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

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Summary

CRIMINAL LAW AND TEENAGE SEXUALITY: CONTROLLING YOUTH AND SEX

The study at hand focuses on the control of sex and youngsters through the response by authorities most notably from within criminal justice. This dissertation consists of five articles and a concluding chapter. The emphasis of this study is on the societal interests as protected by the authorities. This approach provides a useful complement to more conventional research on sexual abuse and sexual transgression. In a lot of studies the behavior of individuals receives most attention and not the response by authorities, which can be indicative of the way authorities envision the organization of society. It is this organization through the control of youth and sex that sets this study apart from other studies.

Regarding scientific relevance there is not a lot of research on the application of criminal law and how it relates to a society in which an overarching moral framework has become problematic. We live in a very diverse society. This is also relevant for sexual norms and values. The criminalization of sexual behavior is a way to examine what criminal law signifies in a morally fragmented universe. The norms regarding sexuality vary from time to time and this implies that the punishment of sexual behaviors can show trends of widening and narrowing. The penal reaction is at the same time not only a reflection of collective morality but also a constitutive element of collective conscience. The significance of criminal law increases in a society where collective consciousness is largely dissolved and where victimhood offers moral guidance for individuals lacking an overarching moral framework. In this thesis larger trends in society will be understood via articles in the penal code, assessments by the police and the district attorney and lastly verdicts by judges. The relationship between the criminal justice response to sex with minors and larger trends in society is understudied and will be at the center of attention. This concerns the link between the macro level through theory on larger trends in society and the level of response by authorities from within criminal justice through empirical data on the application of criminal law in the Netherlands.

The social relevance of this research has to do with criminal law setting limits to sexual contact in the private lives of youngsters. From a legal point of view sex with minors can be qualified as lewd and this can be done without the extra requirements of assault and rape. How is this legal notion understood and applied by criminal justice authorities? By zooming in on the more ambiguous cases of sex with youngsters the tension between effec-

tive protection and unwanted interference can be further examined and checked against the underlying principles of criminalization. It might be consequently possible to find a better balance, which can be instructive for the criminal justice authorities protecting youngsters against harmful sexual behavior but also respecting the sexual autonomy of youngsters.

Criminal law is a means to pass on norms and values in contemporary society and as such it is an important part of the overall social reaction. The criminal justice response comes down to setting a limit or no limit to sex with youngsters with the goal of acting to protect sexual integrity or not acting to enable sexual experimentation. For the purpose of understanding cases of lewd conduct other social reactions offering a broader context are also studied. These reactions are produced by opinion makers such as politicians, journalists and researchers. This study is primarily focused on the question: *What do the criminal justice and media responses to sex with youngsters reveal about the interpretation of underage sex within our society and how does this interpretation inform the aforementioned responses?*

This study starts off with a theoretical analysis of how sex and youngsters are receiving attention in Western society and continues with an empirical study on law enforcement concerning lewd conduct in the Netherlands. The socio-cultural analyzes are intended to clarify the legal consequences of underage sex. These consequences in reverse expose underlying social trends. The title of this thesis is: *Criminal law and teenage sexuality: controlling youth and sex*. The meaning behind 'controlling youth and sex' is twofold: lewd conduct is traditionally understood as a lack of control; at the same time the authorities are able to control sexual behavior and youngsters via the legal application of 'lewdness'. In this context the 'asexual child' and the 'sexual relationship' are two important social constructions that deserve attention. These social constructions act as organizing principle for society and serve larger interests.

DECIPHERING THE AMBIGUOUS MENACE OF SEXUALITY FOR THE INNOCENCE OF CHILDHOOD

This article examines how late modern Western society/culture deals with the utterly despised phenomenon of paedophilia. It will be argued there are ambiguous factors and forces, which are an inherent part of mainstream culture and the wider social fabric, that make an unequivocal stand against sexuality interfering with children somewhat hypocritical. The zealous efforts in battling sexual child molesters as the primordial danger for the innocence of childhood are seen as a strategy for overt redemption. A hidden agenda is detected by recovering complicit support from a diverse range of adjacent sources that defies the genuineness of guarding the sexual innocence of children.

CONTAINING THE SEXUAL TEENAGER IN AN ERA OF SEXUAL CONSUMPTION.
ENJOY RESPONSIBLY

We live in inconsistent times for the distinction between childhood and adulthood is greatly valued, but under erosion due to 1) underage sex and 2) adolescence. Underage sex is now much more visible due to social media. Adolescence as a transition between youth and adulthood is now much more prominent due to the postponement of adulthood. In both cases the distinction between children and adults on the basis of sex and age becomes less attainable. It is the pre-adult embodying a pre-sexual hybrid who is responsible for the loss of this fundamental distinction. What is of particular interest here is not the greatly despised configuration of inter-generational sex as associated with paedophilia, but intra-generational sex of those underage and the teenage girl in particular. By arguing underage sex and adolescence are taking center stage, it will be argued the cultivation of 'asexual childhood' is becoming problematic. Teenage restriction with regard to sex is furthermore heavily undermined by the dissemination of sexual images featuring teenagers and the circulation of pre-adults having casual sex. It will further be argued that underage sex among adolescents is increasingly criminalized by employing the quasi-legal notion of 'age appropriate sex' in order to make clear once again the proper place of youth and sex and the proper transition from childhood to adulthood. This transition is crucial for the sake of upholding the aforementioned distinction. I will turn to law as an instrument for containing underage sex within appropriate parameters. In conclusion some final remarks will be made on the (im)possibility to contain teenage sex.

'PRE-ADULTS' HAVING 'CASUAL' SEX WITH NO STRINGS ATTACHED?
TEENAGE SEXUAL ACTIVITY AND DUTCH CRIMINAL LAW

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.

CRIMINAL JUSTICE AND THE PROTECTION OF YOUNGSTERS AGAINST SEXUAL CONTACT

Teenagers between twelve and eighteen years of age are protected by Dutch criminal law against sexual encounters that can be described as 'voluntarily'. If teenagers are approached without force or approach a person themselves autonomously they are thus protected against such contact, but they could have played a sexual active role nevertheless. How do the alleged offenders in these criminal cases make contact and how are the punishable interactions possible considering the facilitative role of the victim? This paper will deal with the way the officials of the police and justice departments value sexual contacts with youngsters in a diverse range of settings. The crucial question is how the professionals dealing with the protection of youngsters and at the same time safeguarding the legal rights of offenders come to their juridical deliberation.

UNEQUAL SEX. SOME REFLECTIONS ON LEWD CONDUCT AND LAW ENFORCEMENT

A state that acknowledges teenage sexuality but finds it nonetheless precarious faces a dilemma: acting to protect sexual integrity or not acting to enable sexual experimentation. Both assumptions can be related to the interest of the minor. Protection is motivated by the idea that young people are not capable to decide for themselves about their sexual wishes. If one were to disregard the vulnerability of minors their lack of resistance could purposefully be exploited by an offender and mistakenly interpreted as informed consent by the authorities. This perception with regard to vulnerability is not restricted to children but is extended to those aged twelve years or older for whom sexuality is not always an alien force. It is therefore that the criminalization of sexual contact with a minor can make interventions by authorities problematic. It can lead to an intervention, which might be experienced by the minor as a curtailment of sexual expression. Furthermore by also penalizing those sexual encounters lacking coercion there is the risk that the culpability of suspects is sacrificed for the subjective and non-articulated experience of the alleged victim and/or the moral view by the authorities.

THE ASEXUAL CHILD AND THE SEXUAL RELATIONSHIP

The concluding chapter elaborates on the 'asexual child' and the 'sexual relationship' as social constructions. With sexual relationship I am referring to a relationship between two people involving sexual contact as an expression of affection. To be distinguished from sex without a relationship. The dual qualification "wrong sex at the wrong age" offers authorities the opportunity to create order. That order is established in the name of youngsters through the asexual child and in the name of sex through the sexual relationship. As for the asexual child and the sexual relationship the response to sex with minors can be interpreted against the background of the nuclear family and marriage as a blueprint for society. The mentioned social constructions are under pressure due to sex as consumption and the lived experience of youngsters themselves. On an abstract level the asexual child and the sexual relationship are reinforced by the state but not by the market. The sexual teenager is recognized and aesthetically exploited by the market while unrecognized by the state because of the ethics of care primarily aimed at protection. A testament to sex as consumption are the market and the lived experience of youngsters whereas the state and the criminal justice response are a testament to sex as production. On a concrete level it is problematic to uphold the asexual child and the sexual relationship due to contradictions between criminal justice protecting minors against sex and the sometimes incompatible lived experience by youngsters themselves. The nuclear family and marriage are traditionally economic in nature and have gained more emotional significance over time. It seems to me that sex is moving in the opposite direction. In this schizophrenic constellation it is important to recognize that sexual seduction is ambivalent and this tension is clearly manifested there where youngsters have sex according to an economic logic in a society that has become increasingly emotional regarding nuclear family and marriage.

Now what do the criminal justice and media responses to sex with youngsters reveal about the interpretation of underage sex within our society and how does this interpretation inform the aforementioned responses? Through the 'asexual child' and 'sexual relationship' as social constructions it becomes clear what interests are at stake. The criminal justice and media responses are on the one hand aimed at the protection of the asexual child as a victim and on the other hand aimed at the protection of the sexual relationship serving as a public moral. The aforementioned social interests behind the idea of children as asexual and the idea of sex as something that needs to be embedded in a relationship are under pressure due to sexual behaviors that are contrary to these images. This study shows that the presence of the sexual teenager is a problem for the authorities as it is in direct opposition to the asexual child. While the child is the personification of a sexual lack the teenager personifies a sexual surplus. This extreme opposition regarding sex is quite remarkable for every child becomes a teenager at some point in

time. What also becomes clear from this study is that underage sex without an affective relationship is a problem according to the authorities for it is in direct opposition to the sexual relationship. Although sexual abstinence before marriage is no longer the central message in The Netherlands the affective relationship as a criterion can be seen as a more contemporary version of marriage. The underlying message is that sex should be embedded in a relationship while in the past it used to be mainly linked to reproduction. A person committing lewd conduct can be understood as a figure of contrast and is useful in establishing who can express sex and how it should be done. On the one hand sex is an access to control youngsters; *who* can express themselves sexually? On the other hand youngsters are an access to control sex; *how* should sex be expressed?