

# What Really Is Wrong with Pedophilia?

Author: **Robert Ehman**

Source: *Public Affairs Quarterly*, Apr., 2000, Vol. 14, No. 2 (Apr., 2000), pp. 129-140

Published by: University of Illinois Press on behalf of North American Philosophical Publications

Stable URL: <https://www.jstor.org/stable/40441281>

## WHAT REALLY IS WRONG WITH PEDOPHILIA?

*Robert Ehman*

Philosophers tend to neglect pedophilia even though it raises fundamental questions about the justification of the actions of adults toward children. The neglect appears in part to be a result of the radically negative attitudes toward pedophilia in our society. These attitudes are perhaps the final bastion of Puritan sexual ethics. But in part, the neglect might also be accounted for by the assumption that the standard arguments against pedophilia are persuasive. These are, first, the argument that pedophilia is psychologically harmful to children and, second, the argument that since children cannot validly consent to sex, sex with children is a violation of their rights. I believe that there are serious questions about both of these arguments. The case for a causal connection between a child's sex with an adult and psychological harm is at best inconclusive. Those not negatively affected often remain invisible to clinical observation. Moreover, much of the harm from pedophilia arises from the negative social reaction to it, and to the extent that the harm arises from the social reaction, it provides only a limited argument against pedophilia. For harm arising from negative attitudes does nothing to show that the negative attitudes themselves are justified. Moreover, if the harm from pedophilia depends on a negative social reaction alone, it provides an argument against pedophilia only when it cannot be successfully concealed from public view.

Since there have been a number of recent extensive reviews of the psychological literature regarding the harmfulness of child-adult sex putting these claims into question, I shall focus in this paper on the argument from consent.<sup>[1]</sup> I shall argue that the inability of a child to consent in a full sense to sexual interactions is not sufficient to rule out pedophilia. However, I shall attempt to show that if we take the argument from consent one step further and consider the issue in the light of the child's retrospective consent as an adult to the earlier encounter, the argument points to a fundamental constraint on any child-adult sex.

When we speak of pedophilia, the question arises as to the age of the child sexual partners with whom we are concerned. While from a legal perspective, it might be useful in this as in other cases to legislate an age of consent, it must be recognized that children differ in the age at which they become capable of valid consent to any given activity. There are children of twelve or thirteen who might be sufficiently experienced sexually and socially to be capable of meaningful consent to sex; they might be others at seventeen or eighteen who are not. The same sort of variation is found in the capability of meaningful consent to other activities such as investments or the choice of a school or the choice of the parent with whom the child is to live in the case of a divorce. In order for the law and for moral rules not to be blind and oppressive, these should as far as possible take into account the level of maturity and experience of the child in question. For many jurisdictions, sixteen is the age of consent to sex. But there are certainly fourteen-year-olds who are more capable of consent than some of sixteen.

In order to make the judgment as to the capability of consent in a given case, we must apply the criteria of valid consent to the person in question. In considering the capacity for consent, there is a tendency to assume that an agent is either capable of full consent or not capable of consent at all. But since children mature gradually, they increasingly become capable of consent. The assumption that there is a hard and fast boundary between consent and the absence of consent appears to arise from the usefulness of clear legal criteria for consent rather than from an actual examination of the capacities of the agents in question. Moreover, as we shall see, there are at least two distinct dimensions of consent: informed consent and free consent. The one is based on the agent's level of knowledge of the nature and consequences of his choices; the other on the degree to which the agent is free of subordination to others. These not only in each case admit of degrees but also might vary independently of one another. The complexity and variability of a child's capacity for consent make arguments that appeal to a child's lack of consent more problematic than often supposed.

In a recent article in *Public Affairs Quarterly*, Professor Igor Primoratz advances the most recent version of the argument that pedophilia is impermissible because of the child's inability to consent to sex.<sup>[2]</sup> In making his case, Primoratz provides an account of the necessary conditions of consent to sex. The first of these conditions is a knowledge of the physical, psychological, and social aspects of sex. For Primoratz, the inescapable limitation of a child's knowledge of these aspects of sex means that a child cannot consent to sex.

While Primoratz admits that adults might in some cases be as naive and mistaken with regard to the ramifications of their sexual affairs as are children, he maintains that because these limitations are not applicable generally to adult sexual choices and result for the most part from the adult's decision not to examine his sexual choices as fully as he might, they do not put the validity of adult consent to sex in general into question as they do in the case of sex with children. There is clearly an age at which a child does not have sufficient knowledge of sex to be capable of informed consent to it. However, Primoratz and others who reject pedophilia because the child cannot consent to it fail to explain why a child must be capable of informed consent to engage in sex with adults and not to engage in a wide range of other activities for which the child is equally incapable of informed consent.<sup>[3]</sup> Children are typically less informed than adults about the physical, psychological, and social consequences of many of their activities. They do not appear to be less informed of the consequences of sex with adults than of the consequences of athletics, courses of study, religion, and many non-sexual social relationships. I take it that Primoratz and other critics of child-adult sex would hardly prohibit all of these activities on the ground that the child has insufficient knowledge and experience to make possible informed consent to them. For Primoratz children are not only incapable of informed consent to sex with adults, they are also incapable of free consent because of their dependence upon adults and the superior social position of adults.

Primoratz introduces his argument for the inability of children to freely consent to sex with adults by considering David Finkelhor's contention that "adults control all kinds of resources that are essential to (children) -- food, money, freedom etc. In this sense the child is exactly like the prisoner who volunteers to be a research subject. The child has no freedom in which to consider the choice."<sup>[4]</sup> But Primoratz does not maintain, as does Finkelhor, that children are in effect prisoners of adults. He rather makes the point that the "far reaching asymmetry of physical and psychological maturity and power, as well as the consequent social standing, between a child and an adult" reinforced as this is in the manner in which children are brought up means that "a child tends to see an adult as something of an authority figure merely by virtue of his being an adult." Primoratz concludes that the child "tends to defer to adults, and often finds it very difficult to assert itself against an adult, to say no to an adult's requests and advances." For this reason, "a child's willingness to go along is not free enough to licence an adult's sexual involvement with it."<sup>[5]</sup>

However, while the social and economic asymmetry between adults and children puts free consent into question, it does nothing to explain why this rules out sex between children and adults but not other activities that adults encourage children to pursue. The same asymmetry between children and adults is present in many other cases as well as sex. Why is free consent necessary for the permissibility of sex and not for the permissibility of participation in sports or religious activities? These too might involve the exercise of authority over the child to motivate the child to participate in activities that the child might not otherwise participate in.

The asymmetry in social status between the adult and child is in any case far more complex and variable than Primoratz appears to recognize. As a child grows older, the child's dependence and inferiority are reduced in many domains. Hence, an early adolescent is far less subject to the authority of adults in general than a preschool child. When we consider very young children, it is doubtful that they have any real freedom from their adult caretakers. However, this is by no means generally the case even in older pre-adolescents. The asymmetry between child and adult is likewise affected by the relationship in which the younger person stands to the adult in question. In the case of parents and teachers who have authority over the child, the freedom of the child to reject the requests of the adults is typically less than their freedom to reject the requests of adults who have no authority over the child. A ten-year-old child's eighteen-year-old second cousin, for example, has far less control and authority over the child than the child's parents or teachers. By the time a child is school age, the child can normally distinguish between those who have authority over him or her and those who do not and can recognize the domain and extent of the authority. Primoratz's argument that a child cannot freely consent to activities that adults encourage is more plausible the younger the child and the greater the authority the adult in question exercises over the child.

Primoratz appeals to studies by Sandor Ferenczi in 1932 and Michael Ingram in 1981 showing that in typical cases of child-adult sex, the activity has different meanings for the child and for the adult. He argues that this further puts into question the legitimacy of adult-child sexual interaction.<sup>[6]</sup> For the child according to Ferenczi the sexual act is simply playfulness, tenderness, and affection.

The adult often "mistakes the child's playfulness for wishes of a sexually mature person" and acts on the basis of this misperception. One might question whether it is indeed generally the case that children misinterpret sexual activity as nonsexual in the light of the fact that, as most observers admit, children have genuine sexual desires. If they are not asexual, why do they typically fail to recognize sexual activity? But even if we admit that the child typically interprets sexual activity in a nonsexual manner, what does this show? In adult sex, the two parties often interpret the meaning of the act differently. One of the parties might take the sexual act as an expression of love and the other simply as erotic play. If one party misleads the other, this indeed undermines consent and puts the legitimacy of the interaction into doubt. But a difference in interpretation alone does not by itself undermine consent. If the absence of consent is sufficient to rule out sex with children, the difference in interpretation of the act is not needed to condemn it. If the absence of consent is not sufficient to rule out sex with children, it hardly seems that a mere difference of interpretation of the meaning of the act is a stronger basis for condemnation. For children and adults interpret almost every activity in a somewhat different light. Certainly this does not put into question the legitimacy of all such activities. If a difference in interpretation does not put into question other activities in which adults participate with children, why does it put sexual activities into question? One reason why we might require consent for sex and not for such activities as religion, courses of study, or even the decision as to the parent with whom the child is to live might be that sex involves an intimate physical interaction in a manner in which these other activities do not.



Hence, one might argue that nonconsensual sex involves a violation of a child's right to bodily privacy and to a control of his or her body. From this perspective, sexual interaction with a child is a trespass in a sense in which nonsexual activities are not. I find it hard to understand this claim for a special status for sexual interaction. Medical treatment, sports, and nonsexual displays of physical affection involve bodily contact with children. There are nonsexual demonstrations of affection, e.g., the comforting of a child who is ill, that might be more physically intimate than some sexual acts such as masturbation in the presence of a child. One would hardly prohibit all physical interactions between adults and children on the ground that children are not capable of free informed consent to them. In order to prohibit sexual interaction on the ground that it involves physical intimacy, one must make a case that there are physical or psychological features of sexual interaction that justify the ruling out of nonconsensual sex but not other nonconsensual bodily interactions. If, as I suspect, one cannot make such a case, one can rule out nonconsensual sexual interactions between adults and children without ruling out all nonconsensual interactions only if one shows that sexual interactions typically fail to meet the general condition of any legitimate comportment toward children.

I shall argue that the condition of legitimate nonconsensual interactions with children is that the children be justified in retrospectively consenting to the interaction once they become capable of mature judgment.

The first step in this argument is to answer the question as to why we require consent as distinct from a mere willingness as a condition of the legitimacy of certain actions of adults toward one another. Consent imposes more stringent conditions on an action than willingness. In order for an act to be willing, it is necessary only that an agent perform an act apart from coercion or threat. The agent need not understand what he is choosing or be prepared to take responsibility for the outcome. Nor must an agent be free of subordination to the authority of others in choosing the action. By contrast, when an agent consents to perform an action, he must recognize what he chooses and recognize the risks and rewards of the choice and be an independent agent. Hence, consent involves a knowledge of the nature of the act and its significant costs and benefits as well as the freedom to make a decision free from subordination to others. If an action fails to fulfill these conditions of consent, an agent will rightly look back upon the action itself and its consequences as incidental to himself as an agent, and he will therefore be justified in disclaiming responsibility for the act and its outcome. Since he will not understand what he is choosing or the consequences of his choice, he cannot be said in a strict sense to choose the act at all. He will for this reason not regard it as his own in a full sense. If a child is incapable of consent to sex, he will to that extent see the act from the future perspective of an agent capable of consent as something for which he was not himself responsible. The fact that he was willing to engage in the act or that he derived satisfaction from it at the time does not take away from his failure to understand what he was doing, to recognize its risks or rewards, or from his subordination to the adults with whom he interacted.

If from the perspective of mature judgment, he finds that the act is one that he would not have consented to at the time, he will be justified in affirming that he was taken advantage of for ends other than his own even when he was not harmed by the encounter. He will therefore be justified in condemning the adults for their conduct toward him regardless of whether or not it harmed him. For a child to understand the nature of a sexual interaction with an adult in our society poses a substantial challenge to the child. For in the same manner as most other human acts, sexual acts are defined by the rules that apply to them. Just as in order to understand what it is to buy a bond or an option, an agent must understand the rules that govern these investments, so must those who engage in a sexual interaction understand the rules of the relationship. These are often complex. The fact our society generally forbids child sexual activity means that there are no established positive rules that prescribe the expectations that children might reasonably entertain as to the character of their sexual interactions with adults. For this reason, children and the adults who participate in sexual interaction with them must in each case formulate and communicate to each other the rules of the relationship. These include entry and exit rules, rules prescribing the sort of acts permitted and forbidden, rules regarding sexual relationships with others, rules regarding the scheduling of the activity, rules of the disclosure of the affair and so forth. The younger and less experienced the child, the more likely the child will fail to understand some or all of these rules. The fact that an adult cannot appeal to established social rules means that adults too might fail to have a clear conception of the rules of their sexual interaction with a child.

Insofar as adults fail to understand the rules of the interaction, they too fail to meet a necessary condition of informed consent. The existence of established rules in the cases of those activities that we typically find acceptable for children marks an important distinction between these and sex. The existence of these rules in these cases make it more likely that a child will be able to understand the nature of his interactions with others. For example, children typically understand the rules of the sports in which they participate and therefore to that extent understand the nature of the activity even though they might lack an adequate understanding of the benefits and risks. However, children often fail to understand other rules governing the sport. Hence, they might not understand the rules and practices of the adults who coach and supervise the sport or the rules and expectations of the parents and other adults who are involved in the sport as spectators or in other roles. If they fail to understand the full range of rules that govern an activity, their consent is not fully informed in spite of their understanding of certain of the rules of the activity. In order to be capable of informed consent, an agent must, as we have pointed out, not only understand the nature of the act that he chooses but also recognize the significant risks and benefits of the act. In the case of sex, this involves understanding the risks of disappointment, abandonment, sexual competition, the chance of humiliating or offending the other and of the other's humiliating and offending oneself, and in certain cases, the risk of pregnancy.

The younger and less experienced the child, the less likely it is that the child will be able to understand these risks at the time of his action and as a result will experience these as a mere fate that befalls him rather than as a consequence of his own choices.

In order to minimize a child's ignorance of the risks of his or her actions, adults must clearly communicate the parameters of their interaction with the child so that the child understands what sort of commitment the adult is making to the child. If a sexual interaction is to be brief and causal, the adult must make this clear to the child and have evidence that the child understands and accepts this. If the child has expectations of a further commitment, it is essential that the adult make an effort to understand these expectations and be prepared to meet them if he decides in this case to have a sexual relationship with the child. If a child is too young to understand the parameters of an encounter or if the adult is not prepared to meet the expectations of the child, he must refrain from the act since he otherwise takes a high risk of disappointing the child. Children, as Primoratz points out, are typically subordinate to adults in a manner that limits their freedom of choice in relation to the requests of adults. This limitation is, as we have seen, a matter of degree. To the degree that a child's willingness to engage in a sexual relationship with an adult is a result of the superior authority of the adult, to that degree it is unfree and nonconsensual. In order to make the choice of the child as free as possible, adults must make clear to the child that they will do nothing to punish the child because of the child's refusal to engage in the interaction.

While adults typically cannot bring a child to the point where the child is capable of full consent, they can take actions that make a child's interactions with them as consensual as possible. If they do this, and have good reason to suppose that the action will be accord with the child's reasonable goals and values, the person will be justified in retrospectively affirming the relationship as he becomes capable of full consent. This appeal to appeal to future consent as a surrogate for present consent might appear open to the objection that since future consent is based on the values and goals of the adult, not those of the child, it is therefore not a justifiable basis for an assessment of an action toward a child. But the consent in this case is not based on the adult's present values and goals but on the values and goals of the child. In order to be justified in retrospectively consenting to the action, the person must have reason to affirm that the adult took care to assure that the action met the conditions of legitimate actions toward children. In order to be legitimate, these actions need not accord with all the goals and values that the person might acquire as an adult. If this were a requirement of legitimacy, it would be hard to justify any action toward children. For it is just about impossible to know during childhood what the goals and values of a person as an adult will turn out to be.

What adults who interact with children can be expected to know is whether or not an action is in accord with the reasonable goals and values of the child.

For example, it is legitimate for an adult to encourage a child to attend a church when the activity is as consensual as possible, enjoyable to the child, and the adult has reason to believe that it will have no harmful effects on the child. The adult need not have reason to suppose that the person will remain religious as an adult.

In the same manner, the fact that a person might reject a certain sort of sexual interaction as an adult does not justify a condemnation of that interaction as a child when the interaction is as consensual as possible, enjoyable, and appears at the time likely to have no harmful consequences for the child's well-being. The justification of sex between adults and children does not demand meeting the impossible condition that an adult be certain of the child's retrospective assessment of the interaction. It implies only that the adult has good reason to affirm that as the child matures into an adult, he will have no good reason for not consenting to the relationship. For example, social pressures and prejudices might cause a person to condemn a past relationship simply because it violates a common social norm, not because it was manipulative, uncaring, or irresponsible. If a person condemns a past relationship for no good reason, this does not invalidate the relationship; it invalidates the negative judgment. The requirement of justified retrospective consent does not depend on the presence of psychological harm in the absence of such consent. While the duty toward the child in this case is a duty to demonstrate a concern for the child's future welfare, a failure to fulfill the duty might not lead to psychological harm. The moral wrong of a violation of this duty is as independent of actual psychological harm as is the moral wrong from the violation of other duties. No more than a person must suffer demonstrable psychological harm from being defrauded or betrayed in order to claim that he has been wronged by these acts need a person suffer such harm in order to claim that he was wronged in a childhood sexual encounter.

Those who condemn adult-child sex because of psychological harm to the child are as mistaken as those who condemn other moral wrongs on the basis of psychological harm to the victim rather than because of a failure to fulfill one's duties to the victim. The sexual interaction between children and their peers raises issues distinct from those raised by sexual interaction between children and adults. One can hardly demand of children of similar age that they fulfill the requirements that we impose on an adult's interaction with children since the children are typically not capable of taking responsibility for their actions in the manner in which adults are. From the perspective of a mature judgment, we are not justified in demanding that childhood peers take into account our future judgment and welfare in the manner required of adults. For we are not normally justified in holding childhood peers more responsible for their actions than we ourselves were at that age.

However, although children cannot typically expect the same sort of responsibility for actions toward them on the part of their peers than they can from adults, there remain risks in the sexual and nonsexual interaction of children with one another. A ten-year-old might be as psychologically harmed by another ten-year-old as he might by an adult. The adults who have responsibility for children must take responsibility for protecting the children under their care from victimization on the part of other children as well as from victimization on the part of adults. The sexual activities of adults with each other are their own private affairs in a manner in which the sexual activities of children with one another are not.



The fact that children cannot take full responsibility for their own actions means that the adults have an obligation to take responsibility for them in sexual as well as nonsexual domains. Those adults who remain too inexperienced and naive to become informed of what is relevant to their sexual decisions must be treated in the same manner as children are treated. Others must act toward them in such a way that they have good reason to believe that the ill-informed agents would endorse the action once they become capable of informed consent. Those who take advantage of childlike adults are not morally superior to those who take advantage of children. For these adults will retrospectively rightly regard themselves as having been taken advantage of just as children do when treated in this manner. Sexual interactions between adults in a superior position toward adults subject to their authority raise issues similar to those raised by adult-child sex. There are two conditions under which adults have legitimate authority over other adults. In the one, subordinates give free informed consent to the authority; in the other, superiors exercise authority apart from free consent in military or other emergency situations where there may be justification for nonconsensual exercise of authority. When the authority is not consensual, superiors must appeal to retrospective consent to justify the nonconsensual imposition of authority in the same manner as adults must appeal to retrospective consent to justify their interactions with children. The authority of adults over other adults does not legitimately extend to sexual demands.

For legitimate sexual interaction between superiors and subordinates, it is necessary that they be as consensual as sexual interaction between equals. This requires that the authority of the superior play no role in the choice of the subordinate to participate in the interaction. Superiors who engage in sexual interactions with subordinates must accept the burden of proof in justifying the relationship because there is typically a reasonable doubt as to whether a subordinate freely consents in this case. In the same manner that in the case of adult-child sex we must ask whether the child would consent as an adult, in the case of sexual interactions between superiors and subordinates we must ask whether the subordinate would consent as an equal. Unless we have good reason for an affirmative answer, we cannot justify the sexual interaction in either case. The appeal to retrospective consent to justify actions toward children is not distinctive of sex.

When an adult leads a child into a sport or a social interaction that the adult does not have good reason to suppose that the child will consent to as an adult, he violates his responsibility toward the child just as he does when he leads a child into a sexual affair that he does not have good reason to suppose that the child will consent to as an adult. The adult's encouragement of a child to engage in a sport might indeed be even worse than encouraging the child into a sexual interaction if the child is less willing at the time to participate in the sport than to participate in the sex.

This means that unless we are prepared to impose harsh sanctions for these nonsexual infractions of a child's autonomy, we cannot consistently impose harsh sanctions for sex when the failure to take into account the subsequent consent of the child to the sexual activity is the sole offense against the child. In conclusion, let me summarize the basic distinction between my position and the position that pedophilia is impermissible because of the inability of the child to consent to sex. I argue that the absence of valid consent alone is not sufficient to prohibit sex since it is arbitrary to require consent for sex and not for other activities with children. However, I hold that the inability of children to consent imposes a constraint on all adult interaction with children. The adult's interaction with children is legitimate absent full consent only when the adult has reason to suppose the child will have good reason to consent to the interaction when the child becomes an adult capable of free informed consent. When adults constrain their actions toward children in this manner, they can defend their conduct toward them regardless of the nature of the activity. For the most part, adults cannot make the case that children will consent to adult-child sex when they assess it as mature agents. If they cannot make this case, adult-child sex is illegitimate.

Vanderbilt University.

## NOTES:

1. For a critical review of the literature on the psychological affect on children of child-adult sex, see T. O. O'Carroll, *Pedophilia: The Radical Case* (London: Peter Owen, 1980), and R. Ehman, "Adult-Child Sex," in *Philosophy and Sex*, 2d edition, ed. R. Baker and F Elliston (Buffalo: Prometheus Books, 1984).
2. "Pedophilia," *Public Affairs Quarterly*, vol. 13 (1999), pp. 99-109.
3. For a further discussion of this point see Ehman, "Adult-Child Sex."
4. David Finkelhor, "What's Wrong with Sex between Adults and Children?" *American Journal of Orthopsychiatry*, vol. 49 (1979).
5. Primoratz, "Pedophilia," p. 107.
6. S. Ferenczi, "Sprachverwirrung zwischen den Erwachsenen and Dem Kind (Die Sprache der Zaertlichkeit and der Leildenschaft)," *Bausteine zur Psychoanalyse*, 2 Aufl., Bd. III (Bern: Verlag Hans Huber, 1964), p. 518; Michael Ingram, "Participating Victims: A Study of Sexual Offenses with Boys," in *Children and Sex: New Findings, New Perspectives*, ed. Larry L Constantine and Floyd M Martinsom (Boston: Little Brown and Co., 1981).