

# The Historic Origins of Penal Statutes Concerning Sexual Activities Involving Children and Adolescents

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**SUMMARY.** This paper is based on in-depth historical and sociological research (Killias, 1979) exploring the conditions under which societies forbid sexual activities between persons under a certain age, where age is the only criterion for prohibition.

The laws of ancient Rome fixed the minimum ages for marrying at 14 years for boys and 12 for girls. During the Middle Ages there was no minimum age. The minimum age was left up to nature: anybody who had attained physical maturity could marry.

Since law and morality were firmly welded together, any conduct prohibited by Christian morality could—at least in principle—be punished by the secular or clerical authorities. Lawful satisfaction of sexual needs was only possible in marriage or prostitution. Adultery, bigamy, incest, sodomy, rape and abduction were criminal. But sexual activities with children not falling into one of these categories were not considered unlawful. If a child was willingly involved in the commitment of a sexual crime, such as sodomy, the child was not seen as the victim of the adult partner but as a participant and therefore equally punishable. The adult received, at least in principle, the same punishment he would have received for com-

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mitting his crime with another adult; he was not punished just because his partner was a minor. The child was protected exactly as an adult was protected — against being the unwilling victim of rape or indecent assault. This system persisted long after the Middle Ages.

An interesting case which illustrates this situation is that of a priest by the name of Johann Arbogast Gauch, who for ten years (1735-1744), while serving as village parson in the former principality of Fürstenberg (Germany), had sexual relations with a number of boys and a few girls. The sexual acts were restricted to masturbation and, with the girls, displaying of the genitals. Some of the children were willing participants; many seem to have resisted at first but were compelled to give in. It seems that the whole village had been well aware of what had been going on, but for a long time nobody interfered. After ten years, i.e., after a change on the throne of Fürstenberg, however, Gauch was finally prosecuted and sentenced to death. The children were kept in a subterranean prison for several months and the boys, as accessories to the crimes, were beaten and whipped. The oldest of the boys barely escaped death sentences. The girls only received ecclesiastical penalty for unchaste behavior. Since the sexual activities in which they had been involved were heterosexual, they were thus not considered as being too serious.

Later in the sixteenth century, the authorities became more and more diligent in prosecuting people for extramarital relations. They claimed, of course, to be inspired with solicitude for maintaining morality, but their real concern was with the misery caused by overpopulation. Society became more and more openly antagonistic to sexuality in general. The Reformation, stressing Old Testament teachings, gave impetus to this trend. Nudity disappeared from public places; bathing became less popular. A society with a shortage of consumer goods, and hostile to consumption, began to oppress the sexuality of its members, and especially the sexuality of the poor, with extreme severity. This evolution illustrates the close connection between the sexual and economic standards of society, with the latter influencing the former.

In England and under continental “common law” which prevailed before 1800 in France, Italy and Germany, there was no legal prohibition of sexual activities among or with persons over the age

of puberty where age was the only criterion for proscription. There were many other rules restricting sexual behavior but—with the sole exception of the protection of immature girls—their purpose was not to protect young people from moral corruption, in contrast to many of the rules of contemporary criminal law.

During those times the social position of juveniles was quite different from what it is today. In general, everyone who was obviously no longer a child was considered an adult; in other words, everyone over puberty (the age of about 14) was admitted to adult social roles. Thus there were no “children” who had already passed the pubertal threshold, as there are today. Therefore, dispositions involving sexual abuse of individuals younger than some given age were almost never prosecuted. The only exceptions, and these were rare, were some categories of juveniles in the upper social classes.

If rape and abduction of girls and young women (under 25) were strongly forbidden, it was not to protect their personal liberty; rather, just as in Biblical times, it was to protect the power of their fathers over them. A girl, then, was quite unprotected if she did not live under the actual supervision of her father. Moreover, this protection did not extend to lower class girls, and if the guilty person was of high rank he was never prosecuted. Thus these dispositions served mainly to protect the interests of wealthy upper-class fathers against seduction of their daughters by servants, teachers and other individuals of inferior status. Here, again, we can observe that economic considerations prevail.

With the dispositions to protect female honour so very restricted, it would have been unthinkable, even early in the nineteenth century, to render heterosexual contacts with boys criminal. Heterosexual activities did not blemish the honor of a boy, but in the case of homosexual activities, the boy was committing a crime.

Later in the nineteenth century, however, youth was “discovered” as a distinct period of life. During the first decades, because of economic development and the increasing demand for skilled and well-trained manpower, the education sector began to expand rapidly. Although schooling was hardly an invention of the nineteenth century, it increased in duration and extended itself into all classes of society. The result was the emergence of a clearly demarcated,

quasi-infantile social role for juveniles; they were increasingly excluded from production (with, for example, the prohibition of child labor) and from all other relevant spheres of adult society (political rights, criminal responsibility, military service, etc.). Most important was the raising of the age of consent for marriage, and therefore with the exclusion of juveniles from legitimate reproduction. Paralleling these developments, the age of sexual consent was raised in nearly all the Western countries, and sections of the law concerning "statutory rape" were also extended to include indecency, protection of male juveniles, etc.

How did these legal changes come about?

It can be assumed that sexual activity in youth will be placed under a taboo: (a) if young people are forced into playing a role which is different from that of adults and which implies social immaturity: (b) if this role does not include the possibility of socially acceptable procreation: (c) and if sexuality is only socially accepted where its aim is procreation.

The longer young people are considered to remain in this state of social immaturity, the longer their sexuality will be taboo. We can also assume that the more firmly young people are fixed in this specific position, the easier it will be for society in cases of illegal activities to shift the blame onto the adult or older partner exclusive.

Switzerland's 25 cantons can be used as a very instructive sample to test the assumed correlation between the development of the educational system and the criminal laws which deal with sexual activity among or with young people. At the end of the nineteenth century they were extremely heterogeneous both in quality of education and in those sections of criminal law which dealt with sexual offenses. For those years at the turn of the century, the correlation is actually very high between the age of consent and the criminalization of sexual behavior among or with adolescents on one hand, the development and quality of the school system on the other hand, the latter being generally considered as the best available indicator of the degree of segregation of juveniles from adult life. In other words, cantons with highly developed educational systems tended to also have very rigid statutes concerning the sexual protection of juveniles, i.e., a rather high age of consent. This correlation sur-

vives when control variables are introduced, such as industrialization and the percent of Protestant population.

In pre-industrial societies, the sexual activities of youth are less suppressed than those of adults in modern societies. Sexuality is taboo in modern societies until a person has attained a certain age, usually older than in early industrial societies. In the pre-industrial societies, the responsibility for sexual relations rests upon both partners, regardless of their age. In modern societies, the older partner carries the entire burden of responsibility if the younger partner has not yet attained a specified age. Besides, the prosecution of offenders against these new, legally formulated taboos imposed upon the sexuality of children and adolescents becomes increasingly independent of initiative by the family and is increasingly a task of the authorities.

This practice of suppressing sexuality, so well suited to the mentality of pre-industrial and early industrial societies with their low productivity and consequent demands for economy and renunciation of consumption, becomes of doubtful value in post-modern society with its increased means of productivity. Once it was a civic virtue to reduce consumption as far as possible; the exigencies of our time, on the contrary, are immediate and extensive satisfaction of ever-renewed, artificially inflated needs. Under these conditions the suppression of sexual needs no longer serves a social purpose. Consequently, the satisfaction of sexual desire becomes integrated into the general culture of increased consumption, a culture of performance and achievement.

Besides, the general availability of efficient contraceptives has weakened the traditional link of sexuality, procreation and marriage. Therefore, the exclusion of adolescents from adult life, and particularly from marriage and legitimate procreation, no longer necessarily implies the oppression of all forms of sexual behavior among and with juveniles. Accordingly, we may expect a general tendency to reduce the age of consent. It remains to be seen whether this hypothesis holds true. So far, no such legislative change has occurred in Europe. The lowering in some countries of the age of consent for homosexuality, making it identical with that for heterosexual activities, appears instead to be due to an altered opinion about homosexuality rather than to a reappraisal of youth sexuality.

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