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Title: Harm, Responsibility, Age and Consent

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Harm, Responsibility, Age and Consent.

Abstract

This article explores the contradictory ways in which adolescents just under the age of consent are represented in illegal sexual relations with both men and women who are over the age of consent. We are specifically interested in exploring the ways in which the gender of the adolescent and the adult affect public discourse, legal responses and social perceptions of the harm of sexual relations. We argue that the development of an indiscriminate legal and policy narrative of child sexual abuse which increasingly includes all aspects of adolescent sexuality, ‘erases’ an adolescent subjectivity. By exploring the nuanced ways in which the historical construction of childhood as sexually innocent intersects with current cultural scripts of femininity and masculinity, this article hopes to add to the small but growing literature on the issue of sexual consent, sexual ethics and sexual citizenship for young people.

Key words

Child sexual abuse

Heterosexual scripts

Age of consent

Sexual citizenship

Under age sex

Introduction.

In this article we are interested in exploring the relation between harm and consent for adolescents under the age of consent. We are especially interested in the relation between consent and harm where a duty of care, responsibility and authority is relevant, and the ways in which relations of authority in many jurisdictions increase the age for which harm is assumed and protection is required. The seriousness with which many countries around the world now understand the harm of sexual activity below the age of consent is evident in the range of legislation passed in the United Kingdom, Canada, the USA, and states within both the European Union and Australia, to increase the age of protection to eighteen in certain situations, most notably through online ‘child exploitation material’ and when a relationship of authority is misused to gain consent to sexual relations.¹

Such an increase in the age of sexual responsibility demonstrates quite clearly that we are in the midst of a cultural paranoia about young people and sex, a point that has been previously and regularly noted over the last few decades². Since the late 19th century in fact, our societies have become increasingly interested in the normative development of children, the differences between children and adults and have explored a variety of ways in which to demarcate childhood from adulthood³. The creation of adolescence to bridge the divide between childhood and adulthood is one example, and was itself developed in the early 20th century by G Stanley Hall. In this well known formulation, adolescence is understood as a time of storm and strain, where childhood innocence is left behind but where adult capacities are still developing⁴. A developmental psychological creation, adolescence nevertheless has primacy in modern understandings of the (im)mature decision making available to teenagers,

¹ Helmut Graupner ‘*The 17 year old Child: an absurdity of the late 20th century*’. In Helmut Graupner and Vern L. Bullough (eds) *Adolescence, Sexuality and the Criminal Law: Multidisciplinary Perspectives*. Haworth Press: New York, 7-24 (2004); Helmut Graupner, Sexual Consent. *Journal of Psychology and Human Sexuality* 16:2-3, 111-171 (2005).

² Sharon Hayes and Belinda Carpenter with Angela Dwyer *Sex Crime and Morality*. Routledge: London (2012)

³ Belinda Carpenter and Mathew Ball *Justice in Society*. Federation Press: Sydney (2012)

⁴ Gordon Tait *Youth Sex and Government*. Peter Lang: New York (2000)

and has been used in the 21st century to support legislation to increase the age of the sexual protection of children⁵.

We are also well aware, through the work of first and second wave feminism, that legislation which offers an age of consent for sexual activity of any sort has implicit within it culturally specific understandings of masculinity and femininity as they pertain to sexual activity⁶. The first legislation in 1885 in the UK was in fact gender specific (and heterosexual), outlining as an offence in Section 5 of the *Criminal Law Amendment Act*, carnal knowledge of any *girl* above the age of thirteen and under the age of sixteen⁷. While legislation is now gender neutral, traditional cultural scripts of male sexuality as active and pursuant, and female sexuality as passive and resistant, position sexual consent as a predominantly feminine activity within heterosexuality, especially for young women around the age of consent and despite recent gains in “girl power”⁸. This is one reason why age and gender may offer challenges to implicit and blanket suggestions of harm and responsibility in sexual relations between adolescents and adults.

It is also with some caution and restraint that we enter into this domain. Research is clear that child sexual abuse is an important issue in all modern societies, with much of it going undetected and unreported. Prevalence studies in Australia, UK and USA find that the incidence of non-penetrative sexual abuse before the age of sixteen range from 5.9 to 33.6 percent for women and 2.5 to 16 percent for men. Notwithstanding the variety of definitions used to achieve these differing figures, even the lowest end in the range suggests that child sexual abuse is endemic with between 3400 and 3800 substantiated cases identified each year

⁵ Carol Dauda ‘*Sex, Gender and Generation: Age of Consent and Moral Regulation in Canada*’. *Politics and Policy*. 38:6, 1159-1185 (2010)

⁶ Erin O’Brien, Sharon Hayes and Belinda Carpenter *The Politics of Sex Trafficking: a moral geography*. Palgrave Macmillan: London (2013)

⁷ Mathew Waites ‘*Investing a lesbian age of consent? The History of the Minimum Age for sex between women in the UK*’. *Social and Legal Studies*. 11:3, 323-342 (2002)

⁸ Anastasia Powell ‘*Amor fati?: Gender habitus and young people’s negotiation of (hetero)sexual consent*’. *Journal of Sociology*. 44:2, 167-184 (2008); Kay Levine, *When Gender Meets Sex: An Exploratory Study of Women who Seduce Adolescent Boys*. William and Mary *Journal of Women and the Law*. 15:361-376 (2008-2009).

in Australia for instance⁹. Such research has also demonstrated that harm is not gender specific, and that women as well as men can be perpetrators¹⁰. This is also noted in the academic literature on statutory rape, where a growing body of research from both psychology and more recently law, have explored the harm to male adolescents of sexual relations with adult women.¹¹ This research is in addition to the large body of feminist research from the 1970s which named the harm of sexual relations between adolescent girls and adult men, and located it within the unequal power and social location of the participants¹².

In this context, this paper explores a more nuanced understanding of sexual relations between adolescents and adults that does not erase the adolescent's subjectivity and assume their victimisation and harm. Such research, while in its infancy, is especially important in the current context since traditional understandings of sexual scripts position victimisation and harm as peculiarly feminine attributes, making them difficult to be claimed by adolescent boys. These same scripts also position predation and exploitation as peculiarly male, again making such subject positions difficult (some may say impossible) for adult women to inhabit, both socially and personally.

The idea of sexual scripts in research on sexual behaviour is not new. In the 1970s, Gagnon and Simon argued that gendered sexual scripts act as an internal social syntax guiding boys and girls sexual behaviour. This has allowed theorists to see sexual scripts as shared conventions based on mutual dependency that set out boundaries and roles that determine control, power, initiation and pleasure.¹³ We take such discussions as a starting point but choose to follow more closely the work of Judith Butler, who has further influenced our conceptualisation by arguing that "the action of gender requires a performance that is

⁹ Ben Mathews *Teacher Education to meet the Challenges Posed by Child Sexual Abuse*. Australian Journal of Teacher Education. 36:11, 13-32 (2011)

¹⁰ Kay Levine, *When Gender Meets Sex: An Exploratory Study of Women who Seduce Adolescent Boys*. William and Mary Journal of Women and the Law. 15:361-376 (2008-2009).

¹¹ Kay Levine, *No Penis, No Problem*. Fordham Urban Law Journal 33, 357-405 (2005-2006)

¹² Sam Warner, *Understanding the Effects of Child Sexual Abuse: feminist revolutions in theory, research and practice*. Routledge: UK (2008)

¹³ John Gagnon and William Simon, *Sexual Conduct: The Sources of Human Sexuality*. Aldine: Chicago. (1973)

repeated.”¹⁴ By clearly articulating that gender identities are not born but are rather fashioned through a repetition of social norms, gender becomes a performance that is focused on meeting society’s expectations about identity which are in turn enforced through normative devices. By behaving in a gender normative manner, men and women seek to create favourable impressions in others in order to accrue increased social status. Thus to perform gender necessarily affirms conceptions of what it means to be masculine or feminine.¹⁵ This more fluid, and discursive idea of a gender performance, influences our attempt in this paper at a more nuanced notion of harm in the context of underage sex.

In order to achieve these aims, this article will do three things. First it will engage with the historical work which problematises childhood as a natural state of affairs, always and inherently sexually innocent. It will do this to situate the age of consent and other protective legislation as part of a cultural moment in the history of our understanding of children, sex and harm. Second, we will engage with the various ways in which (sexual) citizenship is conferred and denied to young people and how this influences experiences of victimisation and harm in sexual relations. Third, this article will link such discussion to the performance of the cultural scripts of masculinity, femininity and heterosexuality, and thus discuss the gendered nature of sexual activity and sexual consent for young people.

Age.

The enactment of legislation in the late nineteenth century to make sexual relations with children a criminal offence, is considered to be part of a wider concern to express the sexual innocence of children and their need for protection through the domestic realm of the family. As Scott and Swain¹⁶ identify, the child rescue movement, established in most modern liberal democracies between 1870 and 1890, was premised “upon ideas of children as innocents in need of protection from the harshness of the adult world”. This way of thinking about children is a relatively recent phenomenon, disseminated by the rising middle class of the

¹⁴ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge (1990, 178)

¹⁵ Laura Huey and Eric Berndt ‘You’ve gotta learn how to play the game’: homeless women’s use of gender performance as a tool for preventing victimisation. *The Sociological Review*. 56:2, 177-194 (2008).

¹⁶ Dorothy Scott and Shirley Swain *Confronting Cruelty: Historical Perspectives on Child Protection in Australia*. Oxford University Press: Oxford. (2002, p71)

nineteenth century and informed by an “intensified emotional investment in the child and a fear of sexual corruption”¹⁷.

The idea that childhood is a natural state of affairs, was first challenged by Philippe Aries¹⁸ who argued that prior to the Middle Ages, the idea of childhood did not exist. Childhood was nothing more than a “brief phase of dependency passed over quickly and bearing little special importance ... those who could fend for themselves were treated as small adults”¹⁹. There was thus little need to separate children out as a social category since they participated in all of the activities of the adult world, witness to criminal activity, drunkenness and sexual relations. In fact, at this time the word child expressed kinship rather than age and could thus refer to anyone of any age – as in “this is my child”²⁰. Between the 14th and 18th centuries, however, the conception of child as separate from adult took shape. “The category of childhood, in which a person was accorded different responsibilities, rights and social functions due to their age, gained acceptance in Western European society through the middle and upper classes”²¹. At this time, childhood did not bear any of the modern connotations of sexual innocence. Sexual contact between children and adults, touching and stroking of the genitals, dirty jokes, sharing rooms and beds and casual nudity, was taken for granted. “Children were assumed to be closer to the body, less inhibited, and thus unlikely to be corrupted by adult knowledge”²².

Consider for example, the diary of Herod, physician to Henry IV of France, and bear witness to the specific focus on a very young child’s sexuality contained in these pages:

When Louis XIII was not yet one year old: ‘He laughed uproarishly when his nanny waggled his cock with her fingers’. An amusing trick which the child soon copied. ‘Calling a page, he shouted “hey there” and pulled up his robe, showing him his cock’.

¹⁷ Jeffrey Weeks *Sex, Politics and Society: The Regulation of Sexuality since 1800*. 2nd edition. Longman: London (1989, p48)

¹⁸ Phillippe Aries *Centuries of Childhood*. Penguin: Harmondsworth (1973/1986)

¹⁹ Phillippe Aries ‘From Immodesty to Innocence’ in Henry Jenkins (ed) *The Children’s Culture Reader*. New York University Press: New York, 100-103. (1998, p15)

²⁰ Neil Postman *The Disappearance of Childhood*. Delacourte Press: New York (1994, p14)

²¹ Lyn Finch *The nineteenth century identification of incest as a working class crime: implications for analysis*. In Penelope Hetherington (ed) *Incest and the Australian Community: Australian perspectives*. Optima Press: Osbourne Park, WA (1991, p20)

²² Aries, supra note 18 at 16.

On another occasion, he was one year old: 'In high spirits, notes Heroad, 'he made everybody kiss his cock. This amused them all in the court'.

And finally, 'The Marquise often put her hand under his coat; he got his nanny to lay him on her bed where she played with him, putting her hand under his coat', 'The Queen, touching his cock, said 'Son I am holding your spout'²³

During his early life, no-one in the court showed any reluctance or saw any harm in jokingly touching the child's sexual parts. In this romantically inspired vision of the child, childhood, purity and innocence were linked in the social psyche. Sexual knowledge did not corrupt their innocence. Of course this is also not to argue that the way in which children were reared at this time meant that they were all victims of child sexual abuse. While we might want to look back and retrospectively label such actions in this way, we have not raised them for that purpose. On the contrary, the evidence suggests that these children grew up to be responsible and healthy adults who were themselves the parents of happy and healthy children. Certainly those at the time did not perceive themselves to be harmed and many of the greatest thinkers of modernity were children and parents during this time period.

This romantic notion of the innocent child lost ground from the mid 19th century, to a more scientific understanding of the child and childhood sexuality. Following Freud, a sexual instinct was identified as existing from birth but it was positioned as dormant, unconscious and latent. A child was innocent precisely because it had no sexual knowledge, yet at the same time children were perceived of as at constant risk of external corrupting influences on their sexuality "which was always on the verge of materialising"²⁴. The child became both a sentimental figure in need of protection and an object of suspicion that needed to be controlled.

From this time, the child is passive and in need of protection, and yet also at the mercy of the "environmental contagion" of its sexual instinct. For example, girls raised by prostitutes could "catch" the deviance of their mothers, while the corrupt social order and the overabundance of "licentious" individuals in the city were particularly dangerous to children. Access to "immoral and prurient influences" promoted the appearance of the sexual instinct,

²³ Aries, supra note 17, at100-103.

²⁴ Danielle Egan and Gail Hawkes 'The problem with protection: Or, why we need to move towards recognition and the sexual agency of children'. *Continuum: Journal of Media and Cultural Studies*. 23:3, 389-400. (2009, p389)

at an age “much younger than nature ever designed”²⁵. Any expression of children’s sexuality as “prematurely adult” positioned it, and the child, as an “abhorrent manifestation”²⁶. Since the most common causes of this external corruption were a “knowing” companion, a poor environment, and bad parenting, a good home and appropriate parenting became crucial to safeguarding the sexual innocence of children.

The explicit sexual discourse on children seemed to fade away during the 1960s and the first formal acknowledgement of the problem and danger of sexual abuse came with the passage of the *Child Abuse Prevention and Treatment Act* (CAPTA 1974) in the USA in the 1970s. Positioning the child as only and in all circumstances a victim of harm, this legislation marked a major break with earlier discourses that emphasised the sexual instinct. Children were perceived of as “powerless”, “unknowing”, and “unable to consent”; there was “a presumed lack of sexual knowledge” and “an inability to make or understand sexual decisions”²⁷. This is a very different understanding of the relations between sexuality and children noted in the court of Henry IV of France, but it is also a different understanding of the relations between children and sex promulgated in the later 19th and early 20th century. While the latter formulations placed great emphasis on a lack of sexual knowledge in children as a crucial part of their innocence, they also perceived children as having a sexual instinct, an inherent sexuality that was just below the surface, and that could arise at any minute.

To position children as antithetical to sex as this most recent configuration has done, has two important ramifications for our discussion. First, child sexual abuse takes on the qualities of a universal diagnostic term, such that all victims are irrevocably damaged, forever outside normal sexual relations. The trauma of child sexual abuse is argued to follow the victim into adulthood, where “the failure to marry or promiscuity seems to be the only criterion generally accepted in the literature as conclusive that the victim has been harmed”²⁸. Second, although a focus on the asexual innocence of the child would seem to support the blameless status of

²⁵ Ibid, (2009, p 390)

²⁶ Danielle Egan and Gail Hawkes *Producing the prurient through the pedagogy of purity: childhood sexuality and the social purity movement* *Journal of Historical Sociology* 20:4, pp 443-461 (2007)

²⁷ Kerwin Kaye *Sexual Abuse Victims and the Wholesome Family* In Elizabeth Bernstein and Laurie Schaffner (eds) *Regulating Sex: the politics of Intimacy and Identity*. Routledge: New York, 143-166. (2005, p149)

²⁸ *ibid* p157

children, the fact that sexual knowledge is also the boundary between childhood and adulthood, marks out the victim of child sexual abuse as “too knowing”. A child who “sexually responds to the abuse, or appears flirtatious and sexually aware” is judged against the modern norm of childhood innocence. The “no longer virginal child becomes damaged goods” and “violating such a child becomes a lesser offence”, with such children often targeted for further abuse²⁹.

Within this emotionally charged arena there can be no discussion of “children’s rights or needs as sexual beings”, no conception that “exposure to sexuality” is an “experience that is worthy of being nurtured or encouraged”³⁰ or even that exposure to sexual activity can take place in a non-abusive frame. Yet at the same time, the move to engage in sexual behaviour is normal, expected and an “eventually encouraged social achievement for young adults”³¹. In fact, in many parts of the world, the chief task of parenting is to prepare children for adulthood in terms of labour and reproduction. In this current context, the rights of children as sexual beings can only be understood in terms of their right to protection from sexual exploitation. There is no way of thinking about the sexuality of children in terms of sexual responsibility. Difficulty ensues when the age of consent determines childhood, which as noted previously, in many jurisdictions can be as high as eighteen in certain situations. This blanket response to sexual relations between children under the age of consent, and adults over such an age, is to prolong childhood, and to infantilise young men and women, especially those between the ages of fifteen and seventeen.

Consent

By the nineteenth century, the separateness of childhood had become entrenched in Victorian ideology, and a greater capacity for emotional involvement in the welfare of the child, and increased parental authority was being encouraged within the family³². Central to this new

²⁹ *Ibid.* p156

³⁰ Elizabeth Bernstein and Laurie Schaffner ‘*Regulating sex: an introduction*’ in Elizabeth Bernstein and Laurie Schaffner (eds) *Regulating Sex: the politics of Intimacy and Identity*. Routledge: New York, xi (2005)

³¹ Laurie Schaffner ‘*Capacity, Consent and the Construction of Adulthood*’ in Elizabeth Bernstein and Laurie Schnaffer (eds) *Regulating Sex: the politics of intimacy and identity*. Routledge: New York, 189-205 (2005, p192)

³² Weeks supra note 16

relationship was the denial of certain types of behaviour between an adult and a child, with sexual contact specifically excluded. It is within this history of the “child as innocent” that the age of consent laws were passed through most parliaments in the western world. As Finch³³ identifies, these laws emerged as the direct result of a desire to demarcate the social age barriers at which a person could be considered and treated as a child, as well as demarcating a line between the sexual and non-sexual person, with the non-sexual child being “out of bounds” as a sexual partner. As Smart³⁴ notes, “we have a number of quite subtle boundaries being established ... Licit sex is not merely defined as that between married (heterosexual) couples, but between people of acceptable age brackets and doing only acceptable things”. Thomson³⁵ goes so far as to say that legitimate adult sexuality is predicated on the exclusion of the child. The age of sixteen (or eighteen) draws a moral boundary between the adult who can consent, and the child who cannot consent and is thus in need of protection from the harm of sexual relations.

Such an understanding has been enshrined in Canadian legislation, where in 2008, age of consent to sexual acts was renamed the *Age of Protection* and raised for the first time since 1890, from fourteen to sixteen years of age³⁶. The name change from consent to protection was significant, argues Dauda³⁷. “While age of consent speaks to the personal ability to render a decision ... age of protection avoided the question of personal decision making and diverted attention toward harm”. Around the same time in Canada, definitions of child pornography were expanded to include any material depicting persons under the age of eighteen for sexual purposes.³⁸

In a similar fashion, the *Framework Directive on combating sexual exploitation of children and child pornography* obliges all member States of the European Union to create extensive offences of child pornography and child prostitution to include all people up to the age of

³³ Finch supra note 20.

³⁴ Carol Smart ‘Disruptive Bodies and unruly sex: the regulation of reproduction and sexuality in the nineteenth century’, in Carol Smart (ed) *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality*. Routledge: London. (1992, p25)

³⁵ Rachel Thomson ‘An Adult Thing? Young People’s Perspectives on the Heterosexual Age of Consent’. *Sexualities*. 7:2, 133-149. (2004)

³⁶ *Criminal Code* 1985 (Canada) Section 151

³⁷ Carol Dauda ‘Sex, Gender and Generation: Age of Consent and Moral Regulation in Canada’. *Politics and Policy*. 38:6, 1159-1185. (2010)

³⁸ *Criminal Code* 1985 (Canada) Sections 152 and 172.1

eighteen years despite the age of sexual consent ranging from fourteen to sixteen years across all EU countries³⁹. In Australia, Commonwealth legislation on child pornography places the age at which protection is required at 18⁴⁰, as do the states of Victoria, Tasmania, the Australian Capital Territory and the Northern Territory⁴¹. Similar legislative amendments have occurred in New Zealand and the United Kingdom.⁴² This higher age of consent for pornography is argued to be based on the higher risk of exploitation, often for commercial purposes, that such activities might entail. However, recent research on the rise in ‘sexting’ as a sexual activity between teenagers has demonstrated the ambivalence that the criminalisation of such activity can create amongst researchers and legislators. While this activity may be harmful to children and adolescents, it may also unfairly tag them as purveyors of child pornography⁴³.

Understandings of the age at which a person can consent to sexual activity are also made relative to the perceived power relations between sexual partners. The enactment of Relations of Authority (RA) legislation has made it illegal in six of the eight states in Australia, for an adult over eighteen, in a relation of authority, care, supervision and/or trust with a child under the age of eighteen, to have sexual relations with that child even when they have reached the age of sexual consent⁴⁴. In such cases it is argued that a higher age of sexual consent is required due to the increased vulnerability to exploitation and manipulation such a relation

³⁹ The Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography was initially enacted in 2004. This Directive was repealed in 2011 and replaced with a new Framework Decision in 2012. In both cases, EU member states were obliged to enact domestic legislation which protected children under 18 from exploitation via online child exploitation material and prostitution. (European Commission Brussels 29.3.2010. COM (2010)94 Final. Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA)

⁴⁰ *Criminal Code Act 1995 (Cth)* Section 474.19-26

⁴¹ *Crimes Act (VIC) 1958*, section 68 and 70; *Criminal Code Act (TAS) 1924* Section 130; *Crime Act (ACT) 1900* Section 64A and 65; *Criminal Code Act (NT)*, Section 125B

⁴² *Crimes Act 1961 (NZ)* Section 131B; *Films, Videos and Publications Classification Act 1993 (NZ)* Section 127; *Sexual Offences Act 2003 (UK)* Section 15

⁴³ Murray Lee, Thomas Crofts, Michael Salter, Sanja Milivojevic and Alyce McGovern, *Let's Get Sexting: Risk, Power, Sex and Criminalisation in the Moral Domain*. *International Journal for Crime and Justice* 2:1, pp35-49. (2013).

⁴⁴ *Crimes Act 1900 (NSW)* Section 66C and 61M; *Crimes Act 1958 (VIC)* Section 45; *Criminal Code Act 1899 (QLD)* Sections 201 and 215; *Criminal Code (WA)* Sections 320 and 321; *Criminal Law Consolidation Act 1935 (SA)* Section 49; *Criminal Code Act (NT)* Section 127.

places on the child. Most European jurisdictions also have higher age limits for sexual contact within relations of authority, as do 12 states of the USA and all nations within the UK.⁴⁵ In these jurisdictions, individuals under the age of consent and those between the ages of consent and the age of majority are defined as children and categorised as victims through law. These child victims maintain such a status irrespective of their claims to the contrary.

Ironically, these higher ages of consent for certain types of sexual behaviour, based as they are on a perceived dependence and lack of capacity for decision making of young people up to the age of eighteen, are occurring in a cultural context where material dependence is extended often into the third decade of life, and where sexual activity is “an increasingly important marker of adulthood and autonomy”⁴⁶. A national survey of Australian secondary school students in 2008 found that over 50% of year 10 students (many of whom would be under 16 years) had engaged in sexual touching, 33% had engaged in oral sex and more than 25% had engaged in sexual intercourse⁴⁷. In Europe, a 2006 survey of the health behaviour of school aged children by the World Health Organisation found that between 12% (Slovakia) and 61% (Greenland) of survey respondents had their first experience of sexual intercourse by age 15, depending on the nation.⁴⁸ In the USA, the biannual survey of adolescent health risks, found in 2011 that 47.4% of young people (between the ages of 15-17) were sexually active, and that 9% of boys and 3.4% of girls had sexual intercourse before turning 13 years old.⁴⁹ This new rite of passage has replaced other markers of adulthood, like entrance into the labour force, or marriage and parenthood. This can mean that the transition to adulthood is more fragmented than in previous generations, as sexual activity comes long before economic

⁴⁵ Graupner, supra note 1, Tables 5-7.

⁴⁶ Thomson supra note 34, p135

⁴⁷ Anthony Smith, Paul Agnus, Anne Mitchell, Catherine Barrett, Marian Pitts, *Secondary Students and Sexual health 2008: results of the 4th National Survey of Australian Secondary Students HIV/AIDS and Sexual Health*. Australian Research Centre in Sex, Health and Society. LaTrobe University, Melbourne. 2009, <http://www.latrobe.edu.au/arcschs/downloads/arcschs-research-publications/secondary-students-and-sexual-health-2008.pdf>. Accessed 11th June 2013

⁴⁸ World Health Organisation, *Health Behaviour in School Aged Children International Report from 2005/2006 Survey*. Child and Adolescent Health Unit, University of Edinburgh, Scotland. 2006. p144. <http://www.childhealthresearch.eu/research/add-knowledge/HBSC%20international%20report%202005-06%20survey.pdf>. Accessed 11th June 2013

⁴⁹ Youth Risk Behaviour Surveillance System. *National Health Risk Behaviour and health Outcomes by Sex fact Sheet*. Centre for Disease Control and Prevention 2011. http://www.cdc.gov/healthyyouth/yrbs/pdf/us_disparitysex_yrbs.pdf. Accessed 11th June 2013.

independence. And all this in an increasingly sexualised popular culture, where young people are expected to be “competent participants,” and where attempts to regulate the consumption of sexual information and imagery are “confounded”⁵⁰.

Moreover, the various ways in which sexual consent has been policed in a number of western democracies opens up discussion around the context of age and sexual relations, by explicitly suggesting that harm and a response from the criminal justice system, is contingent. In the UK, variable sentences were in place until 2003 which demarcated a lesser punishment for sex with a child if that child was between 13 and 15 years of age (maximum of two years imprisonment) rather than under 13 years of age (maximum life imprisonment). While there was no defence for sex with a child under 13, if the man was under the age of 24 and the girl between 13 and 15, he was able to defend himself on the grounds that he reasonably believed her to be over 16⁵¹. Such defences have been in place since age of consent legislation was first passed. In Colonial Australia in the 19th century, the *Crimes (Girls Protection) Bill* in the state of New South Wales was passed in 1910, raising the age of consent to from fourteen sixteen. However, this Act specifically excluded girls of fourteen or fifteen from its protection if they looked over sixteen⁵². These mistaken identity defences are still common in jurisdictions worldwide where honest mistakes as to age remove liability in most European jurisdictions, with the exception of UK, Ireland, Italy and Norway.⁵³

Close in age exemptions also demonstrate the ambiguity around the relations between harm and sexual relations for those under the age of consent. In Canada for example, a *close in age exemption* was introduced into the criminal code in 2006⁵⁴ which allowed for sexual activity between 14 and 15 year old young people and a partner less than 5 years older (that is up to the age of 19 years) while a close in age exemption of under 2 years is in place for 12 and 13 year olds (with a partner up to the age of 14 years). In a similar fashion, the Australian state of Tasmania manages a higher age of consent (17) through age similarity defences which include those cases where the child is 15 years or over and the accused person is not more than five years older, or the child is above the age of 12 years and the

⁵⁰ Thomson supra note 34, p136

⁵¹ *ibid*

⁵² Judith Allen *Sex and Secrets*. Allen and Unwin: Sydney (1990)

⁵³ Graupner supra note 1, p120.

⁵⁴ Kalev Hunt, *Saving the Children: (Queer) Youth Sexuality and the Age of Consent in Canada*. Sexuality Research and Social Policy. 6:3, 15-33 (2009).

accused person is not more than 3 years older.⁵⁵ Such exemptions are also common in the USA, where between 1971 and 1999, forty-three states adopted close in age provisions which effectively decriminalized sex between teenagers of similar ages - between two and six years apart - depending on the state.⁵⁶

These understandings speak to the idea of *variable competence*, which is an issue that young people themselves have to grapple with everyday, especially when you consider the varying ages with which they are seen to be responsible citizens. Schaffner⁵⁷ identifies for example, the various ages at which adolescents are legally able to access certain rights and responsibilities across states in the USA: while they may not purchase alcohol till they are 21, they can be tried as a felon at 13, marry without parental consent at 16, enter into a labour contract at 14, and be housed in a juvenile detention facility at 10. Similarly, Dauda⁵⁸ notes the contradictions in Canadian parliamentary debate between discussions over sexual consent and criminal activity. While discussions during amendments to the *Protection of Children and Other Vulnerable Persons* and to the *Criminal Code* placed young people (particularly young women) as incompetent, lacking both autonomy and responsibility for decision making, debates during an amendment to the *Youth Criminal Justice Act* discussed offending youths (predominantly young men) as aware of their actions and consequences⁵⁹. Finally, Angelides⁶⁰ notes the fact that adolescents as young as twelve can legally prove their competency to receive contraceptive information, devices or prescriptions, or procure an abortion, and all without the approval of their parents, is an explicit recognition of the “sexual maturity, competence and sexual power of some adolescents.” It also speaks to a differentiation between autonomy and gender, where young men are more often positioned as having more access to dimensions of competency and responsibility than young women.

⁵⁵ *Criminal Code Act (TAS) 1924*, Section 124(3)

⁵⁶ Carolyn E. Cocca. *Jailbait: The Politics of Statutory Rape Laws in the United States*. Albany: State University of New York Press (2004). It is interesting to note that close in age provisions in the USA, for example, which offer a nuanced approach to the relation of harm and sex, occur alongside the strict liability rule where a mistake as to age is not applicable in cases of statutory rape, even when induced by the victim’s false representation.

⁵⁷ Schaffner *supra* note 30.

⁵⁸ Dauda *supra* note 5.

⁵⁹ Rebecca Raby ‘*Children in Sex, Adults in Crime: Constructing and Confining Teens*’. Resources for Feminist Research. 31:3/4, 9-28. (2006)

⁶⁰ Steven Angelides *Inter/subjectivity, power and teacher-student sex crime*. Subjectivity. 26, (2009, p101)

Responsibility

Since the media “discovery” of the paedophile in the 1990’s, sex abuse against children has dominated the press⁶¹ and while research to date indicates that it is difficult to determine the prevalence of sexual abuse due to high levels of underreporting⁶², official statistics generally indicate the majority of sex offenders are male and most victims female⁶³. As a result, most sex offending research has to date focused on male perpetrators and female victims⁶⁴. While there are well identified problems with official statistics on sex offending⁶⁵ such problems have generally been used to suggest that the incidence of female sexual abuse at the hands of men is under-recorded⁶⁶. This response is possible because feminism has been able to identify and theorise the gendered nature of sex crimes through a recognition that male sexual offenders are not aberrant monsters but rather that their behaviour can be located on a continuum of normative masculinity⁶⁷. In this way sex offending is taken out of the sphere of the monstrous and placed squarely and firmly in the domestic and the everyday⁶⁸.

However, the articulation of a normative frame of masculinity as a way of understanding and explaining male sexual abuse of children also essentialises women within a normative frame of femininity. Such a perception draws on an understanding of women as naturally caring,

⁶¹ Terry Thomas, *Sex Crime: Sex Offending and Society*. Willan: London 2nd edition. (2005)

⁶² Alexandra Neame and Melanie Heenan, ‘What lies behind the hidden figure of sexual assault? Issues of prevalence and disclosure’. Australian Centre for the Study of Sexual Assault Briefing Paper, Australian Institute of Family Studies. no. 1, Sept, 2-11.(2003) http://www.aifs.gov.au/acssa/pubs/briefing/acssa_briefing1.pdf. accessed 29th January 2013.

⁶³ Helen Gavin ‘The social construction of the child sex offender explored by narrative’. The Qualitative Report. 10, 395-415 (2005)

⁶⁴ Donna Vandiver and Jeffrey Walker ‘Female Sex Offenders: An Overview of 40 cases’. Criminal Justice Review, 27:2, 284-300 (2003)

⁶⁵ Moira Carmody and Kerry Carrington ‘Preventing sexual violence?’ Australian and New Zealand Journal of Criminology, Volume 33 Number 3 pp.341-361 (2000)

⁶⁶ Denov, Miriam ‘To a safer place? Victims of sexual abuse by females and their disclosures to professionals’. Child Abuse and Neglect. 27, 47-61. (2003); Liz Kelly *Surviving Sexual Violence*. Polity Press: Cambridge (1988)

⁶⁷ Liz Hall and Siobhan Lloyd *Surviving Child Sexual Assault* The Falmer Press: London (1989); Elizabeth Bass and Laura Davies *The Courage to Heal: A guide for women survivors of child sexual abuse*. Harpers Collins Press: New York. Third edition (1995)

⁶⁸ Thomas supra note 61

nurturing, sexually passive, non-aggressive and innocent⁶⁹. This has meant that female sexual abuse of children is positioned in one of three ways: it is an aberrant case and ignored⁷⁰; it is the outcome of coercion or emotional dependence on a male partner⁷¹; or, if the woman offends alone, her history of previous victimisation at the hands of men is utilised to explain her offending behaviour⁷². In most cases, the woman's sexual offending is minimised and her victimisation highlighted⁷³. This renegotiation of offending behaviour enables reconciliation of her aberrant behaviour and returns her to a socially acceptable performance of femininity.

The overwhelming belief that the sex offender is male is supported by the majority of research which does not contemplate the female sex offender,⁷⁴ with most studies failing to even identify the gender of the adult⁷⁵. In fact in the 1970s and 1980s female sexual offending was considered so rare as to be "of little significance," an approach which has now become "paradigmatic" within the field of child sexual abuse⁷⁶. While historically this focus on the male sex offender has been supported by official statistics which have placed female sex offending at 5% of all sex offending⁷⁷, more recent research in the US and UK places female sexual offending at 25%⁷⁸ and 30%⁷⁹ respectively, with further research

⁶⁹ Mary. M. Brabeck 'Introduction: Who Cares?' in M. Brabeck (ed) *Who Cares? Theory, research and educational implications of the ethic of care*. Praeger: New York, 1-14. (1989); Nel Noddings, *The Challenge to Care in Schools*. Teachers College Press: New York. (1992).

⁷⁰ Andrea Nelson and Pamela Oliver 'Gender and the Construction of Consent in Child-Adult Sexual Contact: Beyond Gender Neutrality and Male Monopoly.' *Gender and Society*. 12:5, 554-577. (1998)

⁷¹ Amanda Matravers 'Understanding Women who Commit Sex Offences', in Gail Letherby, Kate Williams, Philip Birch and Maureen Cain (eds) *Sex as Crime?* Willan Publishing: Devon. (2008)

⁷² Donna VanDiver and Glen Kercher, *Offender and Victim Characteristics of registered Female Sexual Offenders in Texas: A Proposed Typology*. *Sexual Abuse: Journal of Research and Treatment* 16:2, p121-137. (2004).

⁷³ Steven Angelides 'Subjectivity under Erasure: Adolescent Sexuality, Gender, and Teacher-Student Sex'. *The Journal of Men's Studies*. 15:3, 347-360 (2007)

⁷⁴ Roland Landor 'Double Standards? Representations of Male vs Female Sex offenders in the Australian Media' *Griffith Working Papers in Pragmatics and Intercultural Communication*. 2:2, 84-93. (2009)

⁷⁵ Nelson and Oliver supra note 70.

⁷⁶ Denov supra note 66.

⁷⁷ Pamela Nathan and Tony Ward 'Female Child Sex Offenders: Clinical and Demographic Features'. *Journal of Sexual Aggression*. 8:1, 5-21(2002).

⁷⁸ Boroughs, Deborah S. "Female sexual abusers of children". *Children and Youth Services Review* 26 (5): 481-487 (2004).

contemplating its rapid increase in relation to male sex offending⁸⁰ and still other research demonstrating that female sex offending is more under-reported than male sex offending⁸¹.

This discovery of the female sexual offender in the last 20 years has however, had ambiguous and contradictory outcomes. In the literature on statutory rape, the shift to gender neutral language in legislation in the USA for example, was hailed as a marked breakthrough in gender equality, challenging the double standard of sexual morality inherent in the law.⁸² However, even today legal research and scholarship still presume that the circumstances under which statutory rape occur is heterosexual, involving cases of “male perpetrators and girl victims almost to the exclusion of any other sex or age combination,” and this is also the “premise that drives the policy agenda.”⁸³ In the USA this policy agenda has been predominantly welfare focused - on teenage pregnancies and child support – and so the shift to gender neutral language, and the recognition of female culpability has done nothing to challenge the traditional heterosexual focus on male perpetrators and female victims. Similarly, the more recent focus on exploitation and harm “has done little to alter the way most criminal justice officials think about statutory rape,”⁸⁴ which continue to reflect highly gendered performances of sexual scripts where girls rather than boys are harmed, and men rather than women are responsible. As an example, Hayes, Carpenter and O’Brien⁸⁵ surveyed 487 media reports from Australia and the UK on female sex offenders over the period 2000 to 2010 and found that women who offended against adolescent boys were the most likely to receive lighter sentences, including suspension of the sentence altogether, when compared with all other female sex offenders. In one high profile case in Australia in 2004, a 37-year-

⁷⁹ Mark Townsend and Rajeev Syal ‘Up to 64000 women in the UK are child sex offenders’. *The Observer*. Sunday 4th October. <http://www.guardian.co.uk/society/2009/oct/04/uk-female-child-sex-offenders> (2009)

⁸⁰ Julia Davidson *Child Sexual Abuse: media representations and government reactions*. Routledge Cavendish: Abingdon. UK (2008)

⁸¹ Rebecca Deering and David Mellor ‘Female Perpetrated Child Sexual Abuse: Definitional and Categorisational Analysis.’ *Psychiatry, Psychology and the Law*. 14:2, 218-226. (2007)

⁸² As of August 2000, all fifty states have gender neutral statutory rape laws. See Carolyn Cocca *Prosecuting Mrs Robinson? Gender, Sexuality and Statutory Rape Laws*. Michigan Feminist Studies, vol 16, 2002.

⁸³ Levine supra note 11, p369

⁸⁴ *ibid* p378

⁸⁵ Sharon Hayes, Belinda Carpenter and Erin O’Brien (2011) “Constructions of Female Sex Offenders: Exploring Public Discourses”. *British Society of Criminology Conference*, 3-6 July 2011, Northumbria University, Newcastle.

old female teacher found guilty of six counts of sexual penetration with a child under 16 was initially awarded a three year suspended sentence of twenty-two months by the Judge, based on his assessment that she was “clearly not a predator.”⁸⁶

However, the news media have also been found to report the sex crimes of female offenders at an exaggerated rate. By emphasising some crimes and ignoring others, and by sympathising with some victims while shaming others, the media draws attention to and creates public perception⁸⁷. The disproportionate amount of attention in the media on the “sexual proclivities of female teachers,” for example, despite them being in the minority of all offenders, is explained by Cavanagh⁸⁸ as part of a deep social and cultural ambivalence. Female teachers who offend against their male students are positioned as doubly damned – they are acting against both their nature and the law. As a teacher – in loco parentis – her transgression is akin to breaking the incest taboo. As predatory and assertive she is transgressive to both her own feminine nature and to the masculinity of her male victims for whom she is seen as “confining to an infantile maternal world”. She is also eroticised as she is punished with an unusually large amount of media discussion about her looks, and her sexual activities with her “victim” – far more than ever occur when the offender is an adult male⁸⁹. She is thus more often portrayed as influential and exploitative rather than coercive or abusive, which according to Cocca, reaches back to a construction of women who sexually offend as a seductive temptress’ rather than a predatory pedophile.⁹⁰

These varying portrayals of female culpability are situated within a context of increasing cultural paranoia over sexual relations with children⁹¹. The public outcry against the perceived lenient sentence of Karen Ellis in Australia, as well as Mary Kay LeTourneau in

⁸⁶ Joe Stennis ‘*Equal Protection dilemma’s: why male adolescent students need federal protection for adult female teachers who prey on them*’. *Journal of Law and Education*. 35, 395-403. (2006);

⁸⁷ Kitzinger, J. *Framing Abuse: Media Influence and Public Understanding of Sexual Violence against Children*. Pluto: London. (2004)

⁸⁸ Sheila Cavanagh. *Sexing the Teacher: School Sex Scandals and Queer Pedagogies*. Vancouver: UBC Press. (2007)

⁸⁹ Steven Angelides ‘*Hot for the Teacher: The Cultural Erotics and Anxieties of Adolescent Sexuality*’. *Media International Australia*. 135: May, 71-81. (2010)

⁹⁰ Cocca, supra note 82.

⁹¹ Steven Angelides ‘*Sexual offences against children and the question of judicial gender bias*’. *Australian Feminist Studies*. 23:57, 359-373 (2008)

the USA and Melissa George in the UK, ⁹²exemplifies this equal opportunity outrage at sexual offending. In the case of Karen Ellis, the Director of Public Prosecution was forced to lodge an appeal on the grounds that the sentence was “manifestly inadequate”. The Appeal was not only upheld, but the offender was imprisoned for two years eight months and registered as a serious sexual offender⁹³. Similar reactions in the USA to the charges being dropped in the highly publicised LaFave case noted the gender inequality of the matter as a kind of reverse sexism⁹⁴. Unlike previously discussed research and the response of criminal justice agencies, public discourse, motivated in part by selective media portrayals, does proclaim the importance of gender neutrality in culpability and harm. However, following Angelides⁹⁵ we query whether the categories of offender and victim “map unproblematically” onto adults and children. As the examples of statutory rape demonstrates, it is very difficult to challenge the traditional sexual scripts of masculinity and femininity, to see harm and responsibility in contexts outside of normative frames of reference that position men and boys with a natural sexual aggression that is powerful, forceful and potentially dangerous, and women and girls with a natural proclivity to contain and resist the harm of risky sexual relations. The rest of the article considers this complex issue by examining the relation between harm and under age sex.

Harm

At its most straightforward, age of consent laws are to protect children from harm and exploitation. The harm of under-age sex is based on the negative psychological and physiological outcomes that can occur as a result of sexual conduct prior to sexual readiness, which generally aligns with the capacities of social and emotional maturity required for meaningful consent, as opposed to simple ‘willingness’. While some of these are quite straightforward and could apply to anyone, and include sexually transmitted diseases and unplanned parenthood, others are much more closely linked with social fears around early sexual activity, and include loss of self esteem, depression, post traumatic stress, self harm

⁹² Sharon Hayes and Belinda Carpenter, *Social Moralities and Discursive Constructions of female sex offenders*. *Sexualities*, 16:1-2, pp159-179 (2013)

⁹³ Steven Angelides ‘*Subjectivity under erasure: Adolescent Sexuality, Gender, and Teacher-Student Sex*’. *The Journal of Men’s Studies*. 15:3, 347-360 (2007)

⁹⁴ Gina Pace *Teacher-Sex Outcome Sparks Outrage*. CBS News (2006)

⁹⁵ Angelides supra note 73.

and substance abuse.⁹⁶ The exploitation of under-age sex relates directly to the wrongfulness of adults engaging in sexual activity with children due to an imbalance in power (physical, social, economic) as well as a capacity for manipulation, control, and dependence. A balance thus needs to be struck between protection from the harm of underage sex and protection from the sexual exploitation of predatory adults.⁹⁷

The problem is not of course, child sexual abuse *per se* but its ever increasing parameters – where children up to the age of eighteen are innocent victims and adults are predatory offenders – “which functions to determine the normative boundaries of adolescent subjectivity at the same time as erasing the experiences of actual adolescents themselves”⁹⁸. In the shift from consent to protection, the danger is in the belief that young people lack the capacity to make informed and responsible decisions with regard to sex. Perhaps this is why it is research which has spoken to young people about their sexual experiences with adults that has had the most to say about the nuances of harm and culpability. By framing the research in terms of sexual experiences and sexual contact rather than sexual abuse, such research has included a range of children otherwise excluded, especially those who do not believe they have been harmed or abused.

According to Rind⁹⁹ research shows that heterosexual adolescent boys react predominantly positively to sexual relations with women. In eight studies across three countries in the 1980s and 1990s, positive experiences were reported by 50 to 85 percent of young men, compared with 3 to 25 percent of negative experiences. Interestingly, all of these studies identified that negative experiences coincided with incestuous contacts and coercion while the positive experiences were related to interest and willingness on the part of the boys involved. Rind¹⁰⁰ concludes that for heterosexual adolescent boys involved with women, “empirical data are

⁹⁶ Mathews, *supra* note 9, p15.

⁹⁷ Tasmanian Law Reform Institute, *Sexual Offences Against Young People: Final Report*, pp1-93, October 2012.

http://www.utas.edu.au/_data/assets/pdf_file/0008/319814/YoungPeopleSexualOffencesFR.pdf. Accessed 11th June 2013.

⁹⁸ Angelides *supra* note 91, p359

⁹⁹ Bruce Rind ‘An Empirical Examination of Sexual Relations between Adolescents and Adults: They differ from those between children and adults and should be treated separately’. In Helmut Graupner and Vern L. Bullough (eds) *Adolescence, Sexuality and the Criminal Law: Multidisciplinary Perspectives*. Haworth Press: New York, 55-62. (2004)

¹⁰⁰ *Ibid.* p61

strongly at odds with the assumption of trauma”. Deering and Mellor¹⁰¹, also cite a range of studies which support this claim, revealing that the majority of male victims perceived early sexual contact with a female as either having a neutral or positive overall general impact. Like Rind they note that such positive experiences are based on “consensual sexual contact with unrelated female perpetrators that typically occur during the period of adolescence rather than early childhood”¹⁰².

Similarly, Nelson and Oliver’s¹⁰³ research compared the gender dynamics in adult-child sexual relations. In a self report questionnaire of 923 college students, 10.4 percent of female students and 5.4 percent of male students reported sexual contact with an adult (eighteen or over) while they were below the age of sexual consent (fifteen or younger). Their findings reveal that the vast majority of adult-child sexual contacts were heterosexual: 98 percent of girls’ contacts were with men while 69 percent of boys’ contacts were with women. They also found that the vast majority of contacts were initiated by adults under the age of 22 for both boys and girls and that many of the children interpreted the experience as consensual. Overall, 24 percent of the sample said “unambiguously” that they wanted or agreed to the experience, 9 percent used words like “curious”, and “experimentation” while a further 26 percent reported both positive and negative feelings. Forty one percent labelled the experience as coercive or negative. Such research does not therefore claim that such relations are always unambiguously healthy and positive, but it does start to offer a more nuanced approach to the blanket imposition of harm when adolescents and adults engage in sexual relations, especially given that many of these would be covered by close in age exemptions in most jurisdictions.¹⁰⁴

However, if we drill down further into the gender specifics of the research findings we start to appreciate the ways in which the sexual scripts of masculinity and femininity may have an impact on the experience for the young person. What Nelson and Oliver also found was when the adults were men, “80 percent of the boys and 78 percent of the girls said they felt

¹⁰¹ Rebecca Deering and David Mellor ‘*An Exploratory Qualitative Study of the Self-Reported Impact of Female-Perpetrated Childhood Sexual Abuse*’. *Journal of Child Sexual Abuse*. 20:1, 58-76. (2011)

¹⁰² *ibid*, p 59

¹⁰³ Nelson and Oliver *supra* note 70

¹⁰⁴ See also Pat Sikes, *Scandalous stories and dangerous liaisons : when female pupils and male teachers fall in love*. *Sex Education: Sexuality, Society and Learning*. 6:3, 265-280 (2006).

forced or coerced while only 12 percent of the girls and no boys said they agreed to or wanted the experience”. In contrast, when the sexual contact was with a woman, 82 percent of the boys reported agreeing to or wanting it and only 18 percent reported coercion or abuse. Like gender, age also affected the experience but more significantly for girls, with 88 percent of those thirteen or under feeling abused or coerced, versus 60 percent of those 14 or 15 years at the time of the sexual contact. In contrast, for boys, the gender of the adult was the most significant. When the adult was a male they were more likely to report abuse or coercion and the only two boys who reported abuse or coercion when the adult was a woman were eight and nine at the time, - “the youngest ages reported in the sample for such contact”. For Nelson and Oliver “the legal category of sexual abuse does not map onto a unitary subjective category of abusive experience”.

In a similar fashion, research which uses hypothetical situations to assess the perceived harm of sexual scenarios between adolescents and adults has also found that traditional sexual scripts influence young people’s readings of the situation, with young women in heterosexual encounters more likely to be seen as victims than young men, irrespective of their encouraging behaviour.¹⁰⁵ In their research with 4585 students across 41 schools in Norway whose average age was eighteen, Smette, Stefanson and Mossige presented a range of heterosexual vignettes that deliberately positioned under-age adolescents in sexual situations with adults. They found that in each case, while the situation was legally an unambiguous instance of child sexual abuse, many students, both boys and girls, did not agree that it was. The main distinctions centred on age and gender: was the ‘victim’ a child or a young person; was the ‘victim’ a boy or a girl.¹⁰⁶ These parameters of gender and age also have an impact on public perceptions of blame, with younger children seen as less culpable than older adolescents, while males, especially adolescent male victims with an adult female, are

¹⁰⁵ Sylvia Broussard, William Wagner and Richard Kazelskis, *Undergraduate Students’ Perceptions of Child Sexual Abuse: The Impact of Victim Sex, Perpetrator Sex, Respondent Sex and Victim Response*, *Journal of Family Violence* 267, 269-272 (1991); Katherine Dollar, Andrea Perry, MaryEllen Fromuth and Aimee Holt, *Influence of Gender Roles on Perceptions of Teacher/Adolescent Student Sexual Relations*, *Sex Roles*, 50, 1: 91-101. (2004).

¹⁰⁶ Ingrid Smette, Kari Stefansen and Svein Mossige, *Responsible Victims? Young People’s understandings of agency and responsibility in sexual situations involving underage girls*. *Young* 17:4, 351-373. (2009)

deemed to be more culpable. Maynard and Weiderman¹⁰⁷ found that this was also compounded by the gender of the survey respondent. Female respondents were more likely to view sexual interactions between adults and children of all ages as child sexual abuse, regardless of gender or sexuality while male respondents were less likely to see sexual interactions between male adolescents and women over the age of consent as child sexual abuse. While close in age exemptions in most jurisdictions also recognise that age may be a complicating factor in the harm of child sexual abuse, the concomitant shift to gender neutral language in legislation, and its underlying assumption that women and men are as culpable, and boys and girls equally vulnerable, suggests that the gender difference in ideas of harm requires further discussion.

One reason given for such differences is the “lucky boy” legend which asserts that young men in relationships with older attractive and sexually experienced women are “living the dream” of heterosexuality, and that rather than being harmed by such encounters, may in fact benefit from them. In the research by Smette, Stefanson and Mossige discussed above, both male and female participants agreed that boys are less vulnerable than girls and that a sexual encounter between a boy and an older woman was not abusive. In fact some of the boys argued that sexual relationships with an older female would be “exciting and attractive”.¹⁰⁸

Another argument for the lack of perceived harm comes from research around young people’s gendered experiences of subjectivity at puberty. According to Martin¹⁰⁹ it is at adolescence that boys “come to solidify feelings of agency and sexual subjectivity” while for girls the opposite is often the case. Girls tend to emerge from puberty feeling “less agentic and sexually subjective” and there may be a number of reasons for this. First, girls tend to reach puberty earlier than boys and often as a consequence have much less subjective experiential knowledge as well as less cognitive rational knowledge about their bodies than boys do when they reach puberty. Second, puberty makes boys look older and more adult and this means that they tend to receive more independence and autonomy from parents. In contrast, puberty for girls makes them look more sexual and parents’ fears about safety often mean that adolescent girls are not given the freedom and autonomy available to adolescent

¹⁰⁷ Carrie Maynard and Michael Weiderman, *Undergraduate student’s perceptions of child sexual abuse: effects of age, sex and gender roles attitudes*. *Child Abuse and Neglect* 21:9, 833-844 (1997)

¹⁰⁸ Smette, Stefansen and Mossige, *supra* note 106, p 361.

¹⁰⁹ Karen Martin *Puberty, Sexuality and the Self*. Routledge: New York (1996, p14-15)

boys. Unfortunately it is the freedom and responsibility given to boys by their parents which then increases the boys' own sense of independence and autonomy. This is not as easily or automatically offered to adolescent girls. Third, boys play with and make use of their pubertal bodies, taking pleasure in the strength and virility of their new bodies and abilities while puberty for girls comes with a range of negative cultural associations around menstruation (dirt, shame, taboo) and sexual experience (the danger of rape, the fear of pregnancy, the loss of reputation) for example, which temper positive experiences. As a consequence, the actual physical experience of puberty for adolescent boys and girls may be markedly different. Most significantly, girls tend to experience a significant drop in self esteem while boys self esteem generally increases during this time.

However, a further reason why sexual contact between adult women and adolescent boys may be perceived as less harmful is due to the way in which the sexual scripts of masculinity and femininity play out in these sexual experiences. In their research on adult child sexual contact, Nelson and Oliver¹¹⁰ also examined the behaviour of the adult. They found that the key to most respondent's interpretation of their experiences was whether the adult "asked" the child rather than simply "taking". Asking was linked to positive experiences while taking was linked to negative experiences and men were more likely to take (76 percent of children reflected on these encounters as negative) while women generally asked (75 percent of children reflected on these encounters as positive). For Nelson and Oliver¹¹¹ "asking and taking appear to be the key". Given that the vast majority of encounters in this research were heterosexual, this may further explain why boys especially tended to construct such encounters in a positive light, "as sexual initiation or sexual experimentation" especially given its alignment with the "lucky boy" legend. This "positive status enhancement" of having sex with a woman seemed to predominate, with the resultant masculine potency more important than any sense of manipulation. In contrast, while both boys and girls defined the majority of their encounters with men as abusive even if they had not been overtly forced, this tended to mean that the vast majority of girls felt abused, given the dominance of heterosexual sexual contact in this research. Moreover, given our previous discussion of puberty and self esteem, Nelson and Oliver¹¹² argue that it was the boys "potent self images" of masculinity and sex which allowed them to counter any feelings of victimisation, "while

¹¹⁰ Nelson and Oliver supra note 70.

¹¹¹ *Ibid.* p569

¹¹² *Ibid.* p573

passive feminine identities reinforced a sense of helplessness and victimisation” for the girls. This was magnified by the girls’ failure to resist the sexual contact in the first place, an important marker of femininity in social and cultural scripts, which also played into concerns over loss of reputation, another important marker of femininity in current social and cultural scripts. The options of status self enhancement available to the boys was “largely unavailable for girls in similar circumstances”¹¹³. This seems to suggest that attention needs to be given to the normative frame of femininity and masculinity in the context of heterosexual sex, operating as it appears to, differentially across the social taboo of sex with children under the age of consent.

Sex

Gendered sexual performances are embedded in cultural norms about sexuality and reflect gendered stereotypes and behavioural expectations. Traditional masculine roles prioritise independence, assertiveness, and sexual exploration, as well as a “bodily centred set of sexual scripts” which see sexual activity as directed toward “self pleasure and tension release” rather than relationship affirmation¹¹⁴. Men are perceived as naturally more aggressive and have the active role in sexual relationships. It is difficult to perceive men as sexually reluctant or as victims of sexual coercion or assault¹¹⁵. In contrast to the traditional masculine script, the traditional feminine script is one that emphasises idealism, passivity and virtue. Feminine gender roles are based more on behavioural restraint and personal control.¹¹⁶ These current notions of femininity and masculinity arose during the eighteenth century when middle class women chose to take on the habitus of the upper class: ease, restraint, calm and luxurious decoration. Passive and dependent, physically frail and asexual, they displayed “divine composure”: silent, static, invisible and composed¹¹⁷. There arose a division between the feminine and the sexual. As sexually passive and innocent, she is sexually harmless - neither sexually aggressive nor an initiator of sex. Her role is to influence men to avoid sex – she is the sexual gatekeeper. Importantly for this discussion, such historical notions have a modern

¹¹³ Ibid.

¹¹⁴ Michael Wiederman ‘*The Gendered Nature of Sexual Scripts*’. *The Family Journal: Counselling and Therapy for Couples and Families*. 13:4, 496-502. (2005)

¹¹⁵ Denov supra note 66.

¹¹⁶ Carolina Overlien, *Innocent Girls or Active Young Women? Negotiating Sexual Agency at a Detention Home*. *Feminism and Psychology*. 13:3, 345-367. (2003).

¹¹⁷ Beverly Skeggs *Formations of Class and Gender: becoming respectable*. Sage: London. (1997)

effect on the available sexual scripts for both men and women with such gender roles strongly embedded in many sex education programs offered to boys and girls, which Carmody¹¹⁸ argues perpetuate the assumption that women are responsible for resisting sex, while men are responsible for pursuing it. This construction not only undermines attempts to reduce sexual violence, but also “precludes a flexible and negotiated consent” for individual sexual encounters¹¹⁹.

In fact it has been argued quite convincingly that the cultural scripts about sex figure in the ways in which women think about sex and learn about sex. Sex is more about sexual intimacy than bodily pleasures and there is a continued missing discourse of desire or erotics in research and sex education for young women¹²⁰. Young women in particular have been regarded as particularly vulnerable to sexually transmitted diseases and pregnancies as well as the emotional trauma and psychological harm that comes from unwanted sexual intercourse¹²¹. In fact research into girls’ sexuality has noted a focus on sex education via discussions of pregnancy and contraception and a subsequent silencing of any discussions about sexual pleasure, desire or the erotic¹²². Tolman¹²³ argues that despite the real gains by feminism in reproductive rights and sexual liberation, “the tactics of silencing and denigrating women’s sexual desire are deeply entrenched”. Sex education curricula name male adolescent desire and teach girls to “recognise and keep a lid on the sexual desire of boys” while failing to acknowledge or even recognise the sexual feelings of the girls¹²⁴. Similarly, Fine¹²⁵ noted that adolescent girls’ sexuality was acknowledged by adults in

¹¹⁸ Moira Carmody 'Sexual ethics and violence prevention' *Social and Legal Studies: An International Journal*, 12:2, 199-216 (2003)

¹¹⁹ Ibid. p205

¹²⁰ Anastasia Powell *Sex, Power and Consent*. Cambridge University Press: Cambridge. (2010)

¹²¹ Michelle Fine ‘Sexuality, Schooling and adolescent females: the missing discourse of desire’ in Michelle Fine (ed) *Disruptive Voices: the possibilities of feminist research*. University of Michigan press: Anne Arbour, 31-60. (1992); Michelle Fine and Di McClelland ‘Sexuality education and desire: still missing after all these years’. *Harvard Educational Review*. 76:3, 297-338. (2006).

¹²² Powell supra note 119.

¹²³ Deborah Tolman ‘Doing Desire: Adolescent Girls struggle for/with Sexuality’ in Michael Kimmel and Rebecca Plante (eds) *Sexualities: Identities, Behaviours and Society*. Oxford University Press: New York. (2004, p88)

¹²⁴ Deborah Tolman *Dilemmas of Desire: Teenage Girls talk about Sexuality*. Harvard University Press: Cambridge MA (2002)

¹²⁵ Michelle Fine ‘Sexuality, Schooling and Adolescent Females: the missing discourse of desire’. *Harvard Educational Review*, 58:1, 29-53. (1988)

schools but in terms that denied the sexual subjectivity of the girls. There was, according to Fine¹²⁶ “a missing discourse of desire”. Thorne and Luria¹²⁷ recognise that sexuality is differently learned for adolescent boys and girls. “Girls emphasise and learn about the emotional and romantic before the explicitly sexual.” For boys the sequence occurs in reverse. “Commitment to sexual acts precedes commitment to emotion laden, intimate relationships and the rhetoric of romantic love.” Moreover, the focus on appearance in pre-adolescent girls, where girls remark on their own and others looks long before they talk about the appearance of boys, has been linked with “the pattern of performing and being watched” in later female sexual expression¹²⁸.

Adolescent female sexuality mixes in desire and sexual feelings with fear and risk, particularly a fear of pregnancy and a loss of reputation. According to Tolman¹²⁹ our current society denigrates and suppresses female sexual feelings but also heightens the dangers of girls’ sexuality. As Kimmel and Plante identified in their research on the sexual fantasies of men and women, whether or not they were active or passive in their fantasy, women always experienced the fantasy as passive while men always experienced the fantasy as active. Such measures of activity and passivity seem to speak to measures of interpersonal sexual power. “By casting themselves as fantasy objects of desire, with less visible sexual agency, women may ultimately be less able to exert sexual desires”¹³⁰.

In Powell’s¹³¹ research with young men and women in Australia, these gendered norms of men as active and pursuant, and women as passive and resistant, were evident in their discussions of their sexual relations. For young women, desire was expressed but only in terms of their desire to please and to be loved. In sexual relationships with young men this became manifest in a range of behaviours which situated love with acquiescence, with

¹²⁶ *Ibid.*

¹²⁷ Barrie Thorne and Zella Luria ‘Sexuality and Gender in children’s daily worlds’. In Michael Kimmel and Rebecca Plante (eds) *Sexualities: Identities, Behaviours and Society*. Oxford University Press: New York, 87-98. (2004, p81)

¹²⁸ *Ibid.*

¹²⁹ Deborah Tolman ‘Doing Desire: Adolescent Girls struggle for/with Sexuality’ in Michael Kimmel and Rebecca Plante (eds) *Sexualities: Identities, Behaviours and Society*. Oxford University Press: New York (2004)

¹³⁰ Micheal S Kimmel & Rebecca F Plante "The gender of desire: The sexual fantasies of women and men", Patricia Gagné and Richard Tewksbury, in (ed.) *Gendered Sexualities* (Advances in Gender Research, Volume 6), Emerald Group Publishing Limited (2004, p73)

¹³¹ Powell supra note 8

pleasing the other person, and putting others sexual needs and desires ahead of their own. For young men, taking the initiative was deemed important, with an active (and at times aggressive) male sexual desire expected. Gendered norms surrounding the performance of sexual scripts also mean that young women choose to have unwanted sex *without* viewing such an encounter as pressured or coerced. Similarly, young women's passivity positions young men as "able to exert pressure whether they actually intend to or not"¹³². Powell¹³³ concludes that a number of highly gendered unwritten rules are still in place in young people's sexual encounters which mean that young women in particular "commonly experience pressured and unwanted sex" especially in love relationships and "in the absence of a sense of their needs and sexual desires". The "romantic" or "perfect love" discourses articulated by young women and identified thirty years ago by Holloway¹³⁴ mean that young women may still submit to sexual pressure in relationships in the name of love, such that love is interpreted as doing what is best for him even if it is contrary to what the women themselves want¹³⁵. In contrast, (young) men are perceived as sexually motivated with an irrepressible biological need for sex and are expected to act on these sexual desires with (young) women as the often passive objects of this.

What this tends to mean is that in heterosexual sexual relations, consent is integral to the feminine performance. Far from being just a personal and individual choice, consent is also situated within a specific social and cultural context. Certainly it is the case that "instances of pressured or unwanted sex are most often attributed to differences in men's and women's gender roles"¹³⁶. Sexual miscommunication is often thus tied up with the sexual scripts of masculine activity and assertiveness and feminine passivity and accommodation. It is women who are the ones responsible for communicating their refusals, and this is evident in the vast array of rape prevention strategies, where women are encouraged to say no clearly or given assertiveness training to help them verbally (and physically) communicate their (lack of) consent. However, research into the issue of sexual consent demonstrates that such consent is

¹³² *Ibid.* p177

¹³³ Powell *supra* note 119.

¹³⁴ Wendy Holloway 'Gender Difference and the production of subjectivity'. In Julie Henriques, Wendy Holloway and C. Urwin, C Venn and Valerie Walkerdine (Eds) *Changing the Subject: Psychology, social regulation and and subjectivity*. London: Sage, 223-261. (1984)

¹³⁵ Mary Thomas *Pleasure and Propriety: teen girls and the practice of straight space*. Environment and Planning D: Society and Space 22, 773-789 (2004).

¹³⁶ Powell *supra* note 8, p170

rarely verbal, with young men and women especially relying on a vast array of unspoken body language¹³⁷.

Age of consent laws figure in such discussions since they frame the sexual cultures within which young people become sexual agents. In Thomson's¹³⁸ research with young people, the connection between culture, the law and intimate relations is clearly seen in the understanding of age of consent laws as much more about the protection of girls than boys. Concerns over sexual pressure dominated the discussions of young women with many describing the difficulties of sexual consent in a cultural context where pressure from boyfriends was normal. Most young women positioned (albeit reluctantly) age of consent laws as a necessary (if rather ineffective) "safety net" due in part to that fact that sexual activity for young women presents a contradiction between the requirement of them to act as sexual gatekeepers and to control sexual encounters, but to do this from a position of relative passivity. In contrast, young men saw none of the dangers in under age sex that were articulated by the young women but they did identify the asymmetry in legislation, perceiving that laws around sexual consent were not for their protection. Thomson concludes that young people perceive age of consent laws as constructed in terms of (female) protection and (male) sexual agency, and that this is due to "a social context characterised by mutually exclusive and oppositional gender roles"¹³⁹.

What seemed to be most important to young women in terms of their readiness for sex, was the idea of *positive consent* - "negotiating the space to allow a choice to be made"¹⁴⁰. Such positive consent was based on "readiness" and included freedom from pressure, self respect, trust and legitimate access to contraception. Interestingly, as previously noted, a similar dynamic seemed to be required for both young men and women in sexual relations with adults, where asking rather than taking positioned the sexual contact as more positive than negative. And while positioning the adult women as initiators of sex did challenge sexual performances of masculinity and femininity for adolescent boys, none perceived the experience as negative. Similarly, for those adolescent girls in heterosexual encounters with men who positioned asking rather than taking as the initiation of the sexual contact, positive

¹³⁷ Powell supra note 119.

¹³⁸ Thomson supra note 34

¹³⁹ *Ibid.* p142

¹⁴⁰ *Ibid.* p144

rather than negative experiences were identified. What this tells us is that sexual contact between adults and young people can be positioned as consensual by both young men and women and that this increases feelings of potency and control for the younger person. While for a range of cultural, historical and social reasons, this feeling “is easier for boys to achieve”, such alternate constructions are of central importance in determining harm and victimisation for both genders¹⁴¹.

Conclusion.

In this article we have suggested that the sexual citizenship of young people is a more complex and nuanced relation than child sexual abuse narratives are currently able to articulate. In the shift to identify and protect some children from the harm of sexual abuse, all children, often up to the age of eighteen, are positioned as victims. However, in seeking to rescue and protect, the narrative may have gone too far. In this regard we have pointed to the nuanced ways in which sexual encounters between adults and young people are perceived by the young people themselves, both hypothetically and through personal experience, to demonstrate that blanket understandings of vulnerability do not always accurately account for young people’s assessment of the situation. In such cases, young people articulate a strong sense of personal responsibility around their actions and “insist on the capacity of people their own age to act and take responsibility for their acts” thereby contesting constructions of themselves as “naive and helpless children.”¹⁴²

We have also engaged with the various reasons for the differing sexual experiences of harm available to young people by discussing the heterosexual scripts of masculinity and femininity, their differing social and cultural experiences of puberty, and the distinct ways in which adult men and women (most often under the age of twenty two) initiate heterosexual contact with children under the age of consent (most often fourteen or fifteen). In all cases we have discussed research which reports on a range of experiences, from harm to enjoyment. We have also engaged with the ambivalence our society feels about women as sexual offenders, and have noted the entrenched ways in which masculinity and femininity

¹⁴¹ Nelson and Oliver supra note 70 p573

¹⁴² Smette , Stefansen and Mossige supra note 106, p367

are performed, have negated the rise of gender neutral language in all legislation aimed at protecting children from sexual exploitation and harm.

What is clear is that in the policing of sexual relations of some young people between the ages of fourteen and seventeen the sexual subjectivity of the young person is in danger of being erased. This seems to most often occur when the child is a young boy between fourteen and seventeen and the adult a young and attractive woman. There is clearly a discord between the child sex abuse narrative of protection and harm, and the lucky boy legend, of desire and culpability. According to Angelides¹⁴³, in the first decade of the 21st century the ‘discursive spaces’ available to articulate the lucky boy myth are decreasing and this may be indicative of the rise of two related ideas: the equal culpability of male and female offenders, and the equivalent harm for male and female victims. Such gender neutrality however, masks the social disquiet over adolescent boys, and what to do with them, and it is this, according to Angelides¹⁴⁴ which creates the public furore over female sex offenders in the first place. It is thus not simply the social fear of the “premature and harmful introduction of young people into the world of adult sexuality” but rather a cultural concern about male adolescent sexualities which are “too knowing”, too developmentally aware, too adult. As noted previously, sex education may have taught girls to be the sexual gatekeepers of boys’ sexual activity, but this implies that the “underlying concern has been holding back the power and force of male adolescent sexuality”¹⁴⁵. Such public fear of adolescent boys is already articulated in terms of criminal behaviour, with their culpability and dangerousness identified and punished in Youth Justice Acts Internationally¹⁴⁶. This concern also speaks to previous ways of thinking about children and sex, which as previously discussed was most popular in the 1930s but fell out of favour from the 1970s when the child sex abuse narrative began its ascent.

We agree with Angelides that it seems a little odd that we are willing to accept uncritically an adolescent subjectivity which claims to have been harmed and victimised, but not accept an adolescent subjectivity which claims desire, autonomy and consent¹⁴⁷. However, there may

¹⁴³ Angelides supra note 89.

¹⁴⁴ *Ibid.* p79

¹⁴⁵ *Ibid.*p80

¹⁴⁶ Bernstein and Schaffner supra note 29, pxi

¹⁴⁷ Angelides supra note 89.

be a further reason, aside from their differing experiences at puberty and sexual relations with adults in predominantly taking rather than asking situations, why girls are more likely to identify being harmed by sexual contact with adults. If passivity is so easily aligned with victimisation, and victimisation with harm, girls have a limited sexual script from which to challenge this representation. In contrast, boys have both the ammunition and the impetus to renegotiate a scripted performance which aligns passivity with victimisation, harm and *femininity*. It thus may be the rigid sexual scripts offered to young people to perform their gender that are at the heart of these differing sexual experiences.

