical Ethics 76; Melodie Labuschaigne, Safia Mahomed & Ames Dhai, "Evolving capacity of children and their best interests in the context of health research in South Africa: An ethico-legal position" (2022) Developing World Bioethics.

[6] Hein et al, "Informed consent instead of assent is appropriate in children from the age of twelve", *supra* note 5.

[7] Perpetua Kirby, "'It's never okay to say no to teachers': Children's research consent and dissent in conforming schools contexts" (2020) 46:4 British Educational Research Journal 811–828.

[8] Tarja Pösö, "Children's consent to child welfare services: Some explorative remarks" (2022) 36:1 Children & Society 52–65.

[9] E Kay M Tisdall, "Subjects with agency? Children's participation in family law proceedings" (2016) 38:4 Journal of Social Welfare and Family Law 362–379.

[10] Ursula Kilkelly, "'Evolving Capacities' and 'Parental Guidance' in The context of Youth Justice: Testing the Application of Article 5 of the Convention on the Rights of the Child" (2020) 28:3 The International Journal of Children's Rights 500–520; Raymond Arthur, "Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: The Age of Criminal Responsibility in England and Wales Special Issue: The Age of Criminal Responsibility" (2016) 67:3 N Ir Legal Q 269–282.

[11] Hein et al, "Informed consent instead of assent is appropriate in children from the age of twelve", *supra* note 5.

The discussion surrounding children's sexual autonomy is particularly intricate. Moore and Reynolds argue that adolescents' rights to partake in sexual decision-making are unlikely to be realized under the CRC, as modern developmental discourse often assumes childhood innocence, immaturity, and asexuality.[12] The prevailing discourses on childhood and sexuality prioritize adult-defined and protectionist perspectives, and these discourses and concerns expressed are rarely about children themselves.[13] Although the UN Committee on the Rights of the Child acknowledges the need to establish a minimum age for sexual consent that accounts for "evolving capacity, age and maturity", the statement remains rather generic and ambiguous.[14] Furthermore, the Committee does not provide guidance on the specific age at which such a minimum age should be set in each state's legal system. It seems that there is difficulty in coming to a common agreement over what the age of consent should be.[15]

I propose that the lack of an established international standard for children's sexual rights can be attributed to the anxiety surrounding adolescents' sexuality. Hawkens and Egans discuss the 'sexualization panic', where young girls are assumed to be unstable and vulnerable, and any dissenting opinions are disregarded.[16] Since the 18th century, child sexuality has been condemned as sinful, harmful, or pathological.[17] In the 19th century, the control of child sexuality was institutionalized,[18] and the age of consent was invented. This institutionalization of child sexuality is grounded in the presumptive innocence and incompetence of children,[19] and its discourse that has been successfully deployed by social and moral conservatives.[20]

Contemporary Western society is dedicated to preventing child sexual abuse more than ever before.[21] However, discussions of childhood sexuality often ignore the subjectivity and agency of children. For example, Freudian theory recognizes children's sexual desires but positions them as non-autonomous objects of adult attention.[22] Similarly, developmental and behaviorist theorists seek to create socially acceptable forms of 'childhood sexuality' rather than acknowledging children's own subjective experiences.[23]

This lack of attention to children's subjectivity means that their ability to give sexual consent is often discounted on the basis of their perceived 'immaturity'. The agency of socially and politically

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[12] Allison Moore & Paul Reynolds, *Childhood and sexuality: contemporary issues and debates* (London: Palgrave Macmillan, 2018), at 73.
[13] R Danielle Egan & Gail Hawkes, "The problem with protection: Or, why we need to move towards recognition and the sexual agency of children" (2009) 23:3 Continuum 389–400.
[14] UN Committee on the Rights of the Child, *General comment No. 4 (2003), Adolescent health and development in the context of the Convention on the Rights of the Child, CRC/GC/2003/4* (2003).
[15] Moore & Reynolds, *supra* note 11, at 87.
[16] Gail Hawkes & R Danielle Egan, "Landscapes of Erotophobia: The Sexual(ized) Child in the Postmodern Anglophone West" (2008) 12:4 Sexuality & Culture 193–203.
[17] Sterling Fishman, "The History of Childhood Sexuality" (1982) 17:2 Journal of Contemporary History 269–283.
[18] *Ibid*.
[19] Joseph Fischel, "Per Se or Power? Age and Sexual Consent" (2016) 22:2 Yale Journal of Law & Feminism.
[20] Kerry H Robinson, *Innocence, Knowledge and the Construction of Childhood: The contradictory nature of sexuality and censorship in children's contemporary lives* (Routledge, 2013).
[21] David Archard, *Sexual consent* (Westview Press, 1998).
[22] Guangxing Zhu, *Protection versus autonomy: The newest developments in age of consent legislation in Europe and China* (Doctoral Thesis, Tilburg University, 2018), at 84.
[23] R Danielle Egan & Gail L Hawkes, "Imperiled and Perilous: Exploring the History of Childhood Sexuality" (2008) 21:4 Journal of Historical Sociology 355–367, at 362.

marginalized individuals often gets nullified when their actions are deemed 'wrong' by more powerful actors or institutions. Apart from age, other social characteristics such as disability, class, sexuality, gender, and ethnicity can also impact the degree to which individuals may be seen as less capable to choose, process information, or resist coercion.[24] Therefore, it is important to examine the circumstances under which children's agency is limited or negated.

This paper will examine when adolescents' consensual or agentic engagement in sexual activities is deemed non-consensual. This article address cases that are clear evidence of physical or psychological force or when minors are in a clearly constrained position, which are unequivocally considered child sexual abuse. Rather, the focus is on situations where minors appear to be giving consent. The study seeks to examine the legal rationales used to criminalize these acts when minors seemingly consent. With respect to research methods, my research involved collecting and analyzing a wide range of primary sources including interviews with legal actors and legal cases of 'child sexual abuse' in three countries: Japan, Indonesia, and the Netherlands. The analysis identified common themes and patterns in the judicial reasoning employed to criminalize sexual acts involving minors.

Collective Harm and Foreseeable Harm

The first pattern is the justification by the invocation of collective, societal, and reputational harm. In Indonesian cases, young boys are prosecuted and jailed for engaging in sexual activity with their girlfriends. For instance, in one case of 'mutual love', a 17-years-old boy and a 16-years-old girl engaged in sexual intercourse, and the boy was sentenced to two years of imprisonment and three months of vocational training. Although the court recognized that "the act of intercourse was done on the basis of mutual willingness and there was no compulsion", the boy was convicted because his actions were "not a good example for other children".[25] The court justified this decision by citing the societal harm caused by premarital sexual intercourse, which breaches the moral code of society and "disturbed the society"[26].

Additionally, many cases framed the harm caused by the sexual acts as damage to the girls' reputation. Losing her virginity results in "a prolonged shame on both the victim and her extended family". The logic is that the boys' actions caused "trauma and shame on the victim among her community and her school".[27] This harm is framed as affecting not only the victim but also her family and extended family, whose lives are embedded within their community, including her school. It is also worth noting that those who are prosecuted are always boys, and never girls, even in cases where the girl was older than the boy. This pattern of prosecution relies on patriarchal and gendered norms that dictate that girls' sexuality must be kept within marriage and that losing their virginity before marriage brings shame to her and her family.[28] This pattern of justification may

[24] Moore & Reynolds, *supra* note 11, at 86.
[25] 28/Pdt.P/2016/PN.Srp. (Indonesia).
[26] 28/Pdt.P/2016/PN.Srp.(Indonesia). Other court decisions (67/Pid.Sus/2013/PN.Dps. (Indonesia), 1/Pid.Sus.Anak/2015/PN Dps.(Indonesia)) also read: "the religious norm that is not to have sexual intercourse outside of husband/wife relationship is violated"; "according to 'religious norms' and 'norms in community', the act is only for legally (sah) married adults"; and "sexual intercourse without adat marriage is against 'norms of decency' and 'legal norms' that damage the reputation of the girl even if it was a case of mutual love."
[27] 28/Pdt.P/2016/PN.Srp.(Indonesia).
[28] Interview with a judge at District Court Depnasar. 16/06/2017.

also be attributed to the socio-legal structure of Indonesian communities, where religious and customary norms are codified and enforced by non-state legal structures alongside state law. The violation of such norms results in the identification of collective harm, which is dealt with through punishment or sanction according to these legal structures.

Unlike in Indonesia, where the harm caused by premarital sex is often framed in terms of collective societal values, some Dutch cases take a more individualistic approach by considering the potential harm to the minor involved. However, socio-ethical norms surrounding age differences and relationships also play a role in determining the legality of the sexual act. Some of the Dutch cases mention "conflict with socio-ethical norm" as a criterion to judge the legality of the sexual act. These norms include factors such as the age difference between the parties and the nature of their relationship.

The second pattern observed is the framing of harm as damage in the future. One Japanese case involving a 17-years-old girl and her high school teacher illustrates this pattern. The student expressed her romantic feelings towards him, and they started a "relationship" in which they engaged in sexual intercourse, despite the teacher being a married man with children. The judgment notes that he "was not in a position to be able to reciprocate her feelings", and sentences him to two and half years in prison. The court's framing of the harm highlights its potential impact on the victim's future development.[29] Similar concerns were raised in another case where teenage girls (aged 16, 17, and 19) seemed to have agreed to have sex with an older man in exchange for cash or a mobile phone. The court noted its concern about the bad influence his actions might have on the young victim's future.[30]

Another case explains the logic as follows: "when a person engages in a sexual act with who is in a less privileged/powerful position, considering it is not hard to imagine there are various reasons why the less powerful party does not/cannot refuse to do so, in most of such cases, the sexual act is not based on genuine/true consent. Thus, we can consider that that person's sexual autonomy has been violated, and it could possibly result in an ex-post psychological disorder."[31] Case 31 clarifies that the interest the law on sexual violence aims to protect is the victims' sexual autonomy.[32] Case 20 emphasizes that some of the young victims "continue to have psychosomatic treatment, as the incident has had a long-lasting harmful impact on their mental health".[33]

Several Dutch cases[34] also mention the foreseeable harm. For example, Case 9 reads: "By his actions, the Defendant seriously violated the physical and mental integrity of the victims. He has crossed a normal and healthy development to which every child is entitled. After all, it is a fact of common knowledge that victims of sexual offences often suffer serious and long-term

[29] Shizuoka District Court, R01.08.28 (Japan). https://okumuraosaka.hatenadiary.jp/entry/2019/10/30/164021
[30] H13(wa)1063 Saitama District Court H14.06.19 (Japan).
[31] H25(wa)290 Kagoshima District Court H26.03.27 (Japan).
[32] H28(u)493 Osaka High Court H.28.10.27 (Japan).
[33] H20(wa)385 Hiroshima District Court H21.09.14 (Japan).
[34] ECLI:NL:RAMS:2019:9738 (the Netherlands)., ECLI:NL:RBZWB:2015:4630 (the Netherlands)., ECLI:NL:RBNNE:2015:2206 (the Netherlands).

psychological damage. The Defendant did not think about this and put his own lust satisfaction first."[35]

In Indonesian cases, the reputational damage is also framed as the "damage for the future of the victim".[36] The cases from all three countries show that courts refer to future harm, but those from Japan and the Netherlands specifically emphasize the influence of psychological knowledge derived from trauma research. Psychological knowledge is predominant in the debates for the law-making process regarding sexual violence, as well as in court hearings. Psychological experts are often called upon to testify for both the defense and prosecutors. Legal actors strategically use the expert knowledge, which shapes the legal reasoning and outcome. Given the significant reliance on psychological knowledge in legal process involving child sexual abuse, it is crucial to critically evaluate the role and effects of this knowledge. Foucault has argued that psychological knowledge has been used to pathologize and normalize individuals, and also disciplining those who do not conform to social norms.

Presumptive Immaturity and Vulnerability of Children

Another important pattern is the nullification of apparent consent by the age gap between two parties. The age gap seems to be an important criterion for prosecution and conviction, particularly in the Netherlands. Dutch law enforcement officials consider three criteria when assessing cases: (1) the age gap, (2) whether the two parties are in an "affective relationship" over time,[37] and (3) whether the acts are ethical from "a standard point of view". For (2), "genuine mutual affection and commitment"[38] is important, and a temporary sexual relationship, such as a one-night stand, is not considered such an affective relationship.

For instance, in Case 12, a boy (14 years old) was not convicted despite a girl (13 years old) claiming that their sexual act was against her will.[39] Case 7 states that sexual acts between minors between the ages of 12 and 16 may not be considered lewd under certain circumstances, such as when the age difference is slight and the acts occur voluntarily, because such sexual behavior between two peers is "considered normal in the current era".[40] By this logic, the court acquitted this case, in which a 14-year-old girl accused an 18-year-old boy of forcible sexual acts. The victim claimed the sexual act was against her will, but the defense argued that it was voluntary and did not violate "socio-ethical norms", and therefore lacked lewd character. Case 16, involving a 15-year-old girl and a 17-year-old boy within courtship, also mentions that the sexual act lacks the lewd character because it was "a non-exceptional sexual exploration within the context of a voluntary sexual contact between two young people who were dating and whose age difference was relatively small".[41]

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[35] ECLI:NL:RBNNE:2015:2206 (the Netherlands).
[36] 67/Pid.Sus/2013/PN.Dps. (Indonesia), 4/Pid.Sus.Anak/2016/PN Dps. (Indonesia), 28/Pdt.P/2016/PN.Srp. (Indonesia), 84/Pdt.P/2017/PN Srp. (Indonesia).
[37] Juul C W Gooren, *Een overheid op drift: de strafrechtelijke beheersing van seks en jongeren* Leiden University, 2016).
[38] ECLI:NL:RBSHE:2007:BB3296 (the Netherlands).
[39] ECLI:NL:RBLEE:2007:AZ8616 (the Netherlands).
[40] ECLI:NL:RBGEL:2020:5287 (the Netherlands).
[41] ECLI:NL:RBSHE:2008:BD1676 (the Netherlands).

In contrast, if the age gap is significant, the older party may be convicted, even if the younger party had romantic feelings for his female teacher. The court mentions that the boy was not yet 14 years old, and due to his age and the teacher-student relationship, he was in a vulnerable position. She "should have been aware of her special responsibility towards the victim" and "should have adapted her actions to this awareness, by discouraging and adjusting the boy's romantic feelings for her as much as possible and by in any case to refrain from the proven sexual contact".[42]

This reasoning relates to another notable pattern, which is the reference to minors' immaturity, incapacity, or vulnerability. In cases of "prostitution", judgments often mention that the defendants "could understand that the minors in general have too little experience and insight to oversee the consequences of prostitution, and that it cannot be said that their choice of prostitution is a completely voluntary choice".[43]

In Case 20, a man in his 40s is convicted for engaging in sexual acts with multiple late-teens (17-18 years old) by bribing them with money, mobile phones, necklace, shoes, or driving lessons.[44] The court found that he "abused his age and physical and psychological predominance over the young victims" and "put them into a dependent relationship with him".[45] Case 17 clarifies that the age of consent law is intended to "protect the sexual integrity of persons who, because of their young age, are generally considered not to be able to or insufficiently capable of doing so."[46]

Japanese cases use the term "immaturity" for referring to the same. In Case C, the defense argued that the young victims "fully understood the meaning of sexual intercourse, and engaged with the sexual acts based on genuine sexual autonomy".[47] However, the court stated that "the law stipulates that any sexual acts with girls under 13 years old, regardless of the presence of consent, are rape. This is because such sexual acts, by adults, are considered to be exploitative, given the fact that girls under 13 years old are so immature in their sexuality and personal development that it is inappropriate to leave their sexual autonomous decisions up to their free will." Therefore, "we cannot consider that the victims in this case (12 and 11 years old) were capable of exercising genuine sexual autonomy." In Case I, the defense pointed out that the 14-year-old victim sent messages to the defendant expressing her intention to marry him, but the court overruled this claim by stating that it must have resulted from her immaturity and lack of cognitive capacity.[48]

Immaturity is also invoked in other cases involving older teens, such as the case of the 17-year-old girl and her high-school teacher mentioned above. The judgment refers to his act as "a selfish and despicable crime in which he takes advantage of her immaturity and lack of sensible judgment".[49] Interestingly, in another case of a girl of the same age (17 years old) and a 23-year-old man, the court acquitted the defendant because "it is hard to consider that he took advantage of her physical and mental immaturity".[50] Although the victim claimed that the sexual act was

[42] ECLI:NL:RBROE:2008:BD5827 (the Netherlands).
[43] ECLI:NL:RBSHE:2003:AN9794 (the Netherlands)., ECLI:NL:RBSHE:2003:AN9846 (the Netherlands).
[44] ECLI:NL:RBZUT:2008:BC9786 (the Netherlands).
[45] ECLI:NL:RBZUT:2008:BC9786 (the Netherlands).
[46] ECLI:NL:HR:2001:AD5390 (the Netherlands).
[47] Fukuoka District Court, H23.03.17 (Japan). https://okumuraosaka.hatenadiary.jp/entry/20110702/1309603880
[48] Osaka High Court, H29.01.29 (Japan). https://okumuraosaka.hatenadiary.jp/entry/2020/02/10/140053
[49] Shizuoka District Court, R01.08.28 (Japan). https://okumuraosaka.hatenadiary.jp/entry/2019/10/30/164021
[50] Sendai District Court, H30.02.08 (Japan). https://okumuraosaka.hatenadiary.jp/entry/2019/07/17/164723

against her will and the prosecutor argued that "they were not in a relationship in which sexual contact is taken for granted", the court declared that "she could have expected that meeting him again could lead to sexual contact" since they had previously had sex.[51]

In summary, young people are considered incapable of making sensible judgments due to their lack of experience, knowledge, and power. Therefore, even if they appear to be consenting to the act, it is a result of manipulation rather than genuine sexual autonomy. However, the difference between these two cases above, involving 17-year-old girls, suggests that the judgment is not only about immaturity or lack of cognitive capacity, but also about normativity, i.e., how their relationship fits in with the standard norms about 'romantic relationship'. Tambe's research on League of Nations' efforts to track ages of consent also concludes that "the modern age of consent typically connotes the age at which a society deems sexual relations acceptable, rather than the age at which a young person has the capacity to have sexual relations".[52] This brings us back to the first pattern: reference to the collective harm, or violation of socio-ethical norms. This point leads us to consider the harm principle, first introduced by John Stuart Mill. The harm principle holds that criminal law should only prohibit actions that cause harm to others, rather than actions that are simply considered immoral. The rationale behind this is that criminal law severely restricts individual freedom and should only be used to prevent serious harm to society. However, when judgments frame harm as a violation of morality, the harm principle loses its edge.

Criminalizing Harmless Immorality?

To reflect on the danger of criminalizing harmless immorality, it is important to first examine how age of consent laws have been institutionalized to control adolescent sexuality. The previous discussions on the age of consent in the UK and in Canada reveal that raising the age of consent is often a 'safe' and conservative political decision.[53] Researchers have pointed out that the protection narrative is sometimes used to serve adults' concerns.[54] As Egan & Hawkes demonstrates, the need to protect children from sexuality sometimes acts as a smokescreen for other social interventions that go beyond the interests of the children themselves.[55] Dauda demonstrates that raising the age of consent was part of the agenda of the conservative political party to re-moralize the family, which precludes youth agency and reinforces inequalities of gender and generation.[56]

The control of adolescent sexuality is a concern not only for the states, but also for parents. All Indonesian, Japanese, and Dutch cases show that in most cases, parents report the case, not the young victims themselves. It is difficult to determine what exactly the young victims wanted in

[51] Sendai District Court, H30.02.08 (Japan). https://okumuraosaka.hatenadiary.jp/entry/2019/07/17/164723
[52] Ashwini Tambe, "Climate, Race Science and the Age of Consent in the League of Nations" (2011) 28:2 Theory, Culture & Society 109–130, at 121.
[53] Moore & Reynolds, *supra* note 11, at 85; Carol L Dauda, "Sex, Gender, and Generation: Age of Consent and Moral Regulation in Canada" (2010) 38:6 Politics & Policy 1159–1185.
[54] Egan & Hawkes, "Imperiled and Perilous", *supra* note 23; Jonathan Herring, "Law and Childhood Studies: Current Legal Issues Volume 14" in Michael Freeman, ed, *Vulnerability, Children, and the Law* (Oxford University Press, 2012) container-title: Law and Childhood Studies; Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (Yale University Press, 2004); Robinson, *supra* note 20.
[55] Egan & Hawkes, "Imperiled and Perilous", *supra* note 22, at 365.
[56] Dauda, "Sex, Gender, and Generation", *supra* note 53.

each case because the court decisions usually do not include such details. However, in some cases it clear that the victims themselves did not see the act as forced or violation of their bodily/sexual integrity and autonomy. Some even showed agentic acts, such as expressing their romantic feelings towards the defendant. This suggests that the parents filed the suit against the will of the victims, or the victims perhaps complied with their parents' initiative. Thus, the age of consent law allows parents to control their children's sexuality in the complicity of state authority.

At the law operationalization level, the age of consent law, when applied by state legal actors and left at their discretionary power, seems to criminalize 'deviant' sexual behaviour of teenagers.[57] These studies suggest that the law can be a form of repressive normalization[58] that restricts individuals' agency in engaging in the intimate relationships of their choice. The fear involved in moral violation can easily justify social and spatial control by the authority.[59]

Considering the danger of criminalizing these acts and the significant limitation of sexual and romantic freedom, it is crucial to reconsider whether adolescents are incapable to consent *at any time*. The challenge related to adolescent sexuality, as reflected in age of consent law, is that statutory sexual offences place the wrong entirely on the age of the victim.[60] This legal approach fails to allow for a more nuanced analysis of the presence or absence of sexual exploitation.[61]

Kitzinger argues that empowering children to resist abuse requires a delicate balance. It is important to make them feel they *can* resist abuse without making them feel guilty if they cannot or do not.[62] To empower children, they need to feel they can resist abuse, instead of being assumed that they are too vulnerable, weak, and immature to resist and say no.

Feminists' discussions of sexual consent emphasize the importance of considering power dynamics between partners. Even if there is no physical force or violence, the power relationship between the victim and perpetrator can affect whether or not there is meaningful consent. While age of consent laws assume that children cannot consent, it is important to recognize the subjectivity of individuals. If their consent is not taken seriously due to their identity (e.g., they are vulnerable or in a weak position), it undermines their subjectivity, ultimately undermining their dignity. Human dignity comes with responsibility for the decision and actions one takes.

Alcoff defines sexual subjectivity as an individual's engagement in practices of sexual self-making to gain freedom.[63] To achieve this, women may need to let go of imagery that promotes submissiveness and self-objectification, while men need to unlearn a form of sexual expressivity

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[57] Gooren, *supra* note 37.

[58] In the sense how Foucault talks about law and its power/knowledge. See for instance: Gerald Turkel, "Michel Foucault: Law, Power, and Knowledge" (1990) 17:2 Journal of Law and Society 170–193.

[59] Kazuaki Sugiyama, *DON'T SEX, JUVIE!: The policing of "covert" sex workers in urban spaces in Toyama prefecture, Japan* (Taegu: Taegu University, Korean Research Foundation, 2000), at 5.

[60] Andrea Slane, "Luring Lolita: The Age of Consent and the Burden of Responsibility for Online Luring" (2011) 1:4 Global Studies of Childhood 354–364, at 357.

[61] *Ibid*.

[62] Jenny Kitzinger, "Who Are You Kidding? Children, Power, and the Strugle Against Sexual Abuse" in Allison James & Alan Prout, eds, *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (London: Falmer Press, 1997) 165, at 179.

[63] Linda Martín Alcoff, *Rape and Resistance*, 1st edition ed (Cambridge, UK: Polity, 2018).

that perceives women's desires as threatening.[64] Similarly, for young persons to engage in practices of sexual self-making to gain freedom and to be respected for their sexual subjectivity, we all need to unlearn the pre-fabricated sexual imagery that there is a child victim and the adult perpetrator. Cultural taboos and anxieties also prevent us from contextual analysis of the nature and circumstances of the relationship to determine whether the sexual act was exploitative.

Drobac states that age-of-consent law is complex and full of pitfalls.[65] If the state sets the age too high, it risks condemning consensual relationships of teenagers as well. While those cases may require adult intervention, they should typically not be criminalized.[66] Therfore, the strict, harsh, and general approach to age of consent law is not necessarily the best solution.

I am not arguing for the abolition of statutory age of consent law. Instead, I suggest that we need to look closely and critically at the types and the degree of harm the age of consent law claims to avoid and punish. In light of the harm principle, criminal law should not punish 'harmless immorality'. In an advanced liberal polity, we cannot agree on more than a minimum of allegedly uncontroversial values. The complex relationship between law and culture or sexual mores is particularly important in the realm of criminal law, which involves the moral condemnation of an act by punishment.[67] Zhu & van der Aa state that within criminal law, there is no room for legal paternalism or legal moralism.[68] While sexual and intimate lives of people require the state's intervention when their rights are violated, matters of sexual mores equally need to ensure individual's privacy and their freedom from the state and parental authorities. This requires a critical discussion of the necessity of punishment.

[64] Susan Bredlau, *The Other in Perception: A Phenomenological Account of Our Experience of Other Persons* (Albany: STATE UNIV OF NEW YORK PR, 2018), at 84.
[65] Jennifer A Drobac, "Age-of-consent laws don't reflect teenage psychology. Here's how to fix them." *Vox* (20 November 2017).
[66] *Ibid*.
[67] Elaine M Chiu, "Culture in Our Midst" (2006) 17:2 U Fla JL & Pub Pol'y 231–262.
[68] Guangxing Zhu & Suzan van der Aa, "Trends of age of consent legislation in Europe: A comparative study of 59 jurisdictions on the European continent" (2017) 8:1 New Journal of European Criminal Law 14–42, at 27.