Adolescence, Sexuality, and the Criminal Law

Multidisciplinary Perspectives

Helmut Graupner, JD • Vern L. Bullough, PhD, D.SCI
Editors

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Introduction

Helmut Graupner, JD
Vern L. Bullough, PhD, DSci, RN

The essays in this special volume are, with two exceptions,[1] amended and updated versions of papers delivered to the biennial conference of the International Association for the Treatment of Sex Offenders (IATSO)[2] held in 2002 in Vienna. They were delivered at a symposion entitled: "Adolescence, Sexuality & the Criminal Law."[3]

The reason for holding this session was the draft for an European Union–"Framework Decision on combating the sexual exploitation of children and child pornography" presented by the European Commission in 2001, which, due to its indiscriminate labelling of all persons up to the age of 18 years as "children," was threatening to criminalize a good deal of consensual adolescent sexual behaviour throughout the European Union. Various speakers from various perspectives (history, law, criminology, psychology, child- and adolescent-psychiatry, social work, and pedagogy) pointed out the intrinsic differences between children on the one hand and adolescents on the other, which differences rule out to treat adolescents like children, and which differences call for respect for sexual autonomy of adolescents and of the partners they choose.

Sexual autonomy does encompass two sides. Correctly understood it enshrines both the right to engage in wanted sexuality and the right to be free and protected from unwanted sexuality, from sexual abuse, and sexual violence. Both sides of the "coin" have to be given due weight

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and neither one neglected. Only then can human sexual dignity be fully and comprehensively respected.

The very essence of human rights is respect for human dignity and freedom,[4] and the notion of personal autonomy is an important principle underlying the interpretation of the right to respect for private life (privacy).[5] Safe-guarding that respect has to be based upon present-day conditions and obligations arising from it have to be met at any time.[6] Attitudes of former times therefore may not serve as justification for lack of such respect today; moreover, states have to actively remove the negative effects which may materialize today as a result of such former attitudes.[7]

With regard to the right to freedom *from* unwanted sexual abuse and violence those rights should be construed as not only including the negative right to be left alone from state intervention but also the positive right to (active) protection of those rights, against the State as well as against other private individuals.[8] The right to respect for private life (privacy) should not be restricted to the classical right to do what you want, but be seen as a comprehensive personality right, including the right to physical and moral (psychological) integrity and security.[9] A right to adequate protection against sexual abuse and violence, and in grave cases even to the employment of the criminal law for the purpose of deterrence.[10] The right to fair trial for persons accused of sexual abuse has to be balanced against the right of victims of abuse to protection; defense rights may (and in some circumstances must) be reasonably limited in the interests of persons who are, or who are presumed to be, victims of sexual abuse.[11]

With regard to the other side of the coin, the freedom *to* engage in consensual sexual activity, the right to respect for private life (privacy) enshrines the right to personal development,[12] to free expression and the development of one's personality,[13] and to establish and develop relationships with other human beings especially in the emotional field for the development and fulfillment of ones own personality.[14] The purpose of the protection of private life (privacy) lies in safe-guarding an area for individuals in which they can develop and fulfill their personality,[15] and in securing the right to choose the way in which to lead a sexual life.[16] Sexuality and sexual life is at the core of private life (privacy) and its protection.[17] State regulation of sexual behavior interferes with this right, and such interference can only be justified, if demonstrably necessary for the prevention of harm to others. Whereby "necessity" in this context is linked to a democratic society, whose hallmarks are "tolerance, pluralism, broadmindedness",[18] those hallmarks requiring that

there is a pressing social need for the measure and that the measure is proportionate to the aim sought to achieve.[19]

Attitudes of the majority can not serve as valid ground for justification.[20] It is the core task of human rights to protect the individual and minorities against unjustified interference by the majority, no matter–as John Stuart Mill put it[21]–how big the majority and how strong its moral rejection and repulsion of the acts, attitudes and values of the minority or the individual might be. Interferences solely based on the views of the majority Mill called a "betrayal of the most fundamental values of the political theory of democracy."[22]

Times passed since the IATSO-conference saw the *EU-Framework Decision*, mentioned above, entering into force by January 21st, 2004. On the other hand they also saw the *European Court of Human Rights* awarding considerable amount of compensation to an adolescent for, between the ages of 14 and 18, having been barred, by age-of-consent legislation, from entering into relations corresponding to his disposition for sexual contact with older, adult partners,[23] and they saw the *Supreme Court of the United States of America* setting aside, on the basis of his right to privacy, the conviction of an 18-year-old adult to 17 years of incarceration for consensual oral sex with a 14-year-old adolescent.[24]

Unfortunately, American law remains particularly ambiguous since age of consent is generally left to the states and is not a matter for federal legislation. In January, 2004, as this introduction is being written, Marcus Dixon, who is black, is serving a ten year term in a Georgia prison for engaging in sex with a girl nearly 16 when he was 18. The sex act took place in February, 2003, and according to Marcus was consensual, although two days later the girl accused him of rape. The jury who heard the case in May, 2003, composed of nine whites and three blacks took just 20 minutes to acquit Marcus of rape. They then had to consider a lesser charge of "aggravated child molestation," a charge that was applicable even if the sex was consensual. This statute had never been used before in Georgia to prosecute consensual sex with teenagers when both partners were close in age. Since Marcus had already admitted to having sex, it was easy to find him guilty. The judge then sentenced him to ten years, a sentence that shocked many of the jurors who later said they thought the charge was a minor one. The case is on appeal.[25]

Many, if not most states, usually are more tolerant, accepting consensual sex between teens with less then a three year sentence. The case even in Georgia probably would have been ignored if the rape charge had not been made which brought the matter into court in the first place. What the case emphasizes is the importance of serious consideration of

what the age of consent should be. As it is emphasized throughout the book, adolescents are sexual beings and it is important for society to accept that. It was in Article 4 of the Declaration of Human and Citizen Rights that the French stipulated that "Liberty consists in being able to do all that does not harm others." Adolescents are people. Hopefully this book will provide a stimulus to serious thinking on the topic.

The book could not have been written without the dedicated help of our authors and contributors. We want to thank them for their efforts in writing and revising their papers and for giving us permission to publish them.

NOTES

1. The chapters by *HON Justice Lilian Hofmeister* and *Lorenz Böllinger*

2. *http://www.medacad.org/iatso*

3. *Max Friedrich*, Dean of child and adolescent psychiatry at Vienna University, unfortunately was not able submit his paper as a chapter. He presented a paper called "Adolescence, Sexuality & the Criminal Law–the Perspective of Child Psychiatry" and, from the perspective of child psychiatry, agreed with the position of the other contributors, favoured an age of consent of 14 and outlined that age-limits higher than 14 (also on so-called "seduction") are not in the best interests of adolescents and endanger their psychosexual development (see also Max Friedrich, Kein Reifezeugnis für die Koalition, *Der Standard* 11.07.2002). At the symposion he submitted the following abstract: *"Minors are not a coherent and uniform group. A 5-year old cannot be equated with a 12-year old and a 12-year old not with a 17-year old. To do so would ignore the findings of child psychiatry and cause considerable harm to a high number of young people. This paper will explore the impact of psychosexual development in children and adolescents on the need for differentiation between various age groups in sexual-offences-legislation."*

4. European Court of Human Right (ECHR): *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 90); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 70)

5. ECHR: *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 90); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 70)

6. See for instance ECHR: *L. & V. vs. Austria* (39392,98, 39829/98), judg. 09.01.2003 (par. 47); *S.L. vs. Austria* (45330/99), judg. 09.01.2003 (par. 39); *Wessels-Bergervoet vs. NL* (34462/97), judg. 04.06.2002 (par. 52f); for an analysis of the respective case-law of the *Court* see Helmut Graupner, *Sexualität, Jugendschutz und Menschenrechte: Über das Recht von Kindern und Jugendlichen auf sexuelle Selbstbestimmung* (Frankfurt/M., Peter Lang, 1997), Vol. 1, 75ff.

7. ECHR: *Wessels-Bergervoet vs. NL*(34462/97), judg. 04.06.2002 (par. 52f)

8. ECHR: *Z. & Others vs. UK* (29392/95), judg. 10.05.2001 [GC] (par. 73); *E. & Others vs. UK* (33218/96), judg. 26.11.2002 (par. 88)

9. ECHR: *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 90: « physical and moral security »); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 70 :

« physical and moral security"); *D.P. & J.C. vs. UK* (38719/97), judg. 10.10.2001 [GC] (par. 118: "physical and moral integrity"); *X. & Y. vs. NL* (8978/80), 26.03.1985 (par. 22: "physical and moral integrity"); *Ilaria Salvetti vs. Italy* (42197/98), dec. 09.07.2002 ("physical and psychological integrity")

10. If effective deterrence, in a case where fundamental values and essential aspects of private life are at stake, cannot be achieved otherwise: ECHR, *X. & Y. vs. NL* (8978/80), 26.03.1985 (par. 27);

11. ECHR: *S.N. vs. Sweden* (34209/96), judg. 02.07.2002 (par. 47); *Owen Oysten vs. UK* (42011/98), dec. 22.01.2002

12. ECHR: *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 90); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 70); *Zehnalová & Zehnal vs. CZ* (38621/97), dec. 14.05.2002

13. ECHR: *Fretté vs. France*(36515/97), judg. 26.02.2002 (par. 32)

14. ECHR: *Zehnalová & Zehnal vs. CZ* (38621/97), dec. 14.05.2002; European Commission of Human Rights, *X. vs. Iceland* (6825/74), dec. 18.05.1976

15. European Commission of Human Rights, *Brüggemann & Scheuten vs. Germany* (6959/75), report 12.07.1977

16. ECHR: *Fretté vs. France*(36515/97), judg. 26.02.2002 (par. 32)

17. ECHR: *L. & V. v. Austria* (39392/98, 39829/98), judg. 09.01.2003, par. 36 (« most intimate aspect of private life »); *S.L. v. Austria* (45330/99), judg. 09.01.2003, par. 29 (« most intimate aspect of private life »); European Commission of Human Rights: *Sutherland vs. UK 1997* (25185/94), dec. 01.07.1997 (par. 57: "most intimate aspect of effected individuals 'private life'", also par. 36: "private life (which includes his sexual life)"; so also the ECHR in: *Dudgeon vs. UK* (7525/76), judg. 22.10.1981, par. 41, 52; *Norris vs. Ireland* (10581/83), judg. 26.10.1988 (par. 35ff); *Modinos vs. Cyprus* (15070/89), judg. 22.04.1993 (par. 17ff); *Laskey, Brown & Jaggard sv. UK* (21627/93; 21826/93; 21974/93) 19.02.1997, par. 36; *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96) (par. 82), 27.09. 1999; *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999 (par. 90); *A.D.T. vs. UK* (35765/97), judg. 31.07.2000 (par. 21ff); *Fretté vs. France* (36515/97), judg. 26.02.2002 (par. 32); German Constitutional Court, BverfGE 47, 46 [73].

18. ECHR: *Dudgeon vs. UK* (7525/76), judg. 22.10.1981, par. 53; *Norris vs. Ireland* (10581/83), judg. 26.10.1988 (par. 44); *Modinos vs. Cyprus* (15070/89), judg. 22.04.1993 (par. 25); *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96) (par. 80), 27.09. 1999; *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999 (par. 87)

19. ECHR: *Dudgeon vs. UK* (7525/76), judg. 22.10.1981, par. 51; *Norris vs. Ireland* (10581/83), judg. 26.10.1988 (par. 41f); *Modinos vs. Cyprus* (15070/89), judg. 22.04.1993 (par. 25); *A.D.T. vs. UK* (35765/97), judg. 31.07.2000 (par. 32f); For a detailed discussion of the requirements for interferences being justified according to Art. 8 par. 2 ECHR see Graupner (1997), *supra*, Vol. 1, 86ff.

20. ECHR: *Dudgeon vs. UK* (7525/76), judg. 22.10.1981; *Norris vs. Ireland* (10581/83), judg. 26.10.1988; *Modinos vs. Cyprus* (15070/89), judg. 22.04.1993; *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96), 27.09. 1999; *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999; *L. & V. v. Austria* (39392/98, 39829/98), judg. 09.01.2003; *S.L. v. Austria* (45330/99), judg. 09.01.2003.

21. J. S. Mill, *On Liberty*

22. J. S. Mill, *On Liberty,* after de Tocqueville, *Democracy in America*.

23. *S.L. vs. Austria* (45330/99), judg. 09.01.2003 (par. 49, 52)

24. *Limon, Matthew R. v. Kansas*, U.S.-Supreme Court, 02.583, 27.06.2003

25. Marian Wright Edelman, "Old South Lingers in a Legal Lynching," *Los Angeles Times*, January 22, 2004, p. B17.

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The 17-Year-Old Child: An Absurdity of the Late 20th Century

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SUMMARY. Recently enacted EU-legislation will affect interferences with the sexual life of adolescents across Europe in an intensity so far not known in any of the European states. The "Framework-Directive on combating sexual exploitation of children and child-pornography" will oblige all member States of the European Union to create extensive offences of "child"-pornography and "child"-prostitution, defining as "child" every person up to 18 years of age, without differentiating between five-year-old children and 17-year-old juveniles. These offences go far beyond combating child pornography and child prostitution, thus making a wide variety of adolescent sexual behaviour, hitherto completely legal in the overwhelming majority of jurisdictions in Europe, serious crimes; for instance: sex between 16-year-olds for "remuneration", which includes invitations to cinema or to a dinner; "lascivious" drawings of a 17-year-old girl possessed by a 15-year-old boy; photographs of a 16 year-old girl in her bikini "lasciviously" exposing her pubic area, taken by her 17-year-old boyfriend on the beach; standard pornography involving younger looking 20-year-old adults or "webcam-sex" between 17-year-old-adolescents; even pictures of one's own adult spouse in "lascivious" poses, if this spouse looks younger than 18. No European jurisdiction so far has such a restrictive law. The massive criminalisation and the equation of adolescents with children caused heavy criticisms among experts but this criticism could not prevent the project from becoming law. This essay provides an analysis of the background, the legislative process and the content of the EU-Framework-Decision. *[Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <http://www.HaworthPress.com>*

KEYWORDS. Youth protection, youth rights, sexual offences, age of consent, sexual consent, sexual violence, sexual abuse, sexual exploitation, child sexual abuse, paedophilia, ephebophilia, child pornography, child prostitution, youth pornography, youth prostitution, juvenile prostitution, criminal law, human rights, sexual rights, European Union, European law

No language in the world ever used the term "child" for persons beyond their early teens (Friedenberg 1974, 21). No person beyond its early teens is a "child" (Baacke 1983, 70; Herbold 1977, 101; Kraemer

et al., 1976, 40; Lautmann 1987, 66).[1] It was the *Convention on the Rights of the Child* of 1989[2] which first did away with the distinction between children and adolescents and labelled all minors under 18 "child" (Art. 1).

The European Commission took this concept over into the criminal law area when it proposed an *EU-Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography* in December 2000.[3] This framework-decision obliges all the member states of the European Union to create certain sexual offences which would go far beyond what is known in that area in any European state today.[4]

The proposal of the Commission defined as "child" every person up to its 18th birthday (Art. 1 lit. a). It did not differentiate in any way between various age groups, i.e., it did not distinguish between children on the one hand and adolescents on the other. The proposal treated a 17 1/2 year old young man in the same way as a 5 year old child.

This implementation of the same criteria for sexual protection and abuse to a five-year-old child and a 17-year-old adolescent leads to absurd and dangerous consequences.[5]

DEFICIENT PROTECTION OF CHILDREN

The Commission in its proposal did not set a minimum age limit for consensual sexual activity, despite the fact that all the EU member states as well as all of the other European and non-European countries have determined such age limits, which limits are nowhere set under 12 years of age and, in most cases at 14 or 15.[6] According to the Commission proposal, member states will be obliged to outlaw sexual activity with children only in the context of pornography, prostitution, violence and inducement (Art. 2 & 3). The proposal (and the final text) did not cover sexual activity with a child outside the area of pornography and prostitution and committed without violence and without inducing the child. This deficiency in protection appears inconceivable, in that it would leave it open to the EU member states to even decriminalize pedosexual contacts, to the extent that no inducement or violence and no involvement into pornography or prostitution of the child takes place.

The Commission proposal also merely required the member states ". . . to *consider* prohibiting natural persons from exercising . . . activities involving supervision of children when they have been convicted for one of the criminal offences provided for . . ." (Art. 5 par. 5).[7] That

this is not an *absolute requirement* is perplexing, indeed. As is the fact that only *private*–and not *public*–bodies can be held responsible for their offences (Art. 1 lit. d, Art. 6 & 7).

These insufficient and half-hearted measures for the protection of children stand in striking opposition to the near draconian limitations prescribed for the sex lives of adolescents. Both being the result of the same mistake: the equation of children with adolescents.

DRACONIAN LIMITATIONS ON THE SEX LIFE OF ADOLESCENTS

The Commission defines as "child"-pornography all visual depictions of explicit sexual conduct which (directly or indirectly) involves a person under 18 (Art. 1 lit. b). Explicit sexual conduct thereby includes even "lascivious exhibition"[8] not only of the genitals but also of the mere pubic area.[9] This phrase, as the whole definition of "child"-pornography, has been literally taken over from § 2256 of the U.S.-Federal Criminal Code. How extensive these phrases are can be inferred from the development in the U.S. In 1994 the Congress, in reaction to a Supreme Court case (United States vs. Knox 1992), expressly declared that in enacting this provision[10] it was and is the intent of Congress that "the scope of 'exhibition of the genitals or pubic area' is not limited to nude exhibitions or exhibitions in which outlines of those areas were discernible through clothing, and that for videotapes falling under this law it is not afforded that the genitals or the pubic area are visible in the tapes and that the minors pose or act lasciviously."[11] So the phrase now taken over into European law covers all kinds of allegedly erotic depictions of persons under 18, even if the young man or woman on the picture is fully clothed.

According to the Commission's proposal also fictitious depictions are covered, as for instance comic strips, drawings and paintings, even if totally unrealistic (Art. 3).[12] In addition it shall not be necessary to establish the true age of the actors; it shall suffice that for the viewer they appear to be under 18.[13] Given the very diverse views in estimating age and considered that according to this wide variety nearly every person of 18, 19, or in its early twenties can be judged to be possibly under 18, a good deal of standard pornography and standard erotic material faces the risk of prosecution under this provision.

The Commission's proposal aimed not only at a massive extension of sexual offences in the area of pornography. It wanted to oblige the

member states also to criminalize sexual contacts with persons under 18 not just against money or other items of economic value but also in exchange for "other (non-economic) forms of remuneration" (Art. 2 lit. b ii), whatever that might be. In addition even "inducement" of young men and women under 18 to sexual acts should become a criminal offence (Art. 2 lit. b ii). The Commission did not define "inducement"[14] and gave no reason whatsoever for this proposed criminalization of sexual contacts of adolescents which are not initiated by themselves but by their partners.[15]

The proposal (as the final text) also contains no exception for juveniles, so the member states have to criminalize even adolescents themselves as perpetrators of these offences. And the penalties suggested by the Commission are draconian: the maximum penalty must be at least four years incarceration, with no differentiation between juvenile and adult offenders (Art. 5). So as victims, adolescents are treated as children, and as offenders, they are treated as adults.

According to the proposal of the Commission in all the member states of the European Union a 15-year-old will be liable to up to four years incarceration (at the minimum) for making a picture of his girlfriend of same age in tight bikinis exposing (not the genitals but) the "pubic area" and posing erotically (or in the words of the law: "lasciviously"). The same is true for a 14-year-old who, in private, draws a young beauty naked and in "lascivious" poses. As well it is for 17-year-olds, who exchange intimate pictures of themselves, or watch each other via live cams on the internet "lasciviously" exposing their "pubic area" (or even their genitals), not to mention watching each other during sexual activity (so called "webcam-sex"). Also adolescents asking other adolescents for sex would face prosecution, as they "induce" a "child" into sex. That would be the more so if they offer any reward for being accepted.

The *European Parliament* welcomed the proposal by a vast majority of 446 against 16 votes. It even called for extensions, as for instance the criminalization of "negligent" production of "child"-pornography and the criminalization of audiovisual, textual, or written material advocating sexual contacts with persons under 18.[16] It also wanted to criminalize images of adults who look younger than 18, even if it is proven that the person depicted was adult at the time of depiction.[17,18]