

HARM, RESPONSIBILITY, AGE, AND CONSENT

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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 that 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

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add to the small but growing literature on the issue of sexual consent, sexual ethics, and sexual citizenship for young people.

Keywords: *child sexual abuse, heterosexual scripts, age of consent, sexual citizenship, underage 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 U.S.A., 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 decades.² Since the late nineteenth 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 adulthood.³ The creation of adolescence to bridge the divide between childhood and adulthood is one example, and was itself developed in the early twentieth century by

1. Helmut Graupner, *The 17-year-old Child: An absurdity of the late 20th century*, in ADOLESCENCE, SEXUALITY AND THE CRIMINAL LAW: MULTIDISCIPLINARY PERSPECTIVES 7–24 (Helmut Graupner & Vern L. Bullough eds., 2004); Helmut Graupner, *Sexual Consent*, 16:2–3 J. PSYCHOL. & HUM. SEXUALITY III–71 (2005).

2. SHARON HAYES, BELINDA CARPENTER, WITH ANGELA DWYER, SEX CRIME AND MORALITY (2012).

3. BELINDA CARPENTER & MATHEW BALL, JUSTICE IN SOCIETY (2012).

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 adult capacities are still developing.⁴ A developmental psychological creation, adolescence nevertheless has primacy in modern understandings of the (im)mature decision making available to teenagers, and has been used in the twenty-first century to support legislation to increase the age of consent and thereby extend the sexual protection of children.⁵

We are also well aware, through the work of first and second wave feminism, that legislation that 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 activity.⁶ The first legislation in 1885 in the U.K. was in fact gender specific (and heterosexual), outlining as an offense in Section 5 of the Criminal Law Amendment Act, carnal knowledge of any *girl* above the age of thirteen and under the age of sixteen.⁷ Although 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, the U.K., and the U.S.A. find that the incidence of nonpenetrative 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

4. GORDON TAIT, *YOUTH SEX AND GOVERNMENT* 89–90 (2000).

5. Carol Dauda, *Sex, Gender and Generation: Age of Consent and Moral Regulation in Canada*, 38:6 POL. & POL’Y 1159–85 (2010).

6. ERIN O’BRIEN, SHARON HAYES, & BELINDA CARPENTER, *THE POLITICS OF SEX TRAFFICKING: A MORAL GEOGRAPHY* (2013).

7. Mathew Waites, *Investing a Lesbian Age of Consent? The History of the Minimum Age for Sex Between Women in the UK*, 11:3 SOC. & LEGAL STUD. 323–42 (2002).

8. Anastasia Powell, *Amor fati?: Gender habitus and young people’s negotiation of (hetero) sexual consent*, 44:2 J. SOC. 167–84 (2008); Kay Levine, *When Gender Meets Sex: An Exploratory Study of Women who Seduce Adolescent Boys*, 15 WM. & MARY J. WOMEN & L. 361–76 (2008–2009).

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 in Australia, for instance.⁹ Such research has also demonstrated that harm is not gender specific, and that women as well as men can be perpetrators.¹⁰ This is also noted in the academic literature on statutory rape, where a growing body of research from both psychology and more recently law has 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 participants.¹²

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 victimization and harm. Such research, although in its infancy, is especially important in the current context since traditional understandings of sexual scripts position victimization 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 behavior 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 behavior. 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 conceptualization by arguing that "the action of gender

9. Ben Mathews, *Teacher Education to Meet the Challenges Posed by Child Sexual Abuse*, 36:II AUSTRAL. J. TEACHER EDUC. 13–32 (2011).

10. Levine, *supra* note 8.

11. Kay Levine, *No Penis, No Problem*, 33 FORDHAM URB. L.J. 357–405 (2005–2006).

12. SAM WARNER, UNDERSTANDING THE EFFECTS OF CHILD SEXUAL ABUSE: FEMINIST REVOLUTIONS IN THEORY, RESEARCH AND PRACTICE (2008).

13. JOHN GAGNON & WILLIAM SIMON, SEXUAL CONDUCT: THE SOURCES OF HUMAN SEXUALITY (1973).

requires a performance that is 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 favorable 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.

To achieve these aims, this article will do three things. First, it will engage with the historical work that problematizes 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, it will engage with the various ways in which (sexual) citizenship is conferred and denied to young people, and how this influences experiences of victimization 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.

I. AGE

The enactment of legislation in the late nineteenth century to make sexual relations with children a criminal offense 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 Swain 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.”¹⁶

14. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 178 (1990).

15. Laura Huey & Eric Berndt, “You’ve gotta learn how to play the game”: Homeless women’s use of gender performance as a tool for preventing victimisation, 56:2 SOC. REV. 177–94 (2008).

16. DOROTHY SCOTT & SHIRLEY SWAIN, *CONFRONTING CRUELTY: HISTORICAL PERSPECTIVES ON CHILD PROTECTION IN AUSTRALIA* 71 (2002).

This way of thinking about children is a relatively recent phenomenon, disseminated by the rising middle class of the 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 Aries,¹⁸ 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 as a distinct 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 fourteenth and eighteenth 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 were 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 his notations:

17. JEFFREY WEEKS, *SEX, POLITICS AND SOCIETY: THE REGULATION OF SEXUALITY SINCE 1800* 48 (2nd ed. 1989).

18. PHILLIPE ARIES, *CENTURIES OF CHILDHOOD* (1973/1986).

19. Phillipe Aries, *From Immodesty to Innocence*, in *THE CHILDREN’S CULTURE READER* 100–103 (Henry Jenkins ed., 1998).

20. NEIL POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* 14 (1994).

21. Lyn Finch, *The Nineteenth Century Identification of Incest as a Working Class Crime: Implications for analysis*, in *INCEST AND THE AUSTRALIAN COMMUNITY: AUSTRALIAN PERSPECTIVES* 20 (Penelope Hetherington ed., 1991).

22. ARIES, *supra* note 18, at 16.

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.”

On another occasion, he was one year old: “In high spirits,” notes Herodotus, “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. Although 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-nineteenth 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 as being 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 in need of control.

23. Aries, *supra* note 19, at 100–103.

24. Danielle Egan & Gail Hawkes, *The Problem with Protection: Or, Why we need to move towards recognition and the sexual agency of children*, 23:3 CONTINUUM: J. MEDIA & CULTURAL STUD. 389–400, 389 (2009).

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, and the corrupt social order and the over-abundance of “licentious” individuals in the city were particularly dangerous to children. Access to “immoral and prurient influences” promoted the appearance of the sexual instinct, 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 U.S.A. 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 emphasized 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 than that 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 nineteenth and early twentieth century. Although 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 could arise at any time.

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

25. *Id.* at 390.

26. Danielle Egan & Gail Hawkes, *Producing the Prurient Through the Pedagogy of Purity: Childhood sexuality and the social purity movement* 20:4 J. HIST. SOC. 443–61 (2007).

27. Kerwin Kaye, *Sexual Abuse Victims and the Wholesome Family*, in *REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY* 143–66, 149 (Elizabeth Bernstein & Laurie Schaffner eds., 2005).

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 children, the fact that sexual knowledge is also the boundary between childhood and adulthood marks 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 abuse.²⁹

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 behavior 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 labor 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 infantilize young men and women, especially those between the ages of fifteen and seventeen.

28. *Id.* at 157.

29. *Id.* at 156.

30. ELIZABETH BERNSTEIN & LAURIE SCHAFFNER, *Regulating Sex: An introduction*, in *REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY* xi (2005).

31. Laurie Schaffner, *Capacity, Consent and the Construction of Adulthood*, in *REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY* 189–205, 192 (Elizabeth Bernstein and Laurie Schnaffer eds., 2005).

II. 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 family.³² Central to this new relationship was the denial of certain types of behavior 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 nonsexual person, with the nonsexual child being “out of bounds” as a sexual partner. As Smart 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.”³⁴ 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 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, the 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 age.³⁶ The name change from consent to protection was significant, argues Dauda: “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.”³⁷ Around the same time in Canada, definitions of child pornography were

32. WEEKS, *supra* note 17.

33. Finch, *supra* note 21.

34. CAROL SMART, *Disruptive Bodies and Unruly Sex: The regulation of reproduction and sexuality in the nineteenth century*, in REGULATING WOMANHOOD: HISTORICAL ESSAYS ON MARRIAGE, MOTHERHOOD AND SEXUALITY 25 (1992).

35. Rachel Thomson, *An Adult Thing? Young People's Perspectives on the Heterosexual Age of Consent*, 7:2 SEXUALITIES 133–49 (2004).

36. Criminal Code 1985 (Canada) § 151.

37. Dauda, *supra* note 5.

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 offenses of child pornography and child prostitution that include all people up to the age of eighteen years despite the age of sexual consent, which ranges from fourteen to sixteen years across all EU countries.³⁹ In Australia, Commonwealth legislation on child pornography places the age at which protection is required at 18,⁴⁰ as do the states of Victoria, Tasmania, the Australian Capital Territory, and the Northern Territory.⁴¹ 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 criminalization of such activity can create amongst researchers and legislators. Although this activity may be harmful to children and adolescents, it may also unfairly tag them as purveyors of child pornography.⁴³

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 legislation has made it illegal

38. Criminal Code 1985 (Canada) §§ 152 and 172.1.

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 that 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) § 474.19–26.

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

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

43. Murray Lee, Thomas Crofts, Michael Salter, Sanja Milivojevic, & Alyce McGovern, *Let's Get Sexting: Risk, Power, Sex and Criminalisation in the Moral Domain*, 2:1 INT'L J. CRIME & JUST. 35–49 (2013).

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 consent.⁴⁴ In such cases it is argued that a higher age of sexual consent is required because of the increased vulnerability to exploitation and manipulation such a relation places on the child. Most European jurisdictions also have higher age limits for sexual contact within relations of authority, as do twelve states of the U.S.A. and all nations within the U.K.⁴⁵ In these jurisdictions, individuals under the age of consent and those between the age of consent and the age of majority are defined as children and categorized 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 behavior, 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 percent of year 10 students (many of whom would be under sixteen years of age) had engaged in sexual touching, 33 percent had engaged in oral sex, and more than 25 percent had engaged in sexual intercourse.⁴⁷ In Europe, a 2006 survey of the health behavior of school-aged children by the World Health Organisation found that between 12 percent (Slovakia) and 61 percent (Greenland) of survey respondents had their first experience of sexual intercourse by age fifteen.⁴⁸

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

45. Graupner, *supra* note 1, Tables 5–7.

46. Thomson, *supra* note 35, at 135.

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>.

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 (2008) at 144. <http://www.childhealthresearch.eu/research/add-knowledge/HBSC%20international%20report%202005-06%20survey.pdf>.

In the U.S.A., the biannual survey of adolescent health risks found that in 2011, 47.4 percent of young people between the ages of fifteen and seventeen were sexually active, and that 9 percent of boys and 3.4 percent of girls had sexual intercourse before the age of thirteen.⁴⁹ This new rite of passage has replaced other markers of adulthood, like entrance into the labor force, marriage, or parenthood. This can mean that the transition to adulthood is more fragmented than in previous generations, as sexual activity comes long before economic independence. And all this in an increasingly sexualized 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 are contingent on age of the victim. In the U.K., variable sentences were in place until 2003, which demarcated a lesser punishment for sex with a child if that child was between thirteen and fifteen years of age (maximum of two years imprisonment) rather than under thirteen years of age (maximum life imprisonment). Although there was no defense for sex with a child under thirteen, if the man was under the age of twenty-four and the girl between thirteen and fifteen, he was able to defend himself on the grounds that he reasonably believed her to be over sixteen.⁵¹ Such defenses have been in place since age of consent legislation was first passed. In Colonial Australia, the Crimes (Girls Protection) Bill in the state of New South Wales was passed in 1910, raising the age of consent to from fourteen to sixteen. However, this Act specifically excluded girls of fourteen or fifteen from its protection if they looked sixteen or older.⁵² These mistaken identity defenses are still common in jurisdictions worldwide, and honest mistakes about age remove liability in most European jurisdictions with the exception of the U.K., Ireland, Italy, and Norway.⁵³

49. Youth Risk Behavior Surveillance System. *National Health Risk Behavior and Health Outcomes by Sex Fact Sheet*. Centers for Disease Control and Prevention (2011), http://www.cdc.gov/healthyyouth/yrbs/pdf/us_disparitysex_yrbs.pdf.

50. Thomson, *supra* note 35, at 136.

51. *Id.*

52. JUDITH ALLEN, *SEX AND SECRETS* (1990).

53. Graupner, *supra* note 1, at 120.

Close-in-age exemptions also demonstrate the ambiguity around the relationship 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 2006,⁵⁴ and allowed for sexual activity between fourteen- and fifteen-year-old young people and a partner less than five years older (that is, up to the age of nineteen), and a close-in-age exemption of under two years is in place for twelve- and thirteen-year-olds (with a partner up to the age of fourteen). In a similar fashion, the Australian state of Tasmania manages a higher age of consent (seventeen) through age similarity defenses, which include those cases where the child is at least fifteen and the accused person is not more than five years older, or the child is at least twelve and the accused person is not more than three years older.⁵⁵ Such exemptions are also common in the U.S.A., where between 1971 and 1999, forty-three states adopted close-in-age provisions that 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 every day, 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 in different states in the U.S.A.: although they may not purchase alcohol till they are twenty-one, they can be tried as a felon at thirteen, marry without parental consent at sixteen, enter into a labor contract at fourteen, and be housed in a juvenile detention facility at ten. Similarly, Dauda⁵⁸ notes the contradictions in Canadian parliamentary debate between discussions of sexual consent and criminal activity. Whereas discussions during amendments to the Protection of Children

54. Kalev Hunt, *Saving the Children: (Queer) Youth Sexuality and the Age of Consent in Canada*, 6:3 SEXUALITY RES. & POL'Y 15–33 (2009).

55. Criminal Code Act (TAS) 1924, § 124(3).

56. CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* (2004). It is interesting to note that close-in-age provisions in the U.S.A., for example, which offer a nuanced approach to the relation of harm and sex, occur alongside the strict liability rule where a mistake about age is not applicable in cases of statutory rape, even when induced by the victim's false representation.

57. Schaffner, *supra* note 31.

58. Dauda, *supra* note 5.

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 consequences.⁵⁹ Finally, Angelides 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.”⁶⁰ 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.

III. RESPONSIBILITY

Since the media “discovery” of the paedophile in the 1990s, sex abuse against children has dominated the press,⁶¹ and although research to date indicates that it is difficult to determine the prevalence of sexual abuse because of high levels of underreporting,⁶² official statistics generally indicate the majority of sex offenders are male and most victims female.⁶³ As a result, most sex offending research has to date focused on male perpetrators and female victims.⁶⁴ Despite well-identified problems with official statistics on sex offending,⁶⁵ such problems have generally been used to suggest that the incidence of female sexual abuse at the hands of men is

59. Rebecca Raby, *Children in Sex, Adults in Crime: Constructing and Confining Teens*, 31:3/4 RESOURCES FOR FEMINIST RES. 9–28 (2006).

60. Steven Angelides, *Inter/Subjectivity, Power and Teacher-Student Sex Crime*, 26 SUBJECTIVITY 101 (2009).

61. TERRY THOMAS, *SEX CRIME: SEX OFFENDING AND SOCIETY* (2nd ed. 2005).

62. Alexandra Neame & 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. 2003). http://www.aifs.gov.au/acssa/pubs/briefing/acssa_briefing1.pdf.

63. Helen Gavin, *The Social Construction of the Child Sex Offender Explored by Narrative*, 10 QUALITATIVE REP. 395–415 (2005).

64. Donna Vandiver & Jeffrey Walker, *Female Sex Offenders: An Overview of 40 cases*, 27:2 CRIM. JUST. REV. 284–300 (2003).

65. Moira Carmody & Kerry Carrington, *Preventing Sexual Violence?*, 33:3 AUSTL. & N.Z. J. CRIMINOLOGY 341–61 (2000).

under-recorded.⁶⁶ This response is possible because feminism has been able to identify and theorize the gendered nature of sex crimes through a recognition that male sexual offenders are not aberrant monsters, but rather that their behavior can be located on a continuum of normative masculinity.⁶⁷ In this way sex offending is taken out of the sphere of the monstrous and placed squarely and firmly in the domestic and the everyday.⁶⁸

However, the articulation of a normative frame of masculinity as a way of understanding and explaining male sexual abuse of children also essentializes women within a normative frame of femininity. Such a perception draws on an understanding of women as naturally caring, nurturing, sexually passive, nonaggressive, and innocent.⁶⁹ This has resulted in the positioning of female sexual abuse of children in one of three ways: it is an aberrant case and ignored,⁷⁰ it is the outcome of coercion or emotional dependence on a male partner,⁷¹ or if the woman offends alone, her history of previous victimization at the hands of men is utilized to explain her offending behavior.⁷² In most cases, the woman's sexual offending is minimized and her victimization highlighted.⁷³ This renegotiation of offending behavior enables reconciliation of her aberrant behavior and returns her to a socially acceptable performance of femininity.

66. Miriam Denov, *To a Safer Place? Victims of sexual abuse by females and their disclosures to professionals*, 27 CHILD ABUSE & NEGLECT 47–61 (2003); LIZ KELLY, SURVIVING SEXUAL VIOLENCE (1988).

67. LIZ HALL & SIOBHAN LLOYD, SURVIVING CHILD SEXUAL ASSAULT (1989); ELIZABETH BASS & LAURA DAVIES, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE (3rd ed. 1995).

68. THOMAS, *supra* note 61.

69. Mary. M. Brabeck, *Introduction: Who Cares?*, in WHO CARES? THEORY, RESEARCH AND EDUCATIONAL IMPLICATIONS OF THE ETHIC OF CARE 1–14 (1989); NEL NODDINGS, THE CHALLENGE TO CARE IN SCHOOLS (1992).

70. Andrea Nelson & Pamela Oliver, *Gender and the Construction of Consent in Child-Adult Sexual Contact: Beyond Gender Neutrality and Male Monopoly*, 12:5 GENDER & SOC. 554–77 (1998).

71. Amanda Matavers, *Understanding Women Who Commit Sex Offences*, in SEX AS CRIME? 299 (Gail Letherby, Kate Williams, Philip Birch, & Maureen Cain eds., 2008).

72. Donna Vandiver & Glen Kercher, *Offender and Victim Characteristics of Registered Female Sexual Offenders in Texas: A Proposed Typology*, 16:2 SEXUAL ABUSE: J. RES. & TREATMENT 121–37 (2004).

73. Steven Angelides, *Subjectivity under Erasure: Adolescent Sexuality, Gender, and Teacher-Student Sex*, 15:3 J. MEN'S STUD. 347–60 (2007).

The overwhelming belief that the sex offender is male is supported by the majority of research, which does not contemplate the female sex offender⁷⁴; in fact, most studies fail to even identify the gender of the adult.⁷⁵ In the 1970s and 1980s, female sexual offending was considered so rare as to be “of little significance,” an approach that has now become “paradigmatic” within the field of child sexual abuse.⁷⁶ Although historically this focus on the male sex offender has been supported by official statistics, which have placed female sex offending at 5 percent of all sex offending,⁷⁷ more recent research in the U.S. and U.K. places female sexual offending at 25 percent⁷⁸ and 30 percent,⁷⁹ respectively, with further research contemplating its rapid increase in relation to male sex offending,⁸⁰ and still other research demonstrating that female sex offending is more under-reported than male sex offending.⁸¹

This discovery of the female sexual offender in the last twenty years has, however, had ambiguous and contradictory outcomes. In the literature on statutory rape, the shift to gender-neutral language in legislation in the U.S.A., 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 occurs 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

74. Roland Landor, *Double Standards? Representations of Male vs Female Sex offenders in the Australian Media*, 2:2 GRIFFITH WORKING PAPERS INTERCULTURAL COMM. 84–93 (2009).

75. Nelson & Oliver, *supra* note 70.

76. Denov, *supra* note 66.

77. Pamela Nathan I Tony Ward, *Female Child Sex Offenders: Clinical and Demographic Features* 8:1 J. SEXUAL AGGRESSION 5–21 (2002).

78. Deborah S. Boroughs, *Female Sexual Abusers of Children*, CHILD. & YOUTH SERVICES REV. 48:1–87 (2004).

79. Mark Townsend & Rajeev Syal, *Up to 64,000 women in the UK are child sex offenders* THE OBSERVER, Oct. 4, 2009, <http://www.guardian.co.uk/society/2009/oct/04/uk-female-child-sex-offenders>.

80. JULIA DAVIDSON, CHILD SEXUAL ABUSE: MEDIA REPRESENTATIONS AND GOVERNMENT REACTIONS (2008).

81. Rebecca Deering & David Mellor, *Female Perpetrated Child Sexual Abuse: Definitional and Categorisational Analysis*, 14:2 PSYCHIATRY & L. 218–26 (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*, 16 MICH. FEMINIST STUD. (2002), <http://hdl.handle.net/2027/spo.ark5583.0016.003>.

policy agenda.”⁸³ In the U.S.A. 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 continues 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 U.K. on female sex offenders from 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 thirty-seven-year-old female teacher found guilty of six counts of sexual penetration with a child under sixteen 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 emphasizing some crimes and ignoring others, and by sympathizing with some victims while shaming others, the media draws attention to and creates public perception.⁸⁷ The disproportionate amount of attention in the media on the “sexual proclivities of female teachers,” for example, despite their 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

83. Levine, *supra* note 11, at 369.

84. *Id.* at 378.

85. Sharon Hayes, Belinda Carpenter, & Erin O’Brien, *Constructions of Female Sex Offenders: Exploring Public Discourses*, British Society of Criminology Conference, July 2011, Northumbria University, Newcastle.

86. Joe Stennis, *Equal Protection Dilemmas: Why male adolescent students need federal protection for adult female teachers who prey on them*, 35 J.L. & EDUC. 395–403 (2006).

87. J. KITZINGER, FRAMING ABUSE: MEDIA INFLUENCE AND PUBLIC UNDERSTANDING OF SEXUAL VIOLENCE AGAINST CHILDREN (2004).

88. SHEILA CAVANAGH, SEXING THE TEACHER: SCHOOL SEX SCANDALS AND QUEER PEDAGOGIES (2007).

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 eroticized 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 male.⁸⁹ 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 children.⁹¹ The public outcry against the perceived lenient sentence of Karen Ellis in Australia, as well as Mary Kay LeTourneau in the U.S.A. and Melissa George in the U.K.,⁹² exemplifies 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.” Not only was the appeal upheld, but the offender was imprisoned for two years eight months and registered as a serious sexual offender.⁹³ Similar reactions in the U.S.A. to the charges being dropped in the highly publicized LaFave case noted the gender inequality of the matter as a kind of reverse sexism.⁹⁴ 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 Angelides,⁹⁵ we query whether the categories of offender and victim “map unproblematically” onto adults and children. As the examples of statutory rape demonstrate, it is very

89. Steven Angelides, *Hot for the Teacher: The Cultural Erotics and Anxieties of Adolescent Sexuality*, 135 MEDIA INT'L AUSTRL. 71–81 (May 2010).

90. Cocca, *supra* note 82.

91. Steven Angelides, *Sexual Offences Against Children and the Question of Judicial Gender Bias*, 23:57 AUSTRL. FEMINIST STUD. 359–73 (2008).

92. Sharon Hayes & Belinda Carpenter, *Social Moralities and Discursive Constructions of Female Sex Offenders*, 16:1–2 SEXUALITIES 159–79 (2013).

93. Angelides, *supra* note 73.

94. Gina Pace, *Teacher-Sex Outcome Sparks Outrage*, CBS News (Feb. 11, 2009), http://www.cbsnews.com/2100-500202_162-1429564.html.

95. Angelides, *supra* note 73.

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.

IV. 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.” Whereas 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, and substance abuse.⁹⁶ The exploitation of under-age sex relates directly to the wrongfulness of adults engaging in sexual activity with children because of an imbalance in power (physical, social, economic) as well as a capacity for manipulation, control, and dependence. A balance thus must be struck between protection and harm in such a way that distinguishes between sexual relations and sexual exploitation.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

96. Mathews, *supra* note 9, at 15.

97. Tasmanian Law Reform Institute, *Sexual Offences Against Young People*, Final Report No. 18 1–93 (Oct. 2012), http://www.utas.edu.au/__data/assets/pdf_file/0008/319814/YoungPeopleSexualOffencesFR.pdf.

98. Angelides, *supra* note 91, at 359.

people lack the capacity to make informed and responsible decisions with regard to sex. Perhaps this is why the research that has spoken to young people about their sexual experiences with adults 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 Rind,⁹⁹ 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 the negative experiences coincided with incestuous contacts and coercion, whereas the positive experiences were related to interest and willingness on the part of the boys involved. Rind concludes that for heterosexual adolescent boys involved with women, “empirical data are strongly at odds with the assumption of trauma.”¹⁰⁰ Deering and Mellor¹⁰¹ also cite a range of studies that support this claim, revealing that the majority of male victims perceived early sexual contact with a female as having either 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

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 *ADOLESCENCE, SEXUALITY AND THE CRIMINAL LAW: MULTIDISCIPLINARY PERSPECTIVES* 55–62 (Helmut Graupner & Vern L. Bullough eds., 2004).

100. *Id.* at 61.

101. Rebecca Deering & David Mellor, *An Exploratory Qualitative Study of the Self-Reported Impact of Female-Perpetrated Childhood Sexual Abuse*, 20:1 J. CHILD SEXUAL ABUSE 58–76 (2011).

102. *Id.* at 59.

103. Nelson & Oliver, *supra* note 70.

reveal that the vast majority of adult–child sexual contacts were heterosexual: 98 percent of girls’ contacts were with men, and 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,” and 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 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 fourteen or fifteen 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; 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 that 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

104. See also Pat Sikes, *Scandalous Stories and Dangerous Liaisons: When female pupils and male teachers fall in love*, 6:3 SEX EDUC.: SEXUALITY, SOC’Y & LEARNING 265–80 (2006).

of the situation, with young women in heterosexual encounters more likely to be seen as victims than young men, irrespective of their encouraging behavior.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, although 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 centered 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, and males, especially adolescent male victims with an adult female, are 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, whereas male respondents were less likely to see sexual interactions between male adolescents and women over the age of consent as child sexual abuse. Although close-in-age exemptions in most jurisdictions also recognize 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 equally 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

105. Sylvia Broussard, William Wagner, & Richard Kazelskis, *Undergraduate Students' Perceptions of Child Sexual Abuse: The Impact of Victim Sex, Perpetrator Sex, Respondent Sex and Victim Response*, 6 J. FAM. VIOLENCE 267, 269–72 (1991); Katherine Dollar, Andrea Perry, MaryEllen Fromuth, & Aimee Holt, *Influence of Gender Roles on Perceptions of Teacher/Adolescent Student Sexual Relations*, 50:1 SEX ROLES 91–101 (2004).

106. Ingrid Smette, Kari Stefansen, & Svein Mossige, *Responsible Victims? Young people's understandings of agency and responsibility in sexual situations involving underage girls*, 17:4 YOUNG 351–73 (2009).

107. Carrie Maynard & Michael Weiderman, *Undergraduate Student's Perceptions of Child Sexual Abuse: Effects of age, sex and gender roles attitudes*, 21:9 CHILD ABUSE & NEGLECT 833–44 (1997).

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 Martin, it is at adolescence that boys “come to solidify feelings of agency and sexual subjectivity” while for girls the opposite is often the case.¹⁰⁹ 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 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, whereas puberty for girls comes with a range of negative cultural associations around, for example, menstruation (dirt, shame, taboo) and sexual experience (the danger of rape, the fear of pregnancy, the loss of reputation), which tempers 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, whereas 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 derives from the way in

108. Smette, Stefansen, & Mossige, *supra* note 106, at 361.

109. KAREN MARTIN, PUBERTY, SEXUALITY AND THE SELF 14–15 (1996).

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 behavior of the adult. They found that the key to most respondents’ interpretations of their experiences was whether the adult “asked” the child rather than simply “taking.” Asking was linked to positive experiences, whereas taking was linked to negative experiences, and men were more likely to take (76 percent of children reflected on these encounters as negative) whereas women generally asked (75 percent of children reflected on these encounters as positive). For Nelson and Oliver, “asking and taking appear to be the key.”¹¹¹ 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, although 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 Oliver argue that it was the boys’ “potent self-images” of masculinity and sex that allowed them to counter any feelings of victimization, “while passive feminine identities reinforced a sense of helplessness and victimisation” for the girls.¹¹² 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 should 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.

110. Nelson & Oliver, *supra* note 70.

111. *Id.* at 569.

112. *Id.* at 573.

113. *Id.*

V. SEX

Gendered sexual performances are embedded in cultural norms about sexuality and reflect gendered stereotypes and behavioral expectations. Traditional masculine roles prioritize independence, assertiveness, and sexual exploration, as well as a “bodily centred set of sexual scripts” that see sexual activity as directed toward “self-pleasure and tension release” rather than relationship affirmation.¹¹⁴ 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 assault.¹¹⁵ In contrast to the traditional masculine script, the traditional feminine script is one that emphasizes idealism, passivity, and virtue. Feminine gender roles are based more on behavioral 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 composed.¹¹⁷ 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 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 Carmody argues perpetuate the assumption that women are responsible for resisting sex, while men are responsible for pursuing it.¹¹⁸ This construction not only undermines attempts to reduce sexual violence, but also “precludes a flexible and negotiated consent” for individual sexual encounters.¹¹⁹

114. Michael Wiederman, *The Gendered Nature of Sexual Scripts*, 13:4 FAM. J.: COUNSELLING & THERAPY FOR COUPLES & FAM. 496–502 (2005).

115. Denov, *supra* note 66.

116. Carolina Overlien, *Innocent Girls or Active Young Women? Negotiating Sexual Agency at a Detention Home*, 13:3 FEMINISM & PSYCHOL. 345–67 (2003).

117. BEVERLY SKEGGS, FORMATIONS OF CLASS AND GENDER: BECOMING RESPECTABLE (1997).

118. Moira Carmody, *Sexual Ethics and Violence Prevention*, 12:2 SOC. & LEGAL STUD.: INT’L J. 199–216 (2003).

119. *Id.* at 205.

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 women.¹²⁰ 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 intercourse.¹²¹ 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 erotic.¹²² Tolman 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."¹²³ 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 recognize the sexual feelings of the girls.¹²⁴ Similarly, Fine¹²⁵ noted that adolescent girls' sexuality was acknowledged by adults in schools but in terms that denied the sexual subjectivity of the girls. There was, according to Fine, "a missing discourse of desire."¹²⁶ Thorne and Luria recognize that sexuality is differently learned for adolescent boys and girls: "Girls emphasise and learn about the emotional and romantic before the explicitly sexual."¹²⁷ For boys the sequence occurs in reverse: "Commitment to sexual acts precedes commitment to emotion laden, intimate

120. ANASTASIA POWELL, *SEX, POWER AND CONSENT* (2010).

121. MICHELLE FINE, *Sexuality, Schooling and Adolescent Females: The missing discourse of desire*, 58:1 HARV. EDUC. REV. 29–53 (1988); Michelle Fine & Di McClelland, *Sexuality Education and Desire: Still missing after all these years*, 76:3 HARV. EDUC. REV. 297–338 (2006).

122. POWELL, *supra* note 120.

123. Deborah Tolman, *Doing Desire: Adolescent Girls Struggle for/with Sexuality*, in *SEXUALITIES: IDENTITIES, BEHAVIOURS AND SOCIETY* 87, 88 (Michael Kimmel & Rebecca Plante eds., 2004).

124. DEBORAH TOLMAN, *DILEMMAS OF DESIRE: TEENAGE GIRLS TALK ABOUT SEXUALITY*. (2002).

125. Fine, *supra* note 121.

126. *Id.*

127. Barrie Thorne & Zella Luria, *Sexuality and Gender in Children's Daily Worlds*, in *SEXUALITIES: IDENTITIES, BEHAVIOURS AND SOCIETY* 87–98, 81 (Michael Kimmel & Rebecca Plante eds., 2004).

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 expression.¹²⁸

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 Tolman,¹²⁹ 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 and 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 behaviors that situated love with acquiescence, with pleasing the other person, and putting the other’s 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 Powell concludes that a number of highly gendered unwritten rules are still in place in young people’s sexual encounters, which

128. *Id.*

129. Tolman, *supra* note 123.

130. Micheal S. Kimmel & Rebecca F. Plante, *The Gender of Desire: The sexual fantasies of women and men*, in ADVANCES IN GENDER RESEARCH, Vol. 6, GENDERED SEXUALITIES, at 73 (Patricia Gagné & Richard Tewksbury eds., 2004).

131. Powell, *supra* note 8.

132. *Id.* at 177.

means 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.”¹³³ 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 want.¹³⁵ 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.

What this tends to mean is that in heterosexual sexual relations, consent is integral to the feminine performance. Far from being only 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 rarely verbal, with young men and women especially relying on a vast array of unspoken body language.¹³⁷

Age of consent laws figure in such discussions because 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

133. POWELL, *supra* note 120.

134. Wendy Holloway, *Gender Difference and the Production of Subjectivity*, in *CHANGING THE SUBJECT: PSYCHOLOGY, SOCIAL REGULATION AND AND SUBJECTIVITY* 223–61 (Julie Henriques, Wendy Holloway, C. Urwin, C. Venn, & Valerie Walkerdine eds., 1984).

135. Mary Thomas, *Pleasure and Propriety: Teen girls and the practice of straight space*, 22 *ENVIRONMENT & PLANNING D: SOC’Y & SPACE* 773–89 (2004).

136. Powell, *supra* note 8, at 170.

137. POWELL, *supra* note 120.

138. Thomson, *supra* note 35.

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 results from “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 although 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 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. Although 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 victimization for both genders.¹⁴¹

139. *Id.* at 142.

140. *Id.* at 144.

141. Nelson & Oliver, *supra* note 70, at 573.

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 that 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, have noted the entrenched ways in which masculinity and femininity are performed, and 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 occur most often when the child is a young boy between fourteen and seventeen, and the adult is 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 Angelides,¹⁴³

142. Smette, Stefansen, & Mossige, *supra* note 106, at 367.

143. Angelides, *supra* note 89.

in the first decade of the twenty-first century, the “discursive spaces” available to articulate the “lucky boy” legend are decreasing, and this may indicate 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 Angelides,¹⁴⁴ that creates the public furor 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 that 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 behavior, with their culpability and dangerousness identified and punished in Youth Justice Acts internationally.¹⁴⁶ 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 favor 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 that claims to have been harmed and victimized, but not accept an adolescent subjectivity that claims desire, autonomy, and consent.¹⁴⁷ However, aside from girls’ differing experiences at puberty and sexual relations with adults in predominantly taking rather than asking situations, there may be a further reason why girls are more likely to identify being harmed by sexual contact with adults. If passivity is so easily aligned with victimization, and victimization 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 that aligns passivity with victimization, 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.

144. *Id.* at 79.

145. *Id.* at 80.

146. BERNSTEIN & SCHAFFNER, *supra* note 30, at xi.

147. Angelides, *supra* note 89.