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"The Individual Can...": Objectifying Consent

*The issue of age of consent for sexual activities has been bedevilled by the absence of any objective standards or criteria for what is meant by or involved in 'consent'. Despite this absence—or because of it—the social and political response has been to reach for blanket prohibitions on sexual activity by persons under particular ages—ages which have settled in the mid- to late teens. At the same time, the percentages of persons aged 15 and under who are sexually active in our societies indicate that young people are regularly consenting to sexual activities. Consent to sexual activity has also been a concern in relation to the lives of the cognitively or mentally impaired. In an attempt to clarify issues surrounding consent there, a significant proposal in regard to objectifying standards for consent was reported by Carrie Hill Kennedy, in her article "Assessing Competency to Consent to Sexual Activity in the Cognitively Impaired Population" (*Journal of Forensic Neuropsychology *1:3, 1999), where she developed a two-part scale for ability to consent, including twelve criteria involving knowledge and five criteria involving personal assertiveness and safety. Kennedy herself has maintained that there is no relevance for her research as applied to minors: adults have sexual rights, minors do not. However, it would seem clear that there is a certain relevance—if not in the use of a similar scale for assessing the competence of a particular minor to consent, then in generally comparing the age at which children attain the developmental level comparable with that implied by Kennedy's five Safety standards, and using that information to critique the present, obviously unrealistic ages of consent. In relation to the Knowledge scale, the importance of sexual education becomes still clearer.*

Keywords: age of consent; child protection; objectifying consent; child protection by education

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The situation surrounding age of consent today is in a theoretical and practical shambles. In its larger context there are contradictory movements with regard to the capability (or culpability, depending on one's perspective) of minors: at the same time that "childhood," defined as a period of innocence when the individual is in-

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capable of making responsible decisions, is being extended to ever higher ages, there is a contradictory demand, rising each time there is a well-publicized violent crime committed by minors, to treat child perpetrators as adults for legal purposes. "Children" are then regarded as entirely *capable* of making decisions about their criminal behavior, and must be held fully accountable for the outcome of those decisions, while these same "children" are regarded as *incapable* of making decisions about alcohol or tobacco use, or of "consenting" to engage in sexual behaviors. Elsewhere in the field of policing sexual conduct this is, I believe, what is called "cognitive dissonance."

But while our legal system increasingly is asked to make exceptions for child perpetrators in order to try them as adults, in general "children" are regarded as incapable, and thus in need of "protection." This produces a whole series of problems and paradoxes. Given the historical background of these laws, it should not be surprising that they are fraught with problems and paradoxes. In the 1970s second wave feminist scholarship examined the rise of social purity legislation at the turn of the 20th century and concluded that while the rhetoric was one of "protection"for women, the primary motivational force behind it had in fact been the desire to control the female body and female desire (Schlossman & Wallach, 1978, pp. 65-94). They were researching from a particular (in this case feminist) perspective; it is not surprising that they found evidence to support their claims. With all due respect, I believe that they cast their net too narrowly. A subsequent discussion of such laws in a study of sexual legislation from the perspective of male concerns and homosexuality—George Chauncey's *Gay New York*—and the rhetoric he quotes there from social reformers' reports suggests that while the true motive was indeed control, the "precocious sexuality" that needed controlling was not merely female, but that of children, and in particular that of poor and immigrant children. Chauncey for instance quotes a report by the Russell Sage Foundation, *Boyhood and Lawlessness*, which focused on the impoverished and immigrant Hell's Kitchen neighborhood on the West Side of Manhattan, where "the children of both sexes indulge freely in conversation which is only carried on secretly by adults in other walks of life ... [the practice of] self-abuse [by children] is considered a common joke ... and boys as young as seven and eight actually practice sodomy" (Chauncey, 1994, p. 203).[1] The aim of the social-purity reformers of the Progressive Era was not just control of female sexuality but also of the archetypical masturbating child, and more particularly the masturbating—and sodomitic—*foreign* child. This is the soil out of which our modern age of consent laws grew.

In practice, this ambivalence about protection and control is irrelevant. "Children" engage in sexual behaviors anyway, and, if we are to believe the media, in rising numbers, and at ever younger ages (though in light of the Sage Foundation's

[1] See also Chauncey's discussion of the work of the Society for the Prevention of Cruelty to Children—simply known in New York City's immigrant neighbourhoods as "The Cruelty" for their practice of removing children from their families if the children were considered to be physically or morally at risk (pp. 138-140).

reports on Hell's Kitchen, one might wish to take these assertions with a whole shaker of salt). In the area of sexual behavior, the legal fiction that "children" are incapable of consent does not prevent them from engaging in and *consenting* to engage in, sexual activities. The figures are overwhelming; and there is no way to avoid or deny them. In The Netherlands, surveys currently suggest that about a third of the population between 12 and 18 (18 being the operational age of consent in The Netherlands at present) are sexually active with other individuals,[2] and while the figures for other Western countries vary, all such surveys indicate that a substantial number of young people are sexually active, and it is simply ridiculous to suggest this is all coerced sexuality. Other indicators point in the same direction: for instance, Oxfordshire, in England, instituted a program by which schools provide the "morning-after" pill for girls from the age of eleven up.[3]

Presently there is also a great deal of panic about "sexting"—teens and pre-teens using their phone-cams to take erotic images of themselves and then send them to their friends or post them on websites for strangers to see. Although little solid information exists about the extent of this phenomenon, let us assume the child protectors' own estimates here that the practice is widespread and growing. On the one hand, the response has been to issue dire warnings of what might happen if the images fall into the wrong hands—the hands of "pedophiles," or perhaps worse, the hands of classmates who are *not* your friends and would be happy to embarrass you. On the other hand, schools are combating it by seizing their students' cellphones, searching them for such images, and turning the results over to the police for prosecution of the "children" for making and distributing "child pornography."[4]

This leads us to the next paradox. Rather than protecting "children," the age of consent laws are criminalizing them and subjecting them to prosecution. The theoretical analysis of how what is ostensibly "child protection" is actually a means for controlling these supposed "victims" and policing their conduct has been made by many writers, including Judith Levine and Steven Angelides (Angelides, 2004; Levine, 2002),[5] and it is unnecessary (and impossible within the scope of this presentation) to repeat it here. With regard to Angelides's thesis, it need only be noted that this is precisely the same mechanism feminists recognized was applied to women, controlling and oppressing them in the name of "protection." The practical results are far worse. There is growing unease about the number of children—"some as young as six," to use a favorite phrase of the Child Protection

[2] See "Kinderen, jongeren, seksualiteit en seksueel misbruik" ACB Kenniscentrum voor Emancipatie en Participatie (2008, 6) and http://www.acbkenniscentrum.nl/upload/UserFiles/Image/ Kinderen,%20jongeren,%20seksualiteit%20en%20seksueel%20misbruik.pdf

[3] See http://www.telegraph.co.uk/education/4110399/Morning-after-pills-available-to-pupils-in-almost-one-third-of-schools.html.

[4] For one case of many: http://news.cnet.com/Police-blotter-Teens-prosecuted-for-racy-photos/2100-1030_3-6157857.html; for one of the few non-hysterical discussions of the phenomenon, see Wypijewski (2009, pp. 6,8).

[5] See also their bibliographies for additional sources.

squads—who are being convicted and placed on Sex Offender Registers, a stigma which in some jurisdictions will follow them for life.[6] Quite recently, Dutch judges were confronted with two cases where the law and sentencing guidelines forced them to sentence 13-year-olds for sexual activity with siblings,[7] or, in another case, to sentence an adult for a relation with a 14 year-old girl where the girl made it plain to the court that *de facto* (if not *de jure*) she had been fully consenting.[8]

The responses so far to these issues have been varied, but not helpful. When confronted with the fact that "children" are consenting (and the ambiguities of what this "consent" involves) some jurisdictions have opted to change the terms: for example, Canada's new law raising the age from 14 to 16, which came into force May 1, 2008, abandons the phrase "age of consent" in favor of "age of protection." The issue is no longer whether the person can consent; even if they can and do consent, they still must be protected—from themselves.

In response to the criminalization of young people for consenting to sex with other young persons, a number of jurisdictions have followed the lead of the DSM definition of "pedophilia," with its qualification that the term does not apply where the age difference is less than five years, and introduced exception clauses for partners who are within three to five years of age of each other. The rationale is that this protects "children," whose sexuality is different than that of adults, from manipulation, while also allowing them to express and explore their "natural" and "immature" sexuality. The problems here are two-fold: first, it undermines the general contention that "children" are incapable of consent (although this can be answered by arguing they can consent—except against the superior status of adults), and second, the fact remains that society still finds many of the resulting relations problematic. This brings us to such media phenomena as "Breezer Sex" (where "young girls" "prostitute" themselves to boys for nothing more than a bottle of Bacardi and cola; this is also being used as an argument for raising the drinking age) and "Lover Boys" (where the boys, almost always non-white, "prostitute" their girlfriends, almost always white, to other boys). By redefining Breezer Sex and the activities of Lover Boys as "prostitution," they fall under different paragraphs of the age of consent statutes, with still higher ages of consent (in the case of The Netherlands, 18) and with no exception clause for near-equal ages.

[6] For instances in America, and other accounts of prosecution of child "sex offenders" or "pre-pedophiles," one should consult the websites of RSOL and Ethical Treatment for All Youth: http://www.reformsexoffenderlaws.org/index.php or http://www.ethical-treatment.org/stories.htm. Other resources to be followed up can be found on each.

[7] In the one instance, a 13-year-old boy, after his mother discovered he and his ten-year-old brother had been engaged in fellatio with one another, the other a 13-year-old girl who had coerced her little sister to masturbate while a group of the older sister's friends watched, by promising she could hang out with the group if she did so: the latter is hardly salubrious, but does it require a criminal record? *Parool:* http://binnenland.nieuws.nl/550975

[8] See http://www.telegraaf.nl/binnenland/3440718/___Seks_met_14-jarige_moet_kunnen___ html?p=2,1.

At the same time, there are voices urging even higher ages of consent (or protection, as the case may be). In the Netherlands, the latest hype is over the *onrijpe puberbrein* ("immature adolescent brain"), the biological "fact" that young people's brains do not mature until age 25, and they are therefore incapable of mature decision-making and need to be protected from themselves until then (Nelis, 2009). While the appeal of this current Dutch best-seller on the subject is, "Parents! Your children need *you* to set their limits and assist in their decisions until age 25!," the same argument about brain development is already appearing in the political arena as a reason for hiking the age of consent and for alcohol and tobacco sales or for military service. Of course, while there may be evidence that the brain does not stop developing until 25, there is nothing to connect that fact with responsible decision making. Do we really believe that people stop making bad decisions when their brain finishes growing at 25? What in fact constitutes sound decision-making?[9]

The problem, I would suggest, is not just that the ages of consent (or protection) are ridiculously high, and that they fail to account for the reality that individuals—particularly in their later teens, but even and increasingly in their early teens as well—are engaging in and consenting to allegedly forbidden behaviors. Even if regarded as laws controlling the behavior of the group they ostensibly "protect," they are still a functional failure. Far from protecting children, these laws actually criminalize and stigmatize them for their conduct. Nor is the problem simply that the ages involved are quite arbitrary and unrelated to any objective behavioral standards for what constitutes the ability to make sound decisions and provide consent. Given the sum total of all these problems interacting with one another, it seems to me that the best way out of this swamp and back to some sort of solid ground is through the development of such objective criteria.

It therefore amazes me that no notice has been taken of one sterling attempt to do precisely that. A decade ago Carrie Hill Kennedy, then affiliated with the Neuropsychology Programs at Drexel University in Philadelphia, U.S.A., published a paper "Assessing Competency to Consent to Sexual Activity in the Cognitively Impaired Population" (Kennedy, 1999). Her work was based on two premises: 1) that sexuality is an integral factor when considering quality of life, and 2) that mental health providers have a responsibility to promote patient's rights to sexual expression, but also to protect patients who may not be able to make informed decisions about their sexuality. In an effort to find a *via media* that would permit both the right to sexual expression for the cognitively impaired and also protect them. Kennedy (1993) developed the Sexual Consent and Education Assessment.

The SCEA is comprised of two scales: Knowledge of Human Sexuality (referred to as the K-Scale) and Safety Practices (S-Scale). These are based on two different

[9] After this paper was written, the Dutch Minister of Justice announced that he is abandoning his attempt to raise the age of consent for any form of sex which has involved any exchange of money, gifts or favors (i.e., "prostitution") to 21—for the present, at least—because of lack of support in the coalition government. *Gay&Night* (Amsterdam), Nr. 134 (May, 2009), p. 9.

types of abilities an individual must possess in order to be considered capable of consent to sexual interaction. The K-Scale evaluates the knowledge the individual possesses regarding sexuality; the S-Scale assesses the individual's functional capacity to apply this information in an independent situation.

The K-Scale is comprised of twelve items, to wit:

K1 Individual can identify basic body parts
K2 Individual can identify own gender
K3 Individual can differentiate between males and females
K4 Individual can identify male and female genitalia
K5 Individual demonstrates knowledge of the basic functions of male and female genitalia
K6 Individual demonstrates understanding and knowledge of masturbation
K7 Individual demonstrates knowledge of sexual intercourse
K8 Individual can identify the major consequences of sexual activity
K9 Individual demonstrates knowledge of birth control
K10 Individual demonstrates knowledge of AIDS and other sexually transmitted diseases
K11 Individual can discriminate between appropriate and inappropriate places for sexual activity
K12 Individual understands the concept of illegal sexual activity.

Two items on this scale (K7 and K8) are critical since they represent the legal criteria in some American states for consent among the cognitively impaired, where such criteria existed at the time. In applying the SCEA rubric, these two *must* be answered correctly in order for the individual to be deemed capable of giving sexual consent. Incorrect responses made to any K-Scale items indicate a need for further sexual education.

The S-Scale, Safety Practices, is a set of five questions asked of a person who has worked closely for at least a year with the individual being assessed. These questions concern the individual's observed ability to make choices and protect himself or herself.

S1 Individual demonstrates preferences for some people over others
S2 Individual makes choices based on preferences
S3 Individual demonstrates effective personal safety practices
S4 Individual effectively communicates to another person that he or she does not want to participate in an activity
S5 Individual rejects unwanted advances or intrusions

Scoring with the SCEA involves a pass or fail decision for each item. For the SCEA, correct responses to K-Scale items 7 and 8 and positive responses to all the S-Scale items are the minimal standard for determining competence to consent. (It should be noted however that it is hard to conceive correct responses to K7 and K8

without correct responses to K1 through K6.) Again, for the purposes of the SCEA, the remaining K-Scale items, while not used to determine competency, are used to assess the extent of the individual's knowledge and provide specific indications about what concepts and information need to be provided in order for the individual to make the most informed choices possible.

The remainder of the 1999 Kennedy article describes and assesses trial applications of the SCEA, comparing results from its use with independent experts' evaluations of the competency to consent on the part of the individuals with whom it was used. Her conclusion is that the results of the two evaluations are generally consistent, and that the SCEA does provide an objective standard for determining capability for consent to sexual activity.

The question now becomes whether the SCEA or some standard similar to it might be helpful in determining the capability for consent among minors. To begin, there are philosophical issues. At first sight, it may seem a bit anomalous to compare children and young people with the cognitively impaired at all. It must be noted, however, that until the past couple of decades, when attitudes changed about the rights and quality of life (and more specifically about sexual rights) of the cognitively impaired, the treatment of children and the cognitively impaired was in practice the same: they were regarded as having no sexual rights (or even needs), and for their own safety they were denied sexual expression.

This leads us to a more specific question: are the rights of the two groups similar? Based on correspondence that an American acquaintance of mine had with Ms. Kennedy, I am told that she herself denies the applicability of the SCEA to the question of sexual consent as it relates to minors, simply because it is intended for cognitively impaired adults, who as *adults* do have the right to sexual expression as a part of their quality of life, whereas children and youth, by definition, do not have that right. There is no point assessing the competence of a child to consent to something to which the child has no right. That is, of course, one potential answer; but it is not the only answer to the question of whether the right to sexual experience is a human right (the expression of which should remain as unimpeded as possible), or a political right (such as the right to vote), which is extended only to those who meet certain criteria. Kennedy's entire project was based on the assumption that as adults cognitively impaired persons still have the right to sexual experience, while "children," under whatever age society defines the "child," do not. As I said before, however, this is not the only possible view on the matter. I cite here Matthew Waites's work on sexual expression as a basic human right (2005), and I agree with his analysis that the right to sexual expression is a basic human right. This does not mean that no limits may be placed on the exercise of basic human rights, but these limitations must not be arbitrary, and they must be as specific as possible, based only on demonstrable need and sound evidence.

A second related objection to comparing the cognitively impaired with "children" is that while adults are sexual beings, "children" are "innocent," by which advocates of this objection mean "without sexuality." In Dutch society, this view often takes the form of letters to the newspapers opposing sex education: "Children should be watching Kabouter Plop, not learning about penises and vaginas.

They have the rest of their life for that." However widespread (and even politically influential) this view is in society, there is no *scientific* evidence to support it. We may not be entirely clear what the parameters of childhood sexuality are or how they relate to adult sexuality, but it is overwhelmingly recognized in the child study community that even young children are sexual, and that they express sexuality with other individuals, both of their own age and other ages.[10] For adolescents, the statistics I noted in the introduction make this case even more abundantly clear.

Accepting that an approach based on Kennedy's SCEA could be productively applied for determining a minor's capacity to consent, there are two more questions. The first is whether the SCEA, as it stands, provides an adequate instrument for use with minors. It seems to me that there are some of the K-Scale entries which are in fact irrelevant for prepubescent children (for instance K9, regarding birth control) but these are very relevant for adolescents. These are, however, not among the critical items—K7 and K8, and the S-Scale items. Potential problems surrounding K8 are more serious. In identifying the major consequences (and I think here we need to understand that, while it is not said, this means major *negative* consequences) of sexual activity for the adult population for whom the SCEA was developed, we are probably dealing with pregnancy and sexually transmitted diseases, as K9 and K10 indicate. With regard to minors there is a widely accepted contention that *all* sexual activity (certainly that with persons more than a few years different in age) will have solely negative consequences. Current calls to restrict "sexting" rely on the contention that the creation and distribution of sexualized images of themselves by minors is potentially damaging in itself, and may have further dangerous unintended consequences if these images slip into the wrong hands (an issue having bearing on K11, perhaps). For dealing with these contentions, which would potentially sabotage the whole effort, we need a more honest assessment of the risks and possible harm from juvenile sexuality or from intergenerational sexuality. In this context, I refer to the contribution of Rind, Bauserman and Tromovich on this issue (1998) and again to Judith Levine's contention that efforts to protect children from sex are a greater potential source of harm.

A further question is how insights gained by using the SCEA might be applied. If blanket age of consent laws were to be replaced by laws criminalizing sexual assault (that is to say, *unwanted* sexual advances or attacks, to which individuals did *not* consent), there would undoubtedly remain instances where one (or both) of the parties would claim consent. In these instances, use of something like the SCEA would of course be similar to the individualized approach assumed by the SCEA itself: in cases where there was a question about whether the child or young person had the capacity to consent, he/she could be assessed on the basis of their own K-Scale answers and answers to the S-Scale questions by parents or teachers who knew them. (This would mean it was being employed retroactively, rather than

[10] Two fairly recent sources, which can stand for a number of others: Sandfort and Rademakers (2000), and Bancroft (2003) particularly Part 3.

proactively, as is the intention with the SCEA.) However, a second possibility exists. Although it would involve massive research in general child study to determine the age at which children on the average attain the functional capacity to fulfil the S-Scale criteria, and the age at which they demonstrate the knowledge required by items K1 through K8, it should not be impossible to reach some scholarly consensus. In regard to the K-items, Renate Volbert's "Sexual Knowledge of Preschool Children" (Volbert , 2000) indicates that a good deal of the knowledge required by items K1-6 is already in place by age six. This information about children's development and knowledge acquisition, once established, could then be used to draft more realistic age of consent laws, certainly at a much lower age than 18.

A final positive point to note here with regard to the application of an objective standard for consent is the importance of sex education, and specifically education as protection. Acknowledging the importance of acquiring information as preparation for consent is the polar opposite to the school of thought on sex education which asserts that ignorance protects children and youth, presumably on the theory that what they don't know can't hurt them. As with the SCEA for the cognitively impaired, for individuals deemed incompetent on the basis of K-Scale items the procedures would provide specific requirements for education toward competency to consent. For those deemed competent to consent, but who do not pass all twelve items, it would indicate learning additional information or concepts to enable them to make the most informed choices possible, for optimal protection. The answer to the contention that "children do not understand" is to educate them so that they do. In terms of the S-Scale, education will mean training individuals toward self-assertion. This may not be welcome to those authorities who believe in imposing a "just say no" or abstinence only agenda; individuals making their own decisions in society has never pleased authoritarians, but assertiveness education, if not favorable for social control, would appear to be the best chance for effective protection.

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