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Een overheid op drift: de strafrechtelijke beheersing van seks en jongeren

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'Pre-adults' Having 'Casual' Sex with No Strings Attached? Teenage Sexual Activity and Dutch Criminal Law

ABSTRACT

Those between 12 and 18 years of age are protected by Dutch criminal law against sexual contact. Based on criminal cases of sexually active youngsters, this article will show that promiscuous teenage sexual activity poses some dilemmas for the just application of law enforcement operating on the basis of age limits. This relates to the fact that sexual contact with minors can be a crime regardless of whether the act can be qualified as consensual. Taking 'consent' as a starting point, the focus will be on criminalizing sex with youngsters from the standpoint of the alleged victim, the alleged offender and society at large. What will be shown is that sex at an illegal age is much more likely to be authorized when the age discrepancy is trivial and when the act of sex is accompanied by an affective relationship over time. Most notably this poses some conflict for promiscuous sexual contact among youngsters exploring their sexual desires and consequently constituting a temporal relationship. After presenting a legal framework and analyzing some empirical data, this article will offer some theoretical reflections on teenage sexual experimentation as linked to social conditions at a more abstract level. In conclusion it will be argued that the legal application of parameters controlling teenage sexual activity is done in order to preserve more than just the sexual integrity of a minor.

Keywords: Sexual activity – Youngsters – Criminal law – Harm – Morality – Excess

Ryan Bingham: Make no mistake your relationships are the heaviest components in your life. All those negotiations and arguments and secrets, the compromises. The slower we move the faster we die. Make no mistake, moving is living. Some animals were meant to carry each other to live symbiotically over a lifetime. Star crossed lovers, monogamous swans. We are not swans. We are sharks.

Up in the Air

INTRODUCTION

This article can be characterized as a search for legal boundaries with regard to underage sex as it is enforced by the Dutch criminal justice apparatus. The technical term for underage sex deemed illegal is known as lewd conduct and that which is considered lewd is a direct reflection of moral boundaries.

It is therefore the case that illegal boundaries are a reflection of moral boundaries. Both will be dealt with throughout this article. Promiscuous teenage sexual activity poses some dilemmas for the just application of law enforcement operating on the basis of age limits. This relates to the fact that sexual contact with minors can be a crime regardless of whether the act can be qualified as consensual. Taking 'consent' as a starting point I will focus on criminalizing sex with youngsters from the standpoint of the alleged victim, the alleged offender and society at large. Regarding the latter it is interesting that the 1960s and 1970s are in retrospect often characterized as sexually permissive (Seidman 1989). At the time a wide range of sexual manifestations were no longer taboo (Mirkin 1999). In the Netherlands diversity was accepted and celebrated to the extent that in some circles even child pornography and paedophilia were treated within that range. The pathological focus on sexual deviance was somewhat replaced by the embracement of plurality. In the aftermath of this liberal era, Dutch labour party senator Brongersma, a well-respected and publicly known paedophile, stated mockingly that paedophilia and child abuse are related to each other in the same way as heterosexuality and rape.

Regarding the topic of this article there was also a lot of talk about decreasing the age of consent so that underage sex would no longer be a crime because of the age limits. All this has changed drastically over the course of four decennia (see for instance Reerink 2007). In talking about sex, the talk is not so much about the liberation from repression but rather the necessity of containment. Instead of viewing sex as a positive force, it is now intimately tied to victimhood.¹ In the slipstream of the sexual emancipation of women and homosexuals, the sexual 'liberation' of children proved to be one step too far. Women movements raised major issues concerning the patriarchal and sexual oppression of women and children. When incest was exposed as an ubiquitous feature of patriarchal society² and with the coming of high profile, sex cases, even in the Netherlands sex became once again suspect. Nowadays, Child Sexual Abuse (CSA) is the dominant discourse and vulnerability is at the centre of attention. Whenever we are dealing with children this might seem a justified compass.³ But what is exactly at stake in upholding age limits when dealing with sexually active teenagers?

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- 1 What is more, since sex is a very private matter and has a very personal impact it has become the prominent site of the enormous inflation of the concept harassment. Within our culture, problems of insecurity seem to focus predominantly on personal safety, making sexual integrity the core of one's precarious standing in the world (see Bauman 1995; Žižek, 2008).
 - 2 Ironically, using the same comparison like the one stated above by Brongersma, but no longer in a ridicule fashion. See Liddle (1993) for a critique with regard to overly deterministic feminist approaches embracing an essentially predatory male sexuality.
 - 3 Although both fall under the heading of 'underage', it is useful to make a distinction between prepubescent children and adolescents. The latter should not be treated a priori as asexual and can engage in autonomous sexual expression. Hence, for these minors the presence of sexuality as an external and alien force penetrating their sexual innocence can be misleading (see Gooren 2011a).

Teenage sexual activity seems to be more and more viewed as problematic and youngsters are said to lack a moral compass in dealing with their sexual appeal and their sexual wishes (McNair 2002; Levy 2005; De Graaf et al. 2007; Hilkens 2008; Bale 2011). A case in point is the current societal emphasis in Dutch society on sexual transgression among youngsters. Teenage sex is primarily understood as in need of regulation and is now for years on the public agenda as a major concern. In the beginning of the twenty first century these concerns focused for instance on the phenomenon of 'breezersex' as it was picked up by the Dutch media. 'Breezersex' refers to juvenile consumption prostitution and is named after a popular alcoholic drink supposedly functioning as a gift in exchange for girls offering their bodies for cigarettes, phone cards, alcohol, rides home or access to a club and on some occasions these acts are taped on camera. Recently a new Dutch phenomenon announced itself: 'banga', bang being slang for sexual intercourse and referring to sexually active girls. Allegedly there is a circulation of banga lists accompanied by a menu of sexual options that are distributed via the use of smart phones and social media listing the biggest sluts in school. These two examples are reminiscent of the American case of so called rainbow parties where females wearing various shades of lipstick would take turns fellating males in sequence, leaving multiple colors (a "rainbow") on their penises. In the Netherlands underage sex understood as an expression of 'loose morals' can be illegal.

In what will follow, I will focus on youngsters between 12 and 18 years of age who are protected by Dutch criminal law against sexual contact. If teenagers are approached or approach a person themselves such contact might be qualified as lewd, but the minor in question could have played a sexually active role nevertheless. What will be shown is that sex at an illegal age is much more likely to be authorized when the age discrepancy is trivial and when the act of sex is accompanied by an affective relationship over time. This poses some conflict for promiscuous sexual contact among youngsters exploring their sexual desires and consequently constituting a temporal relationship. The conflict in question is about a desire for free love and the societal rules that restrict it. After presenting a legal framework and analyzing some empirical data this article will offer some theoretical reflections on teenage sexual experimentation as linked to social conditions at a more abstract level. Parallel to a restricted climate as orchestrated by numerous authorities there is a more open climate as expressed by youngsters themselves practicing uncontained sex. In the last two parts of the article problems related to the absence of clear courtship rituals will be considered and assessed and also how this affects the legal standing of the offender. In the conclusion of the article, it will be argued that the legal application of parameters controlling teenage sexual activity is done in order to preserve more than just the sexual integrity of a minor.

METHOD

Besides studying case law, I have been interviewing professionals within the administration of criminal justice in order to find answers. The empirical data can be found in the sections on paradigmatic cases and analyzing the data. It is also conveyed throughout the article whenever reflecting on the assessments of underage sexual activity. For criminal cases to be selected, the teenage victim had to be at least 12 years old; the difference in age between the alleged offender and victim had to play an important role; the offender had to plea that the sex was consensual and the victim had to refrain from resistance. Together these elements make up the core narrative that is of interest here. The elements serve as preconditions in order to establish that the underage sexual event constituted something different than rape and was possibly legal considering its voluntary nature.

The following professionals have been interviewed: criminal investigators (23), public prosecutors (13), lawyers of alleged victims (8), lawyers of suspects (17) and forensic experts (5). The ultimate composition of respondents was realized through the method of snowball sampling. The criminal investigators and the public prosecutors referred to each other and sometimes to forensic experts since there is obviously a mutual dependence when it comes to investigating and bringing a case to trial. The lawyers made cross-references and sometimes referred to forensic experts. It should be noted that the cases selected were brought up by different professionals operating in different phases within the field of criminal investigation. Thus some cases were actually prosecuted whereas others were already withdrawn in a preliminary phase. It is difficult to give the total number of cases and to make clear if the same case is discussed by different professionals. With respect to case law, both the prosecution and the defense are of course present whenever presenting a specific case. For the most part however the cases are unrelated in the sense that they do fit the general profile but are not one and the same case talked about by different professionals in different phases.

The data were collected by interviewing professionals and thereby focusing on the core narrative resembling the already mentioned preconditions in order for cases to be selected in the first place. The focus was basically on the coherence of narratives and the way victim and perpetrator were portrayed by the different professionals. Furthermore, the data were analyzed according to themes found in the literature and already expressed in advance through the use of a topic list guiding the interviews. In the topic list there were a number of themes that kept on expanding and condensing due to the interaction with the professionals offering new insights. In the end nearly two dozen of themes showed up regularly whenever cases were discussed.

LEGAL FRAMEWORK

Underage Sexual Integrity

Lewd conduct (in America known as statutory rape, see Eidson 1979-Eidson 1980; Oberman 1994) is any unlawful act committed by an individual with the purpose of arousing the libido or sexual interest of themselves or the person towards which this action is directed. The difference with statutory rape is that lewd conduct does not necessarily presume that there was no consent on the part of the victim. The sexual contact is believed to be morally wrong due to its nature in combination with age. Having sex underage is widely believed to cause harm to someone's sexual integrity.⁴ The belief of harm whenever dealing with cases of underage sex is so widespread that it is hardly ever contested. Within the legal context of the Netherlands this belief of harm is grasped by the concept of facts of general knowledge. Even if a minor denies harm or victimhood altogether, in present time authorities tend to delegitimize this stance by transmitting personal harm into the nearby or distant future. It is then when the premature and already sexually awakened victim is said to become truly awake and eventually bear the full consequences (see also Grondin 2011). This inevitability of underage sex is therefore presented as singular, universal and uniformly determinative (Angelides 2009). This belief needs no further elaboration in individual cases and is therefore taken for granted as an unquestioned mechanism causing harm. When someone engages in behavior involving a minor that is intended to arouse his/her sexual libido or the minor, the offender can be charged with lewd conduct. In the Netherlands those between 12 and 18 years of age are protected by various penal codes⁵ against non-coercive sexual encounters which are a crime if deemed lewd. This is different from sexual acts with children under 12 years of age which are always lewd and thus constituting a crime. Besides children, authorities tend to think there are numerous settings in which teenagers are themselves unable to decide autonomously whether or not they want to have sex. It is believed they can end up in positions in which it is difficult to make up their mind freely and responsibly. If it is understood that way, underage sex with a minor above 12 years of age is qualified as lewd. However, as will be shown in the next section the qualification of lewd is not necessarily applied in all cases of underage sex.

4 See R. Kool in Cleiren and Nijboer 2004, (T&C Sr), aant. 1 op artikelen 245, 247, 248 en 249 Sr, p. 1006-1031.

5 There are various penal codes with diverging age limits for lewd conduct with minors referring to different constellations. The most import ones are the sections 245/247 (\16 years of age) and 248a/249 (\18 years of age) of the Penal Code. It should be noted that in most cases the sections 245/247 of the Penal Code are relevant since these are more generic as opposed to 248a/249 of the Penal Code which require a relationship of some authority.

PARADIGMATIC CASES

In this section some empirical data are presented in order to give an impression of the type of cases resembling promiscuous sexual contact among youngsters and that might be qualified as lewd conduct. This is a rather special branch of lewd conduct due to the fact we are dealing with offenders who roughly belong to the same age category as the victim. After this section, an analysis will follow in order to show whenever legal implications are likely to emerge after underage sex.

Data: Case Law

A Dutch case that can actually serve as a blue-print for a lot of similar cases of underage sex among youngsters deals with a 17 year old boy being the offender who is involved in a threesome with a fifteen year old girl being the victim (see HR March 30nd 2010, LJN BK4794). The threesome takes place without force and is to a large extent even initiated by the victim. We are dealing with a participant who knew the victim and already had sex with her before and according to some statements the victim was in love with him. He has the status of being a witness. The other participant also knew the victim and they have been friends for about 5 years according to the victim. He has the status of being the suspect. It is argued by the victim that the sex with this latter participant was a violation of her sexual integrity. This participant is in the end convicted for underage sex because he lacks a previous sexual and/or affective relationship with the victim. According to the offender the following events took place:

I had called my mother and she said it was okay that I stayed the night at my friend's place. On Saturday at about 23.00 or 24.00 I went to this club with my friend. The girl was also there. My friend had a brief conversation with her. At closing time the girl returned to us and the three of us subsequently left the club. My friend told me that the girl would join us home to chill at his place. In the cab that took us home I sat in front and my friend and the girl sat in the back. It was not exactly intimate but I felt that something was happening behind me. I saw that the girl was caressing my friend's leg and that he was giving her the same treatment. I also noticed that she was resting her head on his shoulders. Back home at my friend's place we all went to my friend's room. We all sat on the same couch. My friend sat on the other side of the girl, to her right. Both of them began to caress and kiss. They were French-kissing. At times they stood up and then they would sit down again. My friend asked if she would do a striptease for us. The girl said "you must not laugh when I am stripping" and she looked at me like "what do you think". What I do not understand is the fact that she was so easy. Any other girl would have said "yes... and so". Not this girl. She simply did it without any remark or comment. My friend and I remained on the couch. The girl began to strip. She took her clothes off until she was only wearing her thong and bra. We were very horny because of her vivid performance. I asked my friend whether he had any condoms. He said the condoms were in a nearby drawer. You ask why I asked? I knew things would likely lead to sex. We were totally horny and she was hardly wearing any clothes. I took the condoms from the drawer and went back to the couch. I saw that the girl was dancing in front of my friend and that she was also using her tits to express herself. I was sitting on the couch while the girl was on top of my friend. I handed him a condom and I heard her telling us: "pull of your clothes". The girl was turning round

and round in order for us to become more horny. My friend and I were getting undressed and I was moving closer to the both of them. My friend put on a condom. At some point he stood up. They started kissing again and then they went down on the ground. The girl was on her knees while my friend had a view on her back. They were having sex 'doggy style'. I was busy putting on a condom myself. At some point I stood up and looked at my friend. He was laughing when I replaced him by positioning myself behind the girl. You ask me how the girl responded when I was behind her? She was uttering all kinds of horny sounds. With one hand she was doing my friend and with her other hand she was rubbing my legs. This was not a very practical position. I told my friend he should go first and that I would take over when he was finished. The girl and my friend started fucking. Almost straightaway he had an orgasm. I believe he then went to the bathroom. When he left I immediately took over. The girl asked what kind of sexual position we were going to perform. She put her arms and hands on top of the couch and I fucked her from behind. I was very busy when my friend returned from the bathroom.

The Attorney-General who is an independent advisor to the Supreme Court and who reflects on this case has two crucial observations:

I think it is wrong to qualify a threesome between teenagers as inherently lewd whenever two of the three partners have no previous sexual and/or affective relationship. This is all the more problematic whenever the victim and the offender have known each other for years and are respectively 15 and 17 years old. For the Court the underage sex is already lewd even despite the threesome. The Court reasons nonetheless that the lewdness is reinforced because of the threesome ("especially in the context"). In justifying that the underage sex is lewd both the fact of having no previous sexual and/or affective relationship and the fact that it was threesome are being put forward as equally important. Also, or especially, youngsters experiment with sex. In some respects field experts have observed clear shifts (giving blow jobs instead of kissing, having online sex through the Internet instead of making out in the bike shed). I see no reason to qualify an act as lewd whenever two boys and a girl have a voluntary threesome (at least it was not known to the offender that the victim was actually not wanting to have sex with him). For me it is also really hard to imagine that the Court wanted to prescribe that a threesome between youngster of about the same age of 15-17 years is only then allowed when they already had sexual experiences two-by-two. How else does one gain a previous sexual relationship? A threesome is thus only allowed if there is past promiscuity. Is that the message?

As a side note I want to remark that the offender's friend, the one who had previous sex with the victim and also the one whom the victim was in love with (according to the evidence), has been acquitted of committing lewd acts with the victim. If the offender was in love with the victim is not clear from the evidence and this poses a problem right away when applying the criterion of the affective relationship: must it be reciprocal? What is the minimum duration? Must it be exclusive? Etc.

Data: Interviews

The interviews reveal the following logic whenever reflecting on similar cases such as the one above.

Criminal investigator

Teenagers between twelve and sixteen years of age are in need of protection. They are highly impressionable and take over these norms and values of certain groups to which they want to belong. They have sex for this or that. They go along while not thinking through the consequences or even knowing if they even want to do it. There is this case

of a girl performing fellatio for a boy. What became clear is that she only gave a blow job because everybody told her to do so. The event was even announced via social media. People posted messages like 'you will chicken out' and this triggered the feeling that she would prove them all wrong. At that moment this girl was still thinking she was doing the right thing but eventually she finds out it was not so much fun. In school she is now widely known as a slut whereas the boy is regarded as a hero.

Public prosecutor

A seventeen year old boy had sex with a fifteen year old girl. He was convicted because he 'used' the girl. It was true that they voluntarily went to bed together but they had in fact no relationship. It was not an average dating situation. The boy just said to the girl 'let us go upstairs and fuck' and the girl just went along. In this case the qualification of lewd was appropriate because the way those two behaved was not normal. The question is what is normal? That is difficult. What also played a role in this case was that she had sex with yet another boy on the same day. This happened right after the other boy was finished with her. After he had sex with her he went downstairs and then his friend took over his role by having yet again sex with this girl.

Lawyer of alleged victims

A thirteen year old girl goes to a local festival known for drinking and kissing. There she kisses openly with a twenty-one year old boy. At some point people discover her in the bushes where she is crying. Allegedly the boy raped her. The lawyer of the suspect exploits the raunchy ambiance and states that the girl knew why and what for she came to the festival. The penal codes dealing with lewd conduct and related to a specific age group are vital because most often proving rape is very difficult. All the necessary elements must be proven by supporting evidence. A less demanding penal code such as lewd conduct is crucial otherwise an offender would be entirely absolved of sexual brutality. The boy is in the end acquitted of rape but convicted for lewd conduct.

Lawyer of suspects

The authorities are not familiar with the world teenagers live in nowadays and this is especially true for sexual mores. I once had a case where a girl says 'I was in a place where I knew no one and my father was not picking me up for that evening I went out without permission. I wanted to go home and the offender would only bring me home if I would give him a blow job.' These are very tricky cases for a judge thinks almost immediately that the girl must have not wanted to do this. However I tend to think she could have also called her father by asking the neighbors if she could make a phone call. In retrospect she did not want to do it but the question is whether that is sufficient. The girl makes a choice and reasons she better give the boy a blow job so she is brought back home without her father noticing the fact that she went out in the first place. Instrumental sex like in this case is difficult to explain to a judge who might have a fourteen year old granddaughter who he thinks of as never behaving like that in a voluntary way.

Forensic expert

To me it is strange that girls are always the victim whereas boys are always regarded as the perpetrator in these lewd conduct cases. Of course boys are physically stronger but the point is precisely that it is not about this kind of coercion. It is a misunderstanding of that culture. For the current generation the difference in firmness is less relevant in my opinion. These girls are often just as assertive and tough as boys. These guys are also bullied by

these girls. It is not as simple as often thought whenever assessing a sexual interaction between a girl and a boy. It is often a social construction afterwards; it is an interpretation in hindsight and what matters tremendously is all those persons who interfere in a certain case ... How one looks back at something could be different than the lived experience at a certain moment in time. There are therefore alleged victims who simply participate in a sexual contact and do not even ask themselves whether they want it or not. It just happens and at a certain moment in time the fact that they do it or want to do it tips the scale. After it happened they might think it was actually not the right thing to do. They did not really want to do it but apparently did it anyway. To ponder whether you have wanted to do something is also a mechanism for explaining and justifying your own behavior. From a legal point of view this murky way of thinking and acting is difficult to take into account. To 'want' something is mistakenly thought of as a stable given that stays that way and does not change.

What is noteworthy is that despite a minor discrepancy in age underage sex can be considered lewd because of age limits and especially then when the sex is not embedded in an affective relationship. A majority of the public prosecutors and the lawyers of suspects argue this is the main reason why a case is brought to trial. A majority of the criminal investigators and the lawyers of alleged victims argue however that the lewdness has more to do with the absence of consent and they argue these cases are in fact a light version of rape. What is also noteworthy is the precarious standing of the offender to whom it might have been unknowable that the alleged victim was going along with sex while in fact not wanting to. Besides protecting sexual integrity the underlying message is that underage sex should be properly domesticated. Moreover, lewd conducts cases are heavily gendered. Not a lot of boys are victims in lewd conduct cases. A possible explanation is the difference in perception of victimization or the public manifestation thereof. When it comes to sex, relationships may be more important for girls than for boys. A boy might single out sex without emotional investment whereas a girl might feel 'used' whenever sex is not a subordinate element in a relationship. If the sex lacks intimacy, 'use' might coincide with 'abuse' and then criminal law might be a viable option. For boys however the expectation of sustainability is perhaps less relevant as they are more likely to interpret sex without commitment as mutual 'use'.

Analyzing the Data

There are roughly three criteria used by the professionals enforcing the law in action. Firstly, the more sizable the age difference, the more apt the police and courts are to classify sexual acts as lewd ones. This is actually the most important principle. In fact, sex and lewd are then synchronic. Any sexual contact between a thirty-year-old and a fifteen-year-old is likely to be viewed as lewd, even if the minor agrees to it and is therefore a "participating victim" (see Malón, 2011). Based on the idea that much older people have a certain authority over youngsters, contact of this kind is prohibited in a virtually absolute sense. If a minor has consensual sex with a not much older person sexual contact at an illegal age is however not automatically

apt to be considered lewd. The professionals interviewed on this issue make it quite clear that minor differences in age play an important role in disqualifying an act of underage sex as lewd. A majority of the public prosecutors and the lawyers of suspects argue that a minor difference in age makes these kind of cases weak in that more facts and circumstances are required in order to become qualified as lewd. A majority of the criminal investigators and the lawyers of alleged victims argue however that even with a small difference in age, these cases can already be lewd and especially then when they resemble rape more strongly. Secondly, the specific age of the underage victim is very significant. A 12 year old in primary school and a 15 year old in college are totally different subjects with regard to vulnerability and autonomy. Consequently, a 15 year old boy having sex with a 12 year old girl is very likely to be a crime. In reverse a 20 year old boy having sex with a 15 year old girl could very well be tolerable even though the age difference is bigger. Thirdly and the second most important principle, in addition to difference in age and the age of the victim, the type of relationship is of paramount importance. The type of relationship I am referring to is that of a romantic union between two youngsters engaged in underage sex. The three criteria that have been distilled from the empirical data are operative in the minds of professionals working within the field of criminal justice. In the United States these criteria are much more explicitly operative in so called Romeo and Juliet laws which serve to reduce or eliminate the penalty of the crime in cases where the couple's age difference is minor and the sexual contact is only considered rape because of the lack of legally recognized consent. It should be noted though that the cases presented and analyzed here are much broader and also deal with 'Juliet's' who feel violated by 'Romeo' because of the absence of love. It is therefore that the cases analyzed are not only about those in authority arguing there can be no such thing as consent due to the age of the victim but deal also with alleged victims arguing there was no consent due to the nature of the sexual contact.

REGULATING TEENAGE WILD LIFE

This article is purposefully aimed at linking the empirical research with some theoretical reflections on why upholding moral boundaries is crucial at a certain point of time (twenty first century) in a certain type of society (the West) generating certain types of sexual relations among youngsters (promiscuous sexual contact). The proximal decision-making of professionals with respect to appropriate sexual behavior among minors (charge/no charge) is thus linked to a more structural level where distal forces affect the process of decision-making of those working within criminal justice. Moral boundaries within a society in general have an indirect influence on the individual professionals deciding on cases of underage sex in the Netherlands. What is more, in the Netherlands the concept of lewd is all about social ethics and how sexual contact transgresses collective norms. Taking notice of

changing moral boundaries is thus relevant if we are to comprehend the decisions made by professionals. The more salient use of lewd conduct is related to a changing society. In this section some theoretical reflections are presented in order to understand the societal genesis of promiscuous sexual contact among youngsters and also to understand the underlying moral boundaries which in an indirect way inform the legal boundaries in the previous section.

Societal Breeding Ground for Promiscuous Sex

In studying teenage sexual activity one should also take into account fashionable notions such as the 'pornification' and commodification of society. First, sex is everywhere and at a young age people are confronted with sexual images. It is only reasonable to assume that as a consequence sex might lose some of its significance and becomes a more banal feature within the fabric of everyday life as it is lived by teenagers. It is argued that sexual mores among youngsters are nowadays more discourteous because of the omnipresent feature of degrading sexual images objectifying mostly women (see also McNair 2002; Levy 2005; Bray 2008; Hilkens 2008). Second, this sexual objectification is accompanied by a take on sex as a trade-off commodity. The act of sex is said to become less significant thereby transforming interacting subjects into consumable objects. In our consumer society there is a demand for instant gratification and all relations are increasingly valued in market terms (see for a psychoanalytic account Elliot 2002: 63). With regard to sexual relationship there is an interesting parallel with the Just in time principle which guides post-Fordism in the economic sphere. One could epitomize the phase of post-Fordism as expenditure driven and no longer investment driven as was the case in the era of Fordism. It is interesting to correlate these economic tropes with the domain of the libido. What appears is that having an affective sexual relationship requiring long lasting commitment corresponds to the era of producers while participating in short-term spontaneous sex requiring flexibility corresponds to the current era of consumers. According to Žižek (2006: 309) we live in an era wherein long-lasting commitment is inferior to sexual seduction and the social circulation/exchange involved in it.⁶ Because of this, having an enduring affective relationship of mutual trust which is based on loyalty is ever more dismissed as ballast since it limits options of choice (see also Bauman 2005: 102-115).

6 We are dealing here with sex devoid of intimacy. There are however numerous authors who argue that intimacy is in fact increasing and becoming more democratic because of social changes triggering this positive transformation (see for example Giddens 1992; Weeks 1998; Boutellier 2000). While Giddens' notion of 'confluent love' is liberal democratic in nature, the neoliberal notion of 'detached sex' is plausible as well. This is a far more pessimistic account of sexual relationships as for example expressed in the rather bleak novels of Michel Houellebecq. See also Jamieson (1999) for a powerful critique concerning Giddens' affirmations. She argues such a stance tends to individualize social problems thereby sustaining old gender inequalities.

In accord with this picture, there is a popular belief that teenagers navigate a world of instant sex expressing only interest in sexual gratification and/or material gain. This shift is exemplified by arguing that girls used to kiss to get attention whereas now they allegedly give blow jobs (De Graaf et al. 2007). These are forms of sex which are less affective and because of its volatile nature considered excessive. The excessiveness stems from the fact that the juvenile sexual energy is not contained by love and therefore believed to have run amok. With this I mean not complying to the heteronormative standard of having a sexual relationship that has developed gradually and is embedded in a durable romance (see also Weiss, n.d.). One could argue short-term hedonistic sex among youngsters which is devoid of intimacy has increasing relevance since it embodies the intersection of raunch culture (obscene sex) and consumer culture (instrumental sex).⁷

The Absence of Gender Equality ('Pornification' and Licentious Girls)

Promiscuous sex among youngsters can lead to feelings of regret afterwards. In practice it is mostly girls who are affected by this. Through sexual objectification and taking up the role of a sexual object they might lose respectability. Feelings of shame and regret are easily generated through public exposure causing stigmatization. All this can have damaging effects for mostly girls who had sexual contact of some sort. Often the trigger for initiating criminal law by the victim has much to do with a feeling of discontent generated by reactions from within the immediate social environment. How different this is in gay subcultures promoting homosexual activity which is also loose but accepted and up to a certain point even promoted. What thus has to be noted is that shame and regret have a lot to do with the honour of girls who run far greater risks to be labelled 'slut' (lust) and 'whore' (gain). See for instance Bale (2011: 309) who quotes a female teenager saying: "Like every time you sleep with another person that goes on your clock like you're a car with a speedometer. It does not really happen to guys but it does happen to young women like you have a speedometer and it goes like a milometer and every guy it goes up and the more miles it goes up the less desirable you are in a way. (Female, age 17)." As Muncie (2004: 32) states: "While it is expected that boys will 'sow their wild oats', the implications for girls of becoming known as receivers of the 'wild oats' is often drastic and irreversible. A long list of derogatory labels – slag, slut, scrubber, whore, easy lay – awaits the independent or promiscuous girl, terms for which there are no male alternatives."

In studying cases of lewd conduct among youngsters, not all of them have a lot to do with damage to the sexual integrity or malignant behavior of the alleged offender. This might also have something to do with a harmful myth belonging largely to girlhood and that is the idea that every

7 It should be noted however that even within longstanding committed relationships sex can definitely have instrumental qualities in that it is an exchange value. On sex as leverage between spouses see Bergman's masterpiece *Scenes from a Marriage*.

sexual episode should be beautiful and transformative whereas other outcomes of sexual activity are of no value whatsoever (McCreery 2004). To be treated like a disposable object does not comply to this standard and might thus provoke disillusionment. In relation to sexual contact, whenever the contribution of one party is far less than that of the other one we are usually dealing with weakness and force and in those circumstances it is relatively easy to claim victimhood and pinpoint the aggressor. With regard to lewd conduct the contribution of both parties is however far more balanced, but quite often the masculine share is made relevant before criminal law. What thus seems to play a crucial role is gender. Whereas girls are likely to be perceived as passive and damaged, boys are viewed as active and 'healed'. A possible way for sexually active girls in need of reclaiming their sexual decency and allocating culpability is to instigate criminal law. Although this might benefit those girls seeking retaliation in individual cases it actually deprives the feminine youngster of substantiality since subjectivity and sexual agency are effectively negated (see also Egan and Hawkes 2009).⁸ In fact, criminal law reproduces the old pathological nature of women's sexuality for the logic is that girls are easily corrupted because it is feared that their latently present sexuality is catalyzed by an external interference (Egan and Hawkes 2008). Angelides (2008) argues that for the meaning, experience and effect of underage sex, what is most important is not so much age but the specific gender allocating different cultural scripts. There is always the peril for girls that they become 'damaged goods' and therefore don't live up to the future promise of marriageability. Because females are ultimately tied up to the task of giving birth to a new generation, the monitoring of female chastity has a strong link with anxiety over the reproduction of social order (Myers 2009). Following this line of reasoning it is tempting to comprehend statutory rape as a way to protect a girls 'virginity' which was once the legal property of the father.

The Absence of an Affective Relationship (Commodification and Instant Sex)

Let me remind that underage sex between youngsters outside the reign of a romantic relationship is viewed much quicker as promiscuous. As mentioned earlier, the label lewd is not necessary applied to underage sex when there is a trivial age discrepancy and when the sex is embedded in a relationship of affection. If the age difference is no more than a couple of years and if both participants are in love, the police and justice departments are less inclined to punish only one participant. Say a 21 years old boy has consensual sex with his 15 years old girlfriend. According to criminal law, the boy would have committed a crime but in this case the sex might be acceptable for authorities upholding criminal law. When there is love at stake and this love is accompanied by sex then the sex is valued as a permissible element.

8 For an interesting take on how such a negation disadvantages girls within the context of date rape see Bryan and Wallbank (2004).

The empirical prove of such intimacy is found in a durable relationship that has slowly progressed towards sexual activity. Having an affective relationship is therefore an important criterion that makes underage sex between youngsters permissive and not prohibitive. This concedes to the fact that a lot of teenagers are sexually active at an illegal age. They are thus allowed to do so under the proper circumstance of expressing sex responsibly via the mediation of love.⁹ What becomes clear from case law is that having sex with multiple boys at the same time is regarded irresponsible and therefore lewd. In that respect there is a broader debate in the Netherlands that focuses on teenage girls who are willing to perform fellatio for a drink, group sex in garage boxes by offenders who have hardly passed the age of fourteen and also the internet that makes sexual exposure easy accessible (see for some recent Dutch studies De Graaf et al. 2007; Gooren 2011b; Meintser et al. 2011; Kuyper et al. 2011). We are dealing here with low-investment relationships that are mostly characterized by brief experiences with relative strangers.¹⁰ These sexual interactions are labelled as lewd whenever the alleged victim is below a certain age, regardless of small age differences. Instead of focussing on distinguishable participants it is the act itself that is frowned upon. These acts represent sexual expression outside the context of closeness and guided by egocentric lust and calculative gain.

Although any sexual contact can be grasped in terms of self-centredness and profit, sex within an affective relationship is considered more distinguished because of a deeper involvement that makes the encounter more sustainable.¹¹ The nature of non-affective contacts can be compared to prostitution; the divergence is only to be found in frequency and the respective payment for the selling of one's body that might only differ in nature and volume. In both cases we are dealing with a sexual exchange par excellence. The fact that in the Netherlands the age limit is higher for youngsters occupying this professional position in relation to sex (248b of the Penal Code) demonstrates the logical consequence that the same kind of 'non-professional' behaviour is qualified more easily as lewd. It is believed youngsters who experience spontaneous sex on a regular basis are bound to end up on a slippery slope, constituting a permanent identity readily available for exploitation and perceived as a master status. The strategy of authorities intervening via criminal law in the case of underage sex might be interpreted as reclaiming the message that sex should not be treated indifferently

9 Interestingly enough, sexual relationships that are characterized by too much love are also believed to have run amok ("amour fou" as a hazard). This is often the case in those relationships with huge age discrepancies characterized by enormous intensity due to the passion accompanying puppy love. Therefore, too much love is suspect as well.

10 Illustrative of the encompassing label lewd, these features are the exact reverse of another form of 'classic' lewd conduct, namely, incest between father and daughter (Section 249 Penal Code). There we are dealing with high-investment and long lasting contact with someone familiar.

11 Is a paedophilic relationship not unsustainability par excellence? Sooner or later the object of desire will mature, effectively ending the relationship.

while using a more modest target group, i.e. minors growing up in a sexual world where the pairing of Eros and Love is in fact no longer a prime virtue.

After these abstract remarks about the cultural embeddedness of promiscuous sexual contact among youngsters in the late modern West, glorifying sex and the logic of commodity exchange and the reason why underage sex is categorized as right or wrong, the next two sections will deal with more concrete problems related to making sexual contact and qualifying it as wrong.

EXPANDED SEXUAL EXPERIMENTATION AND THE ABSENCE OF CLEAR COURTSHIP RITUALS

I would argue there is a lot of misperception going on in the world of teenage sexual experimentation (see Gooren 2011b, 2011d). In recent discussions about sex and teenagers in the Netherlands, attention is paid to an allegedly growing number of girls who have vaginal injuries because of sexual inexperience.¹² One might view this as symptomatic of the vigorousness among boys who are not respecting boundaries. In acknowledging that individual behavior is a derivative of social processes this fits perfectly with the consumer ethic of instant gratification. The mutual act of sex between subjects has thus transformed into a solitary act of masturbation while using others as objects for sexual stimulation (see also Žižek, 2008). One could also argue the above-mentioned vaginal injuries are evidence of inertia among girls who are not guarding their boundaries properly. It should be noted however that a double standard exists in the traditional heterosexual script (see also Gagnon and Simon 1973) whereby women are expected to confine sexual behavior to the context of a committed relationship and men are expected to engage in sexual behavior in all kinds of relationships. It is said women are more likely to incorporate emotional intimacy and commitment in sexual and dating scripts whereas a greater acceptance of casual sex is more typical of male scripts (Diane Clark and Carroll 2008). The confusion related to courtship rituals is more and more relevant because the meaning of both gender and age is becoming more diverse for people within the same gender and age. With respect to age limits this is particularly pertinent since adolescent girls move more progressively towards adulthood than boys their age. Teenage girls are as a consequence more attracted to older boys or men as opposed to their somewhat infantile masculine classmates at school. In practice this constellation means that a lot of sexual activity is taking place at the intersections of the legal age limits between those who have the legal age to act on their sexual desires and those whose status makes such conduct illegal notwithstanding their matching desires (for a take on the United States see for instance Leitenberg and Saltzman 2003). Taking

12 See the documentary series for Dutch television made in 2008 by Ingeborg Beugel under the heading *Geloof, seks and (wan)hoop 2*.

in account their physical appearance and the way they present themselves it is very well plausible girls appear older than their true age might reveal. Taking into account these girls are in fact underage and therefore less autonomous can imply however that a sexual encounter between friends that might appear at first as consensual is in fact a rape between acquaintances (or lewd conduct). This all the more feasible if it is considered that there is no single rape script and that conceptions with respect to sexual assault victimization and perpetration are already very different for women and men. "Specifically, women may be more likely to focus on the victim's internal thoughts and motivations, whereas, in an effort to understand the accused's behavior, men may be more likely to focus on the victim's behaviors and how her actions or inactions contributed to the incident (Clark and Carroll 2008: 616)." In the literature the focus by men on the victim's behaviors is linked to the acceptance of rape myths and combined with the adherence to traditional views of female/male sexuality and the perception of sexual aggression as normal this is said to contribute to the potential of men engaging in sexually assaultive, abusive or coercive behavior in order to procure sexual intercourse (Schaefer Hinck and Thomas 1999: 815). The social stereotype of the "real" rape can be so powerful that even victims of rape do not acknowledge their victimization as rape (Kahn and Andreoli Mathie 1994).¹³ All this is especially relevant for sexual experimentation without clear courtship rituals which typically involves a lower level of aggression or force.

In a criminal procedure it is difficult to determine the respective positions in a clear-cut fashion after an act of underage sex has occurred. This is especially true since sex often occurs in private without witnesses and because of the consensual character leaving no physical marks which could indicate wrongdoing. In dealing with lewd conduct among youngsters that is reported to the police, the supposed perpetrator most often responds that the sex was completely voluntarily and that the supposedly harmed party abstained from giving signals that could lead to a different interpretation. The alleged offender frequently states that the act of sex was consensual and that it could not be known otherwise. The alleged victim however frequently states that the act of sex was coercive and that platonic interest has been misperceived as sexual interest (see Farris et al. 2008). A lack of resistance by the victim is often explained by referring to the Traditional Sexual Script (Byers 1996) whereby women are placed in the position of being recipients and gatekeepers, while men are the initiators in sexual situations. "As a byproduct of this conflict, there is an absence of the use of physical resistance by the women in women's acquaintance rape scripts. These scripts reflect the psychological barriers to physical resistance that women experience (e.g., being cognitively flooded and emotionally overwhelmed) (Clark and Carroll 2008: 623)." What should not be overlooked in these kind

13 It is thus possible that many women view non-consensual sex with an acquaintance as extreme seduction rather than as rape (or lewd conduct) (ibid.).

of affairs is that the ritual of courtship among teenagers is in itself deeply problematic for analyzing purposes in retrospect. In relation to sexual contact, initiation is not the same as malignant influence and going along in the beginning does not mean consenting to the end. Making sexual contact is highly ambiguous when it comes to sending and receiving signals of sexual intent (Wagenaar 2005, 2006). Unmistakably there is a grey area concerning encouragement and decline in dealing with sexual innuendo. Particularly for youngsters in the last couple of decades in the Western world, the grey area has only gotten bigger because of the huge amount of experimentation in the ever longer postponed phase of adulthood (Davidson Hunter 2009) characterized by a stable sexual relationship. In former times it was perhaps more clarified; there were heavily guarded courses of action and sex took place after the marriage. Now the greater part of one's sexual life is likely to take place before or without a commitment like marriage and is much more out in the open. Wouters (2002) captures this lack of guidelines as a process of informality whereby firm and detailed rules are replaced by flexible and procedural guidelines that are adjusted to specific situations. Courtship behavior is as a result a far riskier business nowadays. Both, the alleged perpetrator and the alleged victim of lewd conduct, could have contributed to a misunderstanding. An indecisive message could have been sent as well as the reception of that message could have led to a mistaken interpretation. Between the act of coding and decoding it is inevitable some things are lost. Human behavior is largely enacted through definitional negotiations that take place during social interactions (Weiss 2011). It is at the least problematic to recap a sexual event in a way that acknowledges the ongoing negotiation (verbally and bodily) which is characteristic of courting one another. A static legal framework might be unfit for incorporating such fluidity and could play out unjust in individual cases. For an act of sex to fall under the heading of lewd conduct, the facts can afterwards rather easily be rearranged and revalued as to hint at manipulation/power play that might be attributed to one party.

PRECARIOUS STANDING OF THE OFFENDER

For lewd conduct it is not necessary the victim was under any kind of pressure as is the case with rape or indecent assault. Like statutory rape we are dealing with a 'non-forceful' but criminal sexual act. Lewd conduct has much more to do with manipulation but it is less straightforward than strategy and planning. The influence of the offender is more subtle; almost to the point it becomes devoid of meaning, and relies on a mutual attraction between victim and perpetrator. This ambivalence does not matter for criminal law in practice. By numerous authors it is argued that minors are not capable of giving 'consent' to underage sex (see for instance MacMartin 2002). What is more, minors are also protected against their own recruitment when it comes to seducing someone into sex. The idea is that

minors are vulnerable and that because of this the subsequent sexual interaction possibly outgrows the minor and after the initial recruitment by the minor, the experience might be felt as too overwhelming. As a consequence even sexually active minors can be viewed as being exploited for sexual purposes. However, in theory and practice it is thus possible the offender is seduced into sex and is punished afterwards. The relatively open penal provision can be used for goals which are not directly related to the primary goal of protecting the sexual integrity of the minor. It is therefore possible that the penal codes are somewhat misused for improper motives. After underage sexual contact has ended, the alleged victim may have been hurt or offended for one reason or another and feelings of grudge can foster a desire for retaliation. Think for instance about a broken relationship or a regrettable one-night-stand. Perpetrators of lewd conduct thus have a precarious standing because the only two things mostly relevant are: (a) the occurrence of sexual contact, and (b) with someone who has an illegal age. The how is largely beside the point. However, in the literature the act of arousing the libido or sexual interest of a minor is referred to as grooming (Craven et al. 2002; Gillespie 2004); adults manipulating children by being sympathetic to their wishes in order to persuade them to engage in sex. In the course of grooming, intimate contact is gradually intensified and the child is made an accomplice to the sexual event (see also Finkelhor 1984; Leberg 1997; Fernandez et al. 1999; Warner 2000; Van Dam 2001; Gooren 2011d). Notwithstanding a romantic relationship, a much older person who has sex with a teenager is always playing a dangerous game. This becomes all the more clear once the relationship has ended and the minor at some point, perhaps under the influence of parents or a new partner, looks back at the relationship in a different light.¹⁴ Of course it is very difficult to say, especially in retrospect, exactly how a relationship developed. It is quite possible that the much older person and the minor were in love and that gifts and outings were not intended to seduce the youngster, but were simply expressions of affection.¹⁵ However, the social interaction preceding sexual contact with a minor is rather easily put under the heading of grooming; a purposeful act aimed at lewd conduct. Therefore even a romantic relationship with mutually investment is in retrospect often valued as a vulgar instrument for seduction and manipulation. With respect to promiscuous sexual contact among youngsters exploring their sexual desires and consequently constituting a temporal relationship the exact reverse takes places. The libido or sexual interest of a minor is aroused by a fellow-youngster but without any gradual intensification making the victim an accomplice. Most often it is boys who pressure girls into sex. In my view the precarious standing of the offender is most obvious when the offender is in his late teens or

14 In hindsight feelings at the times can be ascribed to a condition of puppy love and authorities might view the inherent temporality of this phase as pathological.

15 As Howitt writes (1995: 176): "Grooming ... is the steps taken by paedophiles to "entrap" their victims and is in some way analogous to adult courtship (cursive JG)".

beginning twenties and pressures someone from the same social group into sex. In these kinds of cases, legal age limits might not overlap with social age limits. Minors can have illegal sex with 'adults' but also with 'youngsters'. Although the words minor and youngster are often used interchangeably, in this article the former word is restricted to legal subjects between 12 and 18 years of age whereas the latter less distinct word refers to all subjects who are considered 'young' in Western society, encompassing an ever larger population and consequently problematizing the legal boundaries. Considering that the victim could have played a major role with regard to the sexual interaction and could have looked older upholding age limits, can cause a burden with respect to the fact that before and during the sexual act it might have been unknowable to the offender that it was an illegal way of interacting. However, the guidelines for the relevant penal codes state it is irrelevant whether the perpetrator was aware of the lack of resilience or the illegal age of the victim.

CONCLUSION

Whenever assessing underage sex there is an overlap between harm (liberal) and morality (conservative) whereby lust (libertine) is virtually excluded. In most cases having underage sex is deemed both harmful and immoral, and if not both, in any case at least one label applies. This comprehensive and dominant point of view is in fact ideological. Harm and morality are expressed via the use of a linguistic and legal apparatus conveying the appropriate coordinates and expressing a limited horizon (Arrigo 1997).¹⁶ The predominant way of thinking in our current sexual regime in the Western world is based on the ideology of 'equality'. In punishing sex among youngsters because of age limits, whenever there is too much permissiveness on the part of the victim and not enough force on the part of the perpetrator, the justice department is prone to use the quasi-legal term unequal sex instead of forcible sex. This means instead of rape or indecent assault the interaction is framed as lewd conduct (Gooren 2011c). By this legal detour a possible state of misunderstanding of the perpetrator is circumvented and made irrelevant. By viewing a sexual event through the lens of equality the more tangible lens of consent is replaced by something much more abstract. Framing an act as lewd implicates the victim is no longer burdened to prove one had given indications as to make the illegal character of the sexual encounter noticeable to the perpetrator who should have had the possibility to refrain during the course of action. In responding to the unequal character of the sexual contact a perpetrator might express confusion by emphasizing

16 For ways to circumvent such a totalizing discourse and allow for diversity see the theoretical elaborations by Milovanovic (1992; 2007). For an illuminating overview of the historical debates surrounding the regulation of sexual behavior see McGlynn and Ward (2009) who distinguish a moral, a feminist and a liberal position with regard to pornography.

the precocious stance of the victim. The gain is however marginal since the somewhat older and masculine person who has sex with a minor is obliged to do intensive research. This holds true for the nature of the sex as well as the age of the victim.¹⁷

In studying cases of lewd conduct with minor age differences it is often the case that we are dealing with girls who are said to have become the victim of boys who acted too straightforwardly and allegedly crossed sexual boundaries. Now, I would argue whenever we are dealing with significant age differences, less noticeability should always be beneficial to the alleged victim. Yet, if the victim and perpetrator belong to the same age group it should be studied per individual case whether or not it is reasonable to focus on one party, let alone punitively. Is it not reasonable to blame both sexually active youngsters whenever they cross the moral boundary of having consensual sex outside the sphere of an affective relationship? Upholding the frontier of proper sexuality at the expense of only one sexually active youngster is rather odd because if sexual transgression is understood as an excess it is only the act itself which is clear and not the respective contributions of the individual participants. For victims who are underage it is taken for granted they do not have the legal capacity to consent and are hence protected against their own immediate gratification. If this logic, which is grounded in developmental psychology, is applicable to victims it should be in same way applicable to perpetrators who are in the same age range and are perhaps a bit blunt in behaving sexually (see for instance Bouhours and Daly 2007; Crone 2008). A bluntness stemming from that same underdeveloped capacity due to their age. In a way, both victim and offender can be considered impotent. A balance must therefore be found that incorporates the notion that both parties could have been incompetent and/or immoral in expressing their sexual desires in a responsible way. Regarding immorality, there is an unmistakable field of tension between the pleasure-seeking mindset among youngsters¹⁸ and the state trying to uphold age limits via criminal law. In this day and age public prosecutors seem to apply lewd conduct more saliently in order to revitalize moral boundaries. In studying cases of underage sex it becomes apparent that applying criminal law is a tool for protecting sexual integrity but it is also a window of opportunity to man-

17 One might accuse me for focusing more on the offender than on the victim. It is important to remind however that criminal law is first and foremost offender based and since it is a *ultimum remedium* it should be scrutinized from that point of view. This of course does not mean that victims should not be protected or that victimhood should be limited to a status only accorded by criminal law. There is definitely a lot of extralegal work to be done in the field of teenage sexual activity and the far more vulnerable positions occupied by girls in this respect.

18 Although it should be acknowledged in late modern Western society, even among youngsters, sexual morality is highly plural and fragmented (about this late modern condition in general see Young 2011: 96) and ranges from puritan to hedonistic. As mentioned earlier, the discourse of criminal law is however dominant, exclusive and rejective towards this diversity.

age heteronormativity since it reproduces a double standard along the lines of gender and it enforces romantic love¹⁹ within a generation of pre-adults having casual sex.

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19 Illouz (2010) argues that the state is most effective in reorganizing romantic relationships through the use of cultural categories such as "power", "reciprocity" and "equality" driving them to become predictable and controllable. The criminalization of underage sex thus serves to control not only youth but also sexual relationships.

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