

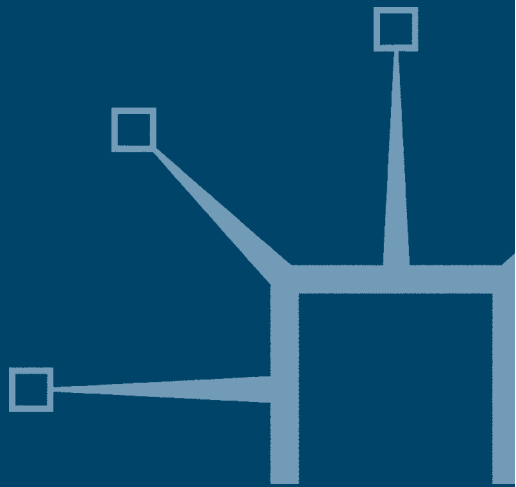
palgrave  
macmillan

# The Age of Consent

Young People, Sexuality and Citizenship

---

Matthew Waites



# The Age of Consent

*Also by Matthew Waites*

SEXUALITIES AND SOCIETY: A Reader (*editor with J. Weeks and J. Holland*)

# **The Age of Consent**

**Young People, Sexuality and Citizenship**

Matthew Waites



© Matthew Waites 2005

Softcover reprint of the hardcover 1st edition 2005 978-1-4039-2173-4

All rights reserved. No reproduction, copy or transmission of this publication may be made without written permission.

No paragraph of this publication may be reproduced, copied or transmitted save with written permission or in accordance with the provisions of the Copyright, Designs and Patents Act 1988, or under the terms of any licence permitting limited copying issued by the Copyright Licensing Agency, 90 Tottenham Court Road, London W1T 4LP.

Any person who does any unauthorised act in relation to this publication may be liable to criminal prosecution and civil claims for damages.

The author has asserted his right to be identified as the author of this work in accordance with the Copyright, Designs and Patents Act 1988.

First published 2005 by  
PALGRAVE MACMILLAN

Houndmills, Basingstoke, Hampshire RG21 6XS and  
175 Fifth Avenue, New York, N.Y. 10010

Companies and representatives throughout the world

PALGRAVE MACMILLAN is the global academic imprint of the Palgrave Macmillan division of St. Martin's Press, LLC and of Palgrave Macmillan Ltd. Macmillan® is a registered trademark in the United States, United Kingdom and other countries. Palgrave is a registered trademark in the European Union and other countries.

ISBN 978-0-230-23718-6 ISBN 978-0-230-50593-3 (eBook)

DOI 10.1057/9780230505933

This book is printed on paper suitable for recycling and made from fully managed and sustained forest sources.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Waites, Matthew.

The age of consent : young people, sexuality and citizenship /  
Matthew Waites.

p. cm.

Includes bibliographical references and index.

1. Age of consent—Great Britain. 2. Minors—Great Britain—Sexual  
behavior. I. Title.

KD7975.W35 2005

346.4101'35—dc22

2005040889

10 9 8 7 6 5 4 3 2 1  
14 13 12 11 10 09 08 07 06 05

# Contents

<i>Acknowledgements</i>	vii
<b>1 Introduction</b>	<b>1</b>
Outline of chapters	6
<b>2 Theorising Age of Consent Laws</b>	<b>11</b>
Childhood and youth	11
Gender and sexuality; heterosexuality and homosexuality	14
The meaning of consent	18
Children, sexuality, consent and the law	24
Consent and children's sexual behaviour	28
The rationale for age of consent laws	30
Citizenship	32
Sexual citizenship	35
Conclusion	39
<b>3 Age of Consent Laws in Global Perspective</b>	<b>40</b>
The globalization of age of consent debates	40
Age of consent laws in comparative cross-national perspective	44
Sex tourism and the transnational extension of sex offences	53
International law and human rights	55
Conclusion	59
<b>4 Heterosexuality and the Age of Consent</b>	<b>60</b>
The origins of law on sex and childhood in the UK	60
Social purity and the age of consent in the late nineteenth century	67
Gender, class, competence and citizenship	71
Parliamentary debates	74
The age of protection	77
The regulation of male homosexuality	80
Conclusion	86
<b>5 Homosexuality and the Age of Consent</b>	<b>88</b>
Lesbianism and the age of consent in the inter-war years	88
The <i>Wolfenden Report</i> and the decriminalisation of male homosexuality	96
Rethinking the <i>Wolfenden Report's</i> rationale for decriminalisation	104

The male homosexual age of consent	114
Conclusion	117
<b>6 Sexual Liberationism and the Search for New Sexual Knowledge</b>	<b>119</b>
New social movements and epistemological transformations	119
Gay liberation: Liberty, equality and the age of consent	123
From the margins to the mainstream: Emerging challenges	131
The Policy Advisory Committee on Sexual Offences	133
Heterosexuality and the age of consent to sexual intercourse	139
Homosexuality	145
Conclusion	155
<b>7 Equality at Last? Age of Consent Debates in the 1990s</b>	<b>158</b>
Age of consent debates 1993–2000: An overview	159
Legal developments: Childhood and consent	162
The emergence of a new hegemony in age of consent debates	166
Political discourses	170
Legal discourses	172
Social policy, health and young people’s welfare	173
Biomedical knowledge of sexual identity and psychological development	174
Conclusion	180
<b>8 New Age of Consent Laws: Adulthood and Childhood</b>	<b>183</b>
The Home Office review of sex offences	184
‘Adult sexual abuse of a child’	188
‘Child sex offences committed by children or young persons’	197
Consent in the <i>Sexual Offences Act 2003</i>	203
Conclusion	204
<b>9 Rethinking the Age of Consent</b>	<b>208</b>
The history of age of consent laws in the UK	209
The contemporary context	212
Young people’s views of age of consent laws	215
Citizenship, sexuality and childhood	217
Libertarian and liberal critiques of age of consent laws	220
Youth justice	227
Consent and vulnerability	229
A proposal for reform of the age of consent	235
 <i>Notes</i>	 242
<i>Bibliography</i>	247
<i>Index</i>	272

# Acknowledgements

There are many individuals and institutions that I wish to thank for supporting my research on age of consent laws.

The empirical research used in this book began in 1995. I would like to repeat my thanks to those who assisted in the early stages: Angela Mason and Anya Palmer at Stonewall; Peter Tatchell; Ken Plummer and Mary McIntosh. I gratefully acknowledge receipt of Economic and Social Research Council award no. R00429534343, which funded three years of research from October 1995.

The final chapters of the book draw on research for a project, *The Regulation of Sexuality: Autonomy, Protection and Consent* (1 October 2001 to 31 August 2002), funded by a grant from South Bank University's Research Development Fund which I also gratefully acknowledge. Jeffrey Weeks was my co-applicant for this grant.

I would like to express my gratitude to those who work in the various lesbian, gay, bisexual and queer organisations which publish newsletters and operate websites and e-mail lists. A constant stream of up-to-date information about campaigns for equalisation of the age of consent was invaluable in my research during the 1990s. Thanks also to Oliver Merrington and others who assisted me in using the Hall-Carpenter Archive, the UK's national lesbian and gay archive, with holdings at both the British Library of Political and Economic Science, and at the Art and Design Library, Middlesex University.

For feedback and assistance at various times which has contributed to the book's development, I wish to thank: Beverley Brown, Matthew Wait, Les Moran, Carl Stychin, Dermot Feenan, Derek McGhee, Gert Hekma and Simon Blake. Special thanks to Daniel Monk and Jenny Hugh for helpful feedback at a late stage.

I am extremely grateful to the friends who have supported me over the years. I am lucky to have a wonderful and loyal bunch of mates from my school days, especially but not only: Steven Pedersen, Anne Topping, Christine Walsh, David Horniblow, Tom Pfeiffer and Sarah Scott. Thanks also to Vernon Hewitt for his confidence in my abilities, and for love and friendship. Thanks to those who were at South Bank University with me between 1995 and 2002, including Clare Farquhar, Jane Franklin, Rajani Naidoo, Philip Gatter, Pam Alldred, Rachel Thomson, Janet Holland, Robert Bell, Sheena McGrellis, Paula Reavey, Isabel Walter, Monica Zulauf and Tampusi Tolonen. Thanks also to those who welcomed me to Sheffield Hallam University, especially Lorraine Green, Julia Hirst, Serena Bufton, Liz Lawrence, Paul Ward, Anna Coates, Rachel Abbott, Anna Weighall and Jane Morgan.



Thanks also to other friends for support, especially to Paula Kuosmanen, Fernando Serrano Amayo, Jenny Hugh and Tina McGuinness, whose love and friendship kept me going in Sheffield and made completing the book possible.

Huge thanks to Jessica Horniblow and Tim Murray for being photographed and giving informed consent to appearing on the cover; and to Steven Pedersen for providing the cover image and discussions on cover design.

Jeffrey Weeks was my PhD Director of Studies (1995–1999), and subsequently my boss while I worked as a researcher at South Bank University until 2002. Jeffrey provided great support and encouragement for my research, and I regard it as a privilege to have been able to work with him.

Brian Heaphy has seen the book develop from beginning to end, and given me enormous practical and emotional support, including comments on many draft chapters. He has contributed greatly to the development of my understanding of social theory, and I will always be grateful to him.

My grandfather, Herbert Waites, provided me with great encouragement and considerable financial support during my time as a student, for which I am very grateful. Thanks also to my brothers, Ben and Daniel Waites.

I dedicate this book to Lilian and Neville Waites, my mum and dad, who have provided me with inspiring examples of commitment to education and academic integrity, equality and social justice – and loved me too.

## Copyright acknowledgements

The author and Palgrave Macmillan gratefully acknowledge permission from publishers to reprint edited extracts from the following copyright material:

Matthew Waites, 'Inventing a "Lesbian Age of Consent"? The History of the Minimum Age for Sex between Women in the UK', *Social and Legal Studies*, Vol. 11, no. 3, September 2002, pp. 323–342. Copyright Sage Publications 2002. Reprinted by permission of Sage Publications Ltd.

Matthew Waites, 'Equality at Last? Homosexuality, Heterosexuality and the Age of Consent in the United Kingdom', *Sociology*, Vol. 37, no. 4, November 2003, pp. 637–656. Copyright BSA Publications/Sage Publications Ltd 2003. Reprinted by permission of Sage Publications Ltd.

Matthew Waites, 'The Age of Consent and Sexual Consent', pp. 73–92 in Mark Cowling and Paul Reynolds (eds) (2004) *Making Sense of Sexual Consent* (Ashgate Publishing Limited, Aldershot, Hants). A 2500-word extract reprinted by permission of Ashgate Publishing Ltd.

# 1

## Introduction

Around the world, the regulation of young people's sexual behaviour is the focus of intense conflict. Amid the culture clashes and reactionary responses produced by globalization, young people's sexuality is a subject causing deep anxiety, and has become the focus for many projects of social and moral renewal. Debates over appropriate forms of emotional and sexual expression between adolescents proceed against a backdrop of intense concern about child sexual abuse and paedophilia. For some, the involvement of children and young people in sexual behaviour amid a rising tide of sexualising imagery in the media is at the heart of social and moral breakdown. For others, the liberalisation of attitudes towards sexual behaviour and increasing openness is evidence of social progress. The meanings of childhood and youth in relation to sexuality are fiercely contested.

'Age of consent' laws – a concept I will use to refer to all laws defining a minimum legal age for young people's participation in sexual behaviour – are at the heart of these political conflicts. While the concept of an 'age of consent' is occasionally used to refer to the legal age for young people to engage in a variety of activities (for example, smoking or drinking alcohol), when *the* 'age of consent' is referred to, it is widely understood that sexual behaviour is at issue – and this in itself evidences the central place of sexuality in cultural understandings of the boundaries between childhood and adulthood. But while 'the age of consent' is commonly understood as the legal age for young people's participation in sexual behaviour, in reality most states have a multiplicity of laws regulating a range of different sexual acts, and people of different genders and sexual identities performing them. There are usually several '*ages of consent*'.

The concept 'age of consent' is itself significant as a form of representation which influences understandings of the law. The concept is often taken for granted in contemporary public and political debates that ignore even its recent history, although its meaning has shifted significantly during the past century, reflecting changing assumptions about age, gender and sexual identities. The phrase is generally absent from the law in many different

states, yet is frequently invoked to describe and contest laws, and is increasingly used to compare laws between different states with contrasting legal frameworks. The concept is often invoked as though it straightforwardly describes the law, yet it is a contested concept which cannot be assumed to refer to a clearly identifiable set of statutes. Ideas about what an 'age of consent' is or should be influence the ways in which sexual life is socially patterned and regulated.

The objective of this book is to provide a systematic analysis of how we think about age of consent laws and the regulation of young people's sexuality. The book seeks to illuminate the issue by exploring international and historical evidence on how societies regulate sexual behaviour. It employs perspectives from contemporary social and political theory to analyse changing rationales for age of consent laws. Unlike so much writing about age of consent laws, which has concentrated solely upon justifying a particular political stance in favour of either a higher or a lower age of consent, a central purpose of this book is to explore and illuminate *how* we have thought, and should think, about age of consent laws – although the implications of the analysis for contemporary policy-making are also addressed in the final chapters.

Current conflicts over the regulation of young people's sexuality raise a number of questions. What is the relationship between public attitudes and understandings of the concept of an 'age of consent', and actual legal frameworks? What understandings of childhood, youth and adulthood have informed past formulations of age of consent laws? How have debates over age of consent laws historically been structured by cultural assumptions about gender, and by gendered power relations? What has been the status of same-sex sexual behaviour in relation to age of consent laws? And what is the relationship between the concept of an 'age of consent' and claims by radical social movements since the 1960s, including feminism, gay liberationism and sexual liberationism, for a more democratic, consensual sexual morality? To answer these questions requires consideration of themes including the meaning of childhood, the meaning of consent, and the meaning of sexuality in relation to citizenship.

Existing academic commentaries on age of consent laws address the issue in particular ways. Increasingly there are attempts to provide cross-national comparative surveys of age of consent laws, especially within particular regions such as Europe, but these are essentially empirical and descriptive (for example: Graupner, 2000). Sociological and historical accounts of changes in sexual life within particular states including sexual offences law provide broad outlines (for example: Weeks, 1989); and feminists have explored the origins of age of consent laws in the context of gendered power relations (for example: Walkowitz, 1992). However, sexuality has historically been a marginal area of study in the discipline of law, and in-depth, theoretically informed discussion of age of consent laws by legal scholars has been slower to develop, although critical and conceptual work is proliferating (for

example: Edwards, 1981; Moran, 1996, 1997). In political science too, conflicts over age of consent laws have become a focus (Cocca, 2004). Some writers critically engage with the concept of an 'age of consent' through more philosophical analysis (Archard, 1998). But the tendency of this work is to approach the issue conceptually from first premises. An alternative approach can also be adopted to shed light on present dilemmas: to use a substantive sociological and historical study, drawing on empirical research, to explore the forms of knowledge and power relations which have structured the changing rationales for age of consent laws, past and present.

This book is intended to contribute to international research and debates concerning age of consent laws. Chapter 2 explores theoretical issues of general relevance to debates over age of consent laws worldwide. Chapter 3 then surveys international comparative research into age of consent laws in different states, and explores the role of international governmental institutions and transnational social processes and movements in the contestation and formulation of such laws. As in other matters, the conception of a state as a self-contained geographical territory with clearly defined borders is becoming increasingly inadequate. The existence of human rights conventions such as the *European Convention on Human Rights* and the *United Nations Convention on the Rights of the Child* alter the context in which citizenship is defined.

The main focus of the book, however, is the UK. Chapters 4, 5, 6, 7 and 8 comprise a detailed historical analysis of debates in the UK, although prior knowledge of UK law is not assumed and the analysis draws out theoretical themes of much wider applicability. Age of consent laws in the UK have been fiercely contested and (especially in England and Wales) fundamentally reformed in recent years. During the 1990s, equalisation of the 'gay age of consent' became a major issue in national politics, until this was achieved throughout the UK via the passage of the *Sexual Offences (Amendment) Act 2000*. A comprehensive review of sex offences and the consequent passage of the *Sexual Offences Act 2003* have subsequently revised the entire legal framework in England and Wales. These recent developments, analysed in detail in the final chapters, make the UK a particularly illuminating example of changing approaches to the regulation of young people's sexual behaviour. For an international audience, additionally, the implementation of English law on sex offences in British colonies gives nineteenth-century conflicts in Britain, discussed in Chapter 4, and debates over the decriminalisation of male homosexuality in the 1950s and 1960s, discussed in Chapter 5, a broader relevance.

The study of age of consent laws stands at the juncture of a range of developments in social theory and the social sciences. The increasing interdisciplinarity of much social research facilitates study of the topic at the interface between law, politics, sociology, social policy, and history, as well as the interdisciplinary fields of gender, sexuality and childhood studies.

The development of increasingly sophisticated work on gender and sexuality and the emergence of a sociology of childhood bring new perspectives to bear on the issue (James, Jenks and Prout, 1998; Jackson and Scott, 2002; Weeks, Holland and Waites, 2003). The aim of the book is to provide a history of political debates and conflicts over age of consent laws in their social context, combining this with an account of changes in the law itself. My objective is to contribute to contemporary political and policy debates over the law, and also to contribute to the development of knowledge in history, law and the social sciences.

As I have already indicated, much writing about age of consent laws approaches the issue from either a protectionist or a libertarian perspective, and depends upon the dichotomy between freedom and protection for its conceptual orientation. By contrast, this book explores a number of interesting theoretical debates. Three theoretical themes in particular are used to give structure to the historical analysis of changing rationales for age of consent laws, and hence to displace the political dichotomy between protectionism and libertarianism. The first is a critical understanding of institutionalised knowledge production in modern societies, focussing particularly upon the role of medical and psychological expertise in shaping understandings of young people's physiological and psychological development (Turner, 1995), with some attention to the changing form and role of such expertise in 'late modernity' (Giddens, 1991; Seidman, 1994). The second is the way in which prevailing understandings of gender and sexuality, and associated forms of inequality, have led to age of consent laws being formulated within a 'heteronormative' framework (that is, a framework which assumes a particular culturally dominant model of heterosexuality to represent desirable forms of gender and sexuality), which can be critically interrogated with reference to feminist, lesbian, gay and queer theoretical perspectives (Weeks, 1985; Seidman, 1996, 1997; Jackson, 1999). The third is the theme of citizenship, a concept which describes the combination of rights and obligations structuring the lives of those who are members of a particular community (Marshall, 1950; Turner, 1993; Weeks, 1998b). Age of consent laws can be understood as particular formal elements of citizenship, offering different forms and degrees of citizenship to different social groups defined by age, gender and sexuality, and are also contested through available forms of political citizenship. The theme of citizenship draws attention to the changing languages of politics, such as the emergence of rights-claims which have been used to debate age of consent laws, as well as to the less explicit conceptions of citizenship which have underpinned such debates. These theoretical issues are discussed further in Chapter 2.

My use of the phrase 'age of consent' to refer to all laws defining a legal age for young people's participation in sexual behaviour requires some immediate justification. Amid the recent expansion of critical socio-legal studies addressing sexuality, in which engagement with post-structuralism

has inspired increasing attention to the language of the law and legal discourses (Smart, 1995; Moran, 1996, esp. pp. 8–10), scholars have begun to pay greater attention to the specific meanings and applications of the concept ‘age of consent’. It is clear that in the late nineteenth century when the concept came increasingly into use in the English-speaking world in the context of increasing legal regulation, it was used primarily with reference to the legal age for a female to consent to sexual intercourse with a male. The concept’s use to describe the law had important ideological effects; in particular, by emphasising the consent of females over the legal age it disguised an absence of full legal and social recognition of women’s entitlement to such consent (see Chapter 4). There has remained a tendency to use the concept primarily with reference to the minimum age for sexual intercourse, and on occasion in the UK it has been officially withheld from application to male homosexuality (Policy Advisory Committee, 1981, pp. 3–4, 11–12: hereafter PAC). These factors have led some commentators towards the conclusion that use of the term ‘age of consent’ in a generalising way is now inappropriate (Moran, 1997).

However, my research suggests that the concept has in recent decades been used with a broad reference in public discourse to encompass legislation applying to a wide range of sexual acts, and also that the reference of ‘age of consent’ historically has been less circumscribed than others have suggested. There is limited empirical evidence on which to base a view of what most people understand by ‘the age of consent’, but from what is available my view is that popular usage is flexible. The phrase is typically used to refer to an age at which the law permits sexual behaviour without any straightforward assumption that this coincides with the law recognising a young person’s capacity to give consent, or that the law demands that consent be positively expressed. It is widely and increasingly used in public debates, and by many legal practitioners, with reference to both male/female and same-sex contexts and a variety of different sexual acts. The dominant meanings of ‘age of consent’ are thus being contested and transformed. In this context it is legitimate to adopt the phrase as a convenient expression to frame discussion, while simultaneously drawing attention to and analysing the specific meanings which ‘age of consent’ has historically held.

Some brief comments on the scope of my studies within the UK, and on my research methods, are appropriate to clarify the book’s content. The UK comprises several distinct legal jurisdictions in which age of consent laws have developed in different ways: England and Wales, governed by what is commonly referred to as English law; Scotland, governed by Scots law; and Northern Ireland – following partition from the Irish free state in 1921 – in which English law has been modified in application by, at different times, a devolved parliament and/or discretionary powers of the UK parliament in Westminster. The book describes changes in age of consent laws throughout the UK (and the nineteenth-century legislation discussed in Chapter 4 also

applied in Ireland and other British colonies). However, as a consequence of selecting official reviews of English sexual offences for study in Chapters 5, 6 and 8, the main focus is on debates in England and Wales, which limits coverage of distinct legal frameworks and political formations in Scotland and, especially, Northern Ireland. More generally, it is necessarily the case that the book's analysis focusses upon selected points in history, which entails certain omissions and exclusions.

With respect to research methods, my research involved collecting and analysing a wide range of primary documentary and web sources including: government committee reports; parliamentary debates in *Hansard*; legal statutes; newspaper articles; the archives of campaigning groups (containing newsletters, minutes of meetings, posters and photographs, etc.); and interest group and political party websites, e-mail newsgroup lists, letters, press statements, newsletters, manifestos and reports. Primary data-collection also included attendance and observation at a succession of debates in the House of Parliament in London during 1998–1999, and at relevant public meetings. Sources used are described in the chapter summaries given at the end of this introduction, and in the introduction to each of the chapters that follow.

The analysis of various forms of qualitative data from documentary sources was informed by methodological debates over discourse analysis (Foucault, 1972; Wilkinson and Kitzinger, 1995). Attention was focussed on competing personal narratives of experience, and their relationship to the wider discourses available in politics and society which structure the meaning of youth, sexual identities, citizenship and age of consent laws. Dilemmas over representing the voices of children in relation to debates over sexual abuse and sexual consent were helpfully addressed by methodological literature which considers the social production of competing narratives representing the voices and interests of children, including the narratives available to children themselves (Aldred, 1998).

Having offered some provisional clarification of the book's objectives, scope and theoretical perspective, and of the research methods and empirical sources I employ, it is appropriate to conclude this introduction by outlining the chapters which follow.

## **Outline of chapters**

Chapter 2 'Theorising Age of Consent Laws' introduces the theoretical themes of the book. First I discuss approaches to childhood and youth in sociology and history, and examine the problematic terminology available to describe age groups. I then discuss the theorisation of gender, sexuality, heterosexuality and homosexuality, focussing upon the 'social construction' of sexual identities, gendered power relations in heterosexuality and 'queer theory'. Next I examine the meaning of 'consent', and introduce debates over sexuality and consent. I then bring together these themes to examine

debates over how children experience sexual behaviour, their competence to consent to sexual behaviour, and the meaning of 'abuse'; and offer some initial comments on the role of the law in regulating young people's sexual behaviour. The final section explores the theme of 'citizenship'. It outlines various uses of the term in public discourse and social theory, before focussing upon how T.H. Marshall's theory of citizenship has been engaged with by theorists of gender and sexuality. Following from this, I discuss the relationships between citizenship, sexual offences, and 'age of consent' law, to provide some theoretical reference points to guide the analyses developed in subsequent chapters.

Chapter 3 'Age of Consent Laws in Global Perspective' examines cross-national data on age of consent laws to develop a comparative perspective. I begin by discussing the way in which existing comparative analyses of age of consent laws have been shaped by particular political agendas and cultural understandings, and then provide a comparative discussion of age of consent laws in a variety of states worldwide, addressing different continents in turn. The diversity of forms of legal regulation and themes such as the legal legacies of colonialism are emphasised. Particular attention focusses on the diversity of regulations in states within the US, and on diversity within Europe, where the legal age is as low as 12 in some circumstances in states such as Malta. The abolition in 2002 of a non-prosecuted category of behaviour for 12–15-year olds in the Netherlands is discussed. I then examine how international sex tourism has led to extensions of national sex offences by some states to apply to their citizens travelling abroad, and analyse the increasing role of international human rights law and international governmental institutions in determining age of consent laws.

Chapter 4 'Heterosexuality and the Age of Consent' begins the book's detailed historical study of age of consent debates in the United Kingdom. The chapter commences with an outline of the emergence of minimum age restrictions on sexual behaviour in English law from 1275, and introduces the overall framework of law addressing childhood and sexual behaviour which had developed by the nineteenth century. The main body of the chapter then examines debates over age of consent laws in the late nineteenth century in their social and cultural context, particularly controversies over an increase in the age of consent to sexual intercourse for a female enacted by the *Criminal Law Amendment Act 1885*. This increase, from 13 to 16, has been identified as a key moment in the definition of gendered sexualities in the late nineteenth century (Mort, 1987, pp. 101–150; Walkowitz, 1992; Bland, 1995), and has defined the legal age for intercourse until the present day. Drawing upon evidence from parliamentary debates, the chapter outlines the gendered social context within which the law was conceived and formulated. The final section of the chapter also briefly discusses the regulation of male homosexuality in the late nineteenth century, a period which was critical in shaping understandings of gender and sexuality throughout the twentieth century.



Chapter 5 'Homosexuality and the Age of Consent' begins with a discussion of a change in the law on 'indecent assault' in 1922 which raised the minimum age for sexual behaviour other than intercourse to 16, resulting from continuing social purity campaigns in the early twentieth century. One effect of this was to increase the minimum age for sexual activity between women. In the context of little previous attention to the history of age of consent laws in relation to lesbianism, I argue via analysis of parliamentary debates that this creation of what was to become understood as a 'lesbian age of consent' in the late twentieth century was appreciated by political elites at the time. The main body of the chapter then focusses on debates over male homosexuality in the 1950s surrounding the *Wolfenden Report*, which provided the dominant rationale for the partial decriminalisation of 'homosexual acts' between men that occurred in England and Wales in 1967, creating a minimum age of 21 (Weeks, 1977, pp. 156–167; Hall, 1980; Weeks, 1989, pp. 239–244). Drawing upon analysis of parliamentary debates and the *Wolfenden Report*, I reappraise existing radical critiques of the regulation of male homosexuality during this period to develop an analysis of the form of citizenship granted to homosexual men, embodied in the legalisation of consenting behaviour within a tightly defined private sphere.

Chapter 6 'Sexual Liberationism and the Search for New Sexual Knowledge' explores the changing context of age of consent debates from the late 1960s, particularly through the emergence of movements for sexual liberation including gay liberationism and feminism which initiated transformations in sexual life. I begin by examining debates over the age of consent within these movements during the early 1970s, drawing upon primary sources including gay liberationist literature and campaigning materials held in the Hall-Carpenter Archive, the UK's national lesbian and gay archive. I argue that the radical sexual movements of the period contained, in microcosm, debates over the age of consent which have subsequently persisted and extended into mainstream politics and culture. I then proceed to examine a major official review of age of consent laws conducted by a Home Office Policy Advisory Committee between 1975 and 1981, which recommended maintaining an age of 16 for girls to consent to sexual intercourse (PAC, 1981). Drawing upon archived newspaper sources and interest group submissions to the review, as well as the committee's reports, I demonstrate how the review's conclusions were structured by a new and distinctive logic. This was influenced by the emerging agendas of new sexual movements, yet drew new social and sexual boundaries through the invocation of new forms of biomedical and psychological expertise.

Chapter 7 'Equality at Last? Age of Consent Debates in the 1990s' analyses debates and conflicts over 'equalisation' of the age of consent for sex between men, the most high-profile issue in British lesbian and gay politics for most of the 1990s. This issue moved to the heart of national political debate in the course of protracted parliamentary conflicts. Drawing upon

primary sources including parliamentary debates (many attended in person during 1998–1999), newspaper reports and interest group campaigning materials, the chapter dissects arguments for and against an equal age of consent at the age of 16, including those based upon health promotion, rights to freedom and equality, child protection, legal philosophies, and medical and psychological knowledge-claims concerning the fixity or instability of sexual identities. I argue that the debates witnessed the emergence of a new hegemony in age of consent debates in favour of ‘equality at 16’, but demonstrate that this was premised upon assurances that heterosexual identity-formation was unthreatened, and was thus secured through strategic engagement with mainstream heteronormativity. Hence an equal age of consent does not embody belief in the equal value of heterosexuality with same-sex sexualities, or equal citizenship. The chapter also discusses developments in law during the 1990s relevant to defining the extent to which consenting activity is legal and non-consensual activity is illegal, with reference to the law on rape, consensual sado-masochism and HIV-infection. This demonstrates the persistent absence of consent as a general principle in UK sex offences law, and thus contextualises contemporary invocations of the concept ‘age of consent’.

Chapter 8 ‘New Age of Consent Laws: Adulthood and Childhood’ discusses debates over the formulation of age of consent laws during the Home Office review of sex offences between 1999 and 2002, and subsequent parliamentary debates leading to the creation of new age of consent laws in the *Sexual Offences Act 2003*. The chapter begins by developing a critique of the proposal for an offence ‘Adult sexual abuse of child’ applying to over-18s which emerged in the review’s consultation paper *Setting the Boundaries*, focussing particularly on its employment of the concept ‘abuse’. Via discussion of this proposal, and of offences including ‘Sexual activity with a child’ which subsequently emerged to address over-18s in its place, I develop a critical analysis of the contemporary field of policy-making in relation to young people’s sexual behaviour. I argue that the offences which emerged were the consequence of problematic protectionist perspectives prevailing among leading children’s organisations, allied to both conservative moralism and particular strands of feminism. In the second half of the chapter, I focus on the development of the new age of consent law addressing ‘Child sex offences committed by children or young persons’, applying to persons under 18 involved in sexual behaviour with under-16s. I discuss criticisms of this offence made during parliamentary debates by advocates of children and young people who sought to contest the criminalisation of under-16s. Finally I discuss wider features of the *Sexual Offences Act 2003* including its use of different age boundaries to regulate different forms of sexual behaviour, and its regulation of non-consensual behaviour, in order to clarify the contemporary legal context in which the concept ‘age of consent’ is used.

In Chapter 9 ‘Rethinking the Age of Consent’ I reflect back upon the history of age of consent debates in the UK, before considering the UK

situation in the light of current evidence about young people's sexual behaviour and the international comparisons made in Chapter 3. I then return to the general themes and theoretical issues raised in Chapter 2, beginning with the theme of citizenship, considering how the new terrain structuring conflicts over age of consent laws relates to transformed formations of citizenship in relation to gender, sexuality and childhood. I reconsider the fundamental rationale for age of consent laws, developing my own perspective through critical engagement with libertarian perspectives, and by discussing how the law should be understood in relation to 'consent' and 'vulnerability'. From this discussion I draw out the implications for policy-making and sexual politics in the UK, and conclude by proposing changes to the present law.

# 2

## Theorising Age of Consent Laws

In this chapter, I introduce a variety of conceptual themes and perspectives required for the analysis of debates over age of consent laws, drawn from sociology, socio-legal studies and social and political theory. The first section begins by exploring sociological approaches to childhood and youth. The chapter then discusses approaches to theorising gender, sexuality, heterosexuality and homosexuality developed in feminist theory, lesbian, gay and queer theory. The meaning of 'consent' is discussed, and considered in relation to sexual behaviour. The chapter then introduces discussions over how young people experience sexual behaviour and their 'competence' to give consent to participate, and provides an introductory discussion of the appropriate role of law in the regulation of sexual behaviour. The final section explores the concept of citizenship, examining how it has recently been conceptualised by social and political theorists in debates over 'sexual citizenship', and how it can be utilised in the analysis of debates over age of consent laws.

### **Childhood and youth**

Understandings of childhood have been profoundly influenced since the 1960s by work which has argued that understandings and representations of childhood are socially and historically extremely variable. The theorist generally credited with a leading role in initiating such work is Philippe Ariès, whose book *Centuries of Childhood* argued that the contemporary western concept of childhood began to emerge in the seventeenth century (Ariès, 1962). Ariès' thesis has subsequently been challenged, for example, by those who suggest previous eras had a different conception of childhood rather than none at all (cf. Archard, 1993, pp. 15–28). But his emphasis on how childhood is imagined and represented in society and culture had a major impact on the discipline of history, which together with anthropological research has more recently influenced work across the social sciences, and led to the birth of what is

described as a 'new sociology of childhood' (Jenks, 1996; James, Jenks and Prout, 1998).

More recent work in history, sociology and anthropology now tends to accept that 'pre-modern' societies and non-western cultures had and have a multitude of understandings of childhood which should be evaluated in their broader social context. Understandings of childhood in these cultural contexts may be problematic, however, if they view childhood as being defined by some determining inner aetiology or characteristic. For example, in the west Christian religious doctrines and institutions have sometimes encouraged tendencies to view children as either 'evil' or 'innocent' (James, Jenks and Prout, 1998, pp. 10–15). Yet modern 'scientific' conceptions of childhood did not necessarily represent advances upon traditional understandings. In the twentieth century the developmental psychology advanced by theorists such as Piaget saw child development as proceeding through an inevitable process of maturation, according to a set of biologically pre-ordained stages (Archard, 1993, pp. 32–37; James, Jenks and Prout, 1998, pp. 17–19). As James, Jenks and Prout acerbically comment:

Psychology, unlike sociology, never made the mistake of questioning its own status as a science and, in the guise of developmental psychology, firmly colonized childhood in a pact with medicine, education and government agencies. (James, Jenks and Prout, 1998, p. 17)

Subsequent 'socialisation' theories developed in the social sciences granted more significance to social processes, but continued to analyse children in relation to a teleological understanding of the requirement to accomplish 'adulthood', understood as a complete and fully rational state (James, Jenks and Prout, 1998, pp. 6, 9–10, 22–25).

By contrast, contemporary sociological theories view childhood as historically and culturally variable, emphasising a view of children as social actors with agency, while simultaneously incorporating analysis of social structures (Jenks, 1996; James, Jenks and Prout, 1998, pp. 3–34). They stress the relational character of childhood, analysing childhood and adulthood as products of dynamics of identification among adults and children as social groups (James, Jenks and Prout, 1998, pp. 4, 9, 202–203). Sociologists of childhood emphasise a range of themes: childhood as 'socially constructed'; examining children's own 'communities', social worlds and worldviews; politicised understandings of children as a group which is subject to systematic injustice and removal of power; children's standpoint epistemologies; children as citizens; children as 'subjects' in a post-structuralist sense, and so on (James, Jenks and Prout, 1998, pp. 26–34, 208–216). Such theoretical understandings increasingly underpin research on childhood (for example: Mayall, 1994; Brannen and Edwards, 1996, pp. 7–9; Economic and Social Research Council, 1997).

Such perspectives are even more influential in critical research on 'youth' and 'young people', where critiques of developmental approaches have been most forcefully advanced. Psychological literature has tended to view adolescence as a universal developmental phase, rather than as a historically specific discourse, yet many sociologists argue that the medicalisation of young people's experiences underplays social structural factors (Gillies, with Ribbens McCarthy and Holland, 1998). Concepts such as 'youth transitions' prevailing in contemporary youth policy literature subtly reproduce developmental thinking and pathologise youth by approaching it as a 'difficult phase' requiring management oriented towards the attainment of 'adulthood', understood as a stable condition and desirable goal. Forms of social behaviour by the young that are characterised as 'disruptive' by both popular culture and many forms of academic knowledge are often attributed to individual biological factors – the effects of puberty, 'raging hormones' and so on – rather than being recognised as either emotional responses to social constraints, or rational 'political' strategies to subvert local contexts. Christine Griffin, for example, has criticised the ways in which 'troubled teens' are constructed as problematic and addressed by state welfare institutions and 'treatment regimes' (Griffin, 1997).

Hence prevailing forms of knowledge are increasingly subject to challenges deriving from critical and sociologically informed understandings of childhood and youth. While sexuality tends to remain largely absent even from academic discussion of children's lives, with the exception of child sexual abuse (for example: Jenks, 1996; James, Jenks and Prout, 1998), it is clear that a sociological approach to childhood and youth has profound implications for the understanding of debates over sexuality and age of consent laws.

Sinikka Aapola has drawn upon such perspectives to challenge understandings of adolescence as a 'troublesome phase', and hence explored the interplay between ageing processes, adolescence, gender and sexual identities (Aapola, 1997). She demonstrates that the operation of gendered models of sexuality and heterosexuality, interwoven with contemporary developmental biological and psychological theories, can help explain attitudes towards adolescent sexual behaviour. Because boys are believed to 'mature' later than girls, adolescent girls are brought up with expectations that they will act as the 'responsible' partner, the partner who will 'wait' and 'resist', in contrast to boys who are expected to want sex from the moment they reach puberty.

a double standard prevails: boys are at the mercy of their 'natural' desires, whereas girls should act rationally. (Aapola, 1997, p. 63)

A particular focus of sexual differences in transitions to adulthood relates to the key symbolic signifiers that serve as 'rites of passage'. For girls, the transition from 'girl' to 'woman' is powerfully associated with *menarche*, the onset of menstruation (Matthews Lovering, 1995; Prendergast, 1995). For

boys, in the absence of such a clear symbolic event determined by biology, the meaning of first heterosexual sex takes on a greater significance: 'a man gains manhood through a woman's loss of virginity' (Holland *et al.*, 1998, p. 172; cf. pp. 86, 162). These different understandings serve as examples of the gendered conceptions of 'adolescent development' which provide a crucial background to debates over age of consent laws.

Before proceeding to discuss gender and sexuality further it is useful to reflect on the important role of language in defining social groups in relation to age. The terms available, such as 'child', 'young person', 'teenager', 'adolescent', 'juvenile' or 'minor', are contested in definition, vague in scope and heavily loaded with symbolic associations. They are particularly sensitive in the context of age of consent debates because sexuality is a primary element in the drawing of boundaries between age categories.

In contemporary societies 'child' potentially spans the age group 0–18 since, for example, 18 is the boundary suggested in the *United Nations Convention on the Rights of the Child* to apply where a state does not define its own age (United Nations, 1989). Yet the western cultural concept of 'childhood' has historically been partly defined as 'pre-sexual': a meaning which is in tension with childhood's extension to 18. 'Minor' is primarily a legal term, but differs greatly in scope between legal contexts. 'Youth' is often used in social research to describe the section of the population aged 16–25, but has a widely variable reference in common usage (ESRC, 1998; Osgerby, 1998, pp. 1–2). Other mediating terms between childhood and adulthood, such as 'adolescent', 'juvenile' and 'teenager', may potentially be helpful through suggesting the exclusion of persons aged 20 or more, but tend to be problematically inflected by developmental understandings. 'Adolescence' has a particular history of being pathologised as a 'difficult' 'troublesome phase' of biological and psychological development (Aapola, 1997, p. 51).

Choice of language thus always carries assumptions and meanings. Terms such as 'young people' or 'young persons' are commonly used in place of 'children' to emphasise the competence of those referred to as 'persons'. Emphasising the status of a child as an 'individual' or 'person' carries meanings from the dominant notion of an 'individual' as rational, autonomous and fully developed. Negotiating these meanings within the limited and inflexible vocabulary available is therefore a complex task. In this study my tendency to use the term 'young people' to encompass a wide range of ages is intended to displace the traditional assumptions accompanying 'childhood', particularly views of children as non-sexual, and as subjects without any rights or degree of competence.

## **Gender and sexuality; heterosexuality and homosexuality**

The emergence of second wave feminism and movements for sexual liberation from the late 1960s initiated an outpouring of theoretical and empirical research concerning gender and sexuality. Such work provides extensive

resources for conceptualisation of the sexual behaviours and identities which are contested in debates over age of consent laws, particularly as these relate to relationships between men and women, heterosexuality and homosexuality. Theorists who have integrated insights from feminist, lesbian and gay theory and (more recently) 'queer theory' (see pp. 17–18) have developed critical perspectives on the social organisation of gender and sexuality, apparent in a web of diverse literature that now expands across the social sciences and history (for example: Weeks, Holland and Waites, 2003) and law (for example: Stychin and Herman, 2000).

Feminist theorists have produced compelling analyses of the role of patriarchal power in structuring social life. The analytical category 'gender', originally developed in contrast to biological features understood as 'sex' (though more recently extended to biology in the light of the mutability of 'sex': Butler, 1990), facilitates analysis of the ways in which men and women are socially and culturally constituted and situated (Jackson and Scott, 2002). Feminist theorists have advanced their critique of gendered power relations in a number of fields, including that of sexuality where feminists have struggled to decide the appropriate balance between liberation and regulation, pleasure and danger (Vance, 1984; Jackson and Scott, 1996). A feminist perspective is essential to understanding the historical development of age of consent laws.

The dynamics of gendered power in heterosexuality have been a particular focus. A wide range of positions in debates over the politics of heterosexual sex emerged from debates in the women's liberation movement, ranging from the radical lesbian feminist (Dworkin, 1981) to more positive feminist evaluations of sexual possibilities (Vance, 1984). More recently heterosexuality has been less susceptible to wholesale rejection, but remains the subject of critical theorisation and debate among feminists in the context of gendered power (Richardson, 1996; Holland *et al.*, 1998). Some emphasise heterosexual sex as pleasurable despite its location in gendered power relations, with a variety of possible meanings (Segal, 1994), while others continue to emphasise that heterosexuality is at the root of women's oppression (Wilkinson and Kitzinger, 1993; Jackson, 1999).

Feminist analysis has examined how heterosexuality as a form of sexual preference or 'orientation' is analytically distinct from but socially interwoven with heterosexuality as a social institution or form of social organisation, involving systematic linkages between forms of sexual behaviour, subjectivity and sexual desire, identities, the sexual division of labour (in employment, domestic labour, emotional labour), law, political citizenship and other aspects of social life. The term 'compulsory heterosexuality' was coined by Adrienne Rich to refer to the way society compelled participation within heterosexuality as a form of social organisation (Rich, 1980). Stevi Jackson's recent work provides one of the most sustained analyses of heterosexuality, drawing together past and present critiques to conceptualise heterosexuality as patterning forms of social organisation, as a form of identity



and as influencing forms of desire, while seeking not to conflate these different elements (Jackson, 1999, esp. pp. 159–185). A critical perspective on heterosexuality is crucial to conceptualise age of consent laws, which historically have been formulated with an emphasis upon the need to protect young women from men.

Another crucial current of analysis addressing sexuality has been that emerging from the gay liberation movement (Abelove, Barale and Halperin, 1993; Nardi and Schneider, 1997). Work by gay and lesbian theorists has produced critiques of the institutional and cultural exclusions enforced by heterosexuality. This has generally complimented feminist perspectives, although sometimes challenging them, particularly where differences emerged over the extent to which sexuality requires regulation. Sometimes lesbian and gay perspectives have critiqued heterosexuality without attention to gendered power relations within heterosexuality. The best political and theoretical analyses seek to combine elements of both (see for example: Segal, 1999), and also seek to incorporate analysis of the specific forms of exclusion faced by bisexuals (Eadie, 1993, pp. 139–170; Hemmings, 1993, pp. 118–138; Dollimore, 1997).

One key debate in which theoretical work by lesbian and gay writers has been crucial, and which is significant in understanding age of consent debates, has focussed on the extent to which categories of sexual identity are products of society and culture, rather than biology. In debates over sexual identities, ‘social constructionist’ theories challenged those which regarded identity categories as unproblematically deriving from and representing characteristics of the body and/or the self understood as their aetiology, focussing instead on the production of cultural categories (Vance, 1989). Early social constructionists questioned the existence of shared biological or psychological characteristics within categories such as ‘homosexuality’ and ‘heterosexuality’ (McIntosh, 1968; Plummer, 1975; Weeks, 1977, 1981). Foucault’s subsequent commentary on the appearance of the nineteenth-century homosexual suggested similar lines of inquiry (Foucault, 1981, pp. 42–44). The subsequent ‘social constructionist/essentialist debate’ raged in various directions (Vance, 1989; Stein, 1992), taking new forms in work influenced by post-structuralism (Fuss, 1989; Butler, 1990; Sedgwick, 1990; Seidman, 1993).

The case has been consistently and convincingly argued against biological theories of the causation of homosexuality, of which the latest manifestation has been the ‘gay gene’ (Rose, 1996; Fernbach, 1998; cf. ‘No tears for passing of “gay gene”’, *The Observer*, 25 April 1999, p. 4). Some theorists who reject biological causation models, however, have turned to psychoanalysis to propose that shared forms of desire and subjectivity, structured in relation to sexual difference, lie behind the strong sense of sexual identity felt by many people. Yet psychoanalytic theories also suffer from their own forms of ‘essentialism’, and work as narratives which constrain ways of thinking about sexual identity and subjectivity, particularly by tending to assume

that sexual desires and identities are established early in childhood (cf. Plummer, 1981, pp. 53–75; Weeks, 1985, pp. 127–156). Limited attempts have been made to explore alternative possibilities, such as developing sexual script theories or symbolic interactionism to suggest a more diffuse understanding of how psychic processes and bodily sensations interact with cultural categories (Jackson, 1996b, pp. 15–22).

The view which informs this study, therefore, is that categories such as ‘homosexual’ and ‘gay’ can be understood as categories that play a profoundly constitutive role in structuring social experience. Desires are best conceived as oriented towards ‘acts’, ‘sensations’ or particular elements of ‘bodies’ (or perhaps better, psychic representations of these), and are only organised in relation to biological sex differences through available cultural concepts and narratives. Hence the ways in which behaviour is socially organised through sexual identity categories are more susceptible to change than is commonly accepted. Nevertheless, identity categories are meaningful constraints in the lives of individuals, associated with personal narratives concerning the degrees of ‘fixity’ or ‘unfixity’, ‘determinacy’ or ‘choice’ people experience in their sexual identity, orientation or desires. People who do not believe their sexual identity can change are thus extremely unlikely to engage in sexual practices which appear to contradict that identity, and sexual identities can be the subject of intense emotional investments linked to the constitution of self-identity, making them far from easy to transgress. Despite this, the implications of this kind of approach must be confronted and introduced into public debates, even if such perspectives are in tension with the dominant narratives of lesbian and gay people (Whisman, 1996), and their associated political strategies for claiming citizenship (Epstein, 1987, p. 243; Evans, 1995, pp. 130–137; Jackson, 1998, pp. 70–72; Waites, 2003, 2005).

The emergence of ‘queer politics’ and ‘queer theory’ since the early 1990s has in some ways reoriented these and other debates over sexuality. Both terms are highly contested (Epstein, 1996). ‘Queer politics’ has been used variously to describe ‘lesbian, gay, bisexual and transgender’ politics, to denote a renewed oppositional ‘lesbian and gay’ activist vigour, or to emphasise a questioning of all established sexual identity categories (cf. Warner, 1993, pp. vii–xxx). ‘Queer theory’, a term coined by Teresa de Lauretis (1991), has also been used in many ways to describe diverse theoretical positions, and most of the key examples typically cited do not explicitly use the term (Butler, 1990; Sedgwick, 1990), while even those which do include a variety of work (Warner, 1993). Nevertheless, despite justified criticism of queer theory’s lack of coherence (Mort, 1994), some distinctive tendencies can be discerned. Steven Seidman has argued that a discernible current identifiable as ‘queer theory’ has:

sought to shift the debate somewhat away from explaining the modern homosexual to questions of the operation of the hetero/homosexual

binary, from an exclusive preoccupation with homosexuality to a focus on heterosexuality as a social and political organizing principle, and from a politics of minority interest to a politics of knowledge and difference. (Seidman, 1996, p. 9; see also Seidman, 1997)

As Epstein has commented, it is doubtful whether Seidman is right that earlier 'social constructionist' work failed to perform these tasks, at least implicitly (Epstein, 1999, p. 271). It is also clear that earlier feminist understandings of compulsory heterosexuality understood sexual and gender identities to be linked within a single structural system (Rich, 1980; Jackson, 1999). Nevertheless, queer theory has been distinguished by its explicit problematisation of 'heteronormativity', which can be defined as 'the institutions, structures of understanding and practical orientations that make heterosexuality seem not only coherent – that is organised as a sexuality – but also privileged' (Berlant and Warner, 1998, p. 548); and also by advocacy of the destabilisation of the heterosexual/homosexual binary via the promotion of other forms of sexual identification (Warner, 1993). Although 'queer' as a concept must carry some association with homosexuality, queer sexual practices have been conceived as encompassing anything which could be juxtaposed to heteronormative sex (problematically understood as oriented to reproduction via male/female vaginal intercourse), such as fetishisms, sado-masochism and so on. Thus in relation to law, queer politics and queer theory suggest the need for analysis of not only the heteronormativity of law (McGhee, 2001, pp. 1–24), but also the way in which a variety of sexual practices are regulated, without reference solely to a heterosexual–homosexual axis (Stychin, 1995).

An appreciation of gendered power, and of the ways in which heterosexuality and heteronormativity have historically structured society and shaped law, is vital for the analysis of debates over the meaning of consent in the context of sexual behaviour. These are discussed in the next section.

## **The meaning of consent**

The meaning of 'consent' is crucial in considering debates over age of consent laws, although not all rationales advanced for legal prohibitions on young people's involvement in sexual behaviour have made reference to the capacity of young people to give meaningful consent, as will be demonstrated in subsequent chapters. There are numerous competing perspectives on the meaning of 'consent', and how it should be conceptualised in relation to childhood and sexual behaviour.

The conditions necessary for an individual to give their consent are a perennial source of debate within philosophy and social theory, but debates over consent and competence have been the subject of increasing interest and dispute in recent decades (Alderson, 1995). The boundary between consent

and non-consent is contested in relation to issues such as differential power, coercion and deception with regard to relevant information (Archard, 1998, pp. 2–3).

‘Consent’ implies voluntary agreement, undertaken by a subject with a sufficient degree of free will and agency. To be judged valid, consent must be based upon predetermined criteria in relation to both the social context and the status of the agent (Shildrick, 1997, p. 82). The agent’s capacities for ‘free will’ and ‘reason’ are therefore relevant parameters, as are contested definitions of relevant social contexts (for discussion, see Shildrick, 1997, pp. 79–90; Archard, 1998, pp. 1–18).

The capacity to ‘consent’ in any given circumstance can be understood as a particular kind of ‘competence’, which may be defined as ‘the capacity or potential for adequate functioning-in-context as a socialised human’ (Jenkins, 1998, p. 1). In western societies since the enlightenment, particular forms of competence associated with the intellectual capacity to ‘reason’ and the exercise of free will have been valued. The subject of most enlightenment thought has been associated with the attainment of capacities to reason and act autonomously as an independent, disinterested, self-complete, self-determining being (Alderson, 1990; Shildrick, 1997, pp. 86–90). Autonomy has typically been characterised as taking place in the absence of constraint, rather than being facilitated by ‘positive conditions’. Moral agency within much of western ethics is characterised as ‘the realisation of a capacity to choose and act, freely and rationally, within a framework of moral requirements’ (Shildrick, 1997, p. 63). Such understandings have been mirrored in the assumptions of developmental psychology, as discussed above. This context implies that the characteristics attributed to certain social groups have been systematically linked to the kind of action which consent has been imagined to be.

The social distribution of rights and freedoms in western societies, including rights to consent in sexual and other activities, has historically been hierarchically structured in accordance with such perspectives. Those groups not believed to possess ‘reason’, such as women, non-white peoples, children, and those defined as mentally deficient, were refused rights on the grounds that they did not possess the necessary forms of competence (Alderson, 1994). Hence meaningful ‘consent’ has historically been associated with forms of competence facilitating ‘rational’ decision-making in the context of ‘free will’ – the preserve of adult white men. Children, like women, were historically viewed as being ruled by their bodies, and hence incapable of exercising moral agency over their bodies (Shildrick, 1997, p. 81). Consequently, where the patriarchal family has been a central institution, consent by women and children has not been deemed relevant to much sexual behaviour. This is the background to much contemporary sexual violence and abuse.

During the twentieth century, groups previously not recognised as possessing capacities for reason sufficient to justify granting of rights and autonomy

were increasingly granted such recognition: not only women but also groups such as children and the mentally ill, though more recently and to a much lesser extent. This occurred through the influence of critical political perspectives, and associated philosophies and social theories. However, some have pursued change simply through a revision of beliefs about who possesses reason, and/or through a re-conceptualisation of social contexts defining the circumstances in which decisions are made. Others have more profoundly questioned the nature of 'reason', 'rational decision-making' and the characteristic emphasis on the 'autonomous' individual in enlightenment thought.

Among the latter, critiques have emerged from a variety of theoretical streams within social and political theory and moral philosophy. Some have questioned the possibility and desirability of the self's 'detachment' from its social context. These include communitarian critiques of the characterisation of ethical decision-making as being by an 'unencumbered self', distanced from particular interests (Sandel, 1984/1992; Taylor, 1985/1992). Such perspectives suggest that the self's embedding in its social context may facilitate good ethical choices, rather than constrain them. Similar themes have been raised by feminist maternalists advocating recognition of an 'ethic of care', who have sought to re-value the role of emotions, non-rational subjectivity, the subconscious and/or the body/embodyment in decision-making and the generation of knowledge (Gilligan, 1982; see also Shildrick, 1997). Others, advocating post-structuralist and postmodernist perspectives critiquing Enlightenment thought, have more radically questioned the possibility and desirability of the subject's coherence (Foucault, 1970; Lyotard, 1984). Some have sought to bring together elements of these perspectives (Benhabib, 1992); and debates have ensued over the character of rationality in both modern and postmodern thought (Rengger, 1995, pp. 70, 77–125). These various currents collectively demand a re-conceptualisation of any rationale for granting particular rights, freedoms or forms of social status to adults but not to children.

Critiques of an emphasis upon autonomous individualism require us to approach consent within a new analytical context as a situated activity never perfectly achieved, always given with limited knowledge, cultural resources, finite degrees of competence and often in the context of unequal power. This implies understanding mental choice as a capacity which is a learned form of competence, and a socially situated understanding of the conditions for 'freedom' of action (Shildrick, 1997, pp. 86–87). Genuine rationality must be situated in the context of alternative choices, in order for discernment to become possible. The competence to 'consent' may be attained in different ways and to different degrees; the giving of 'consent' can be conceived as a situated social process.

But even if the desirability of extending 'autonomy' to social groups previously not permitted autonomy is accepted, this does not simply imply the extension of formal rights and freedoms. Margrit Shildrick has suggested

that the granting of greater formal autonomy to patients in medical contexts can leave dominant conceptions of autonomy and existing structural power relations between medical professionals and patients intact (Shildrick, 1997, p. 80; cf. pp. 62–90). Recognising the extent to which competence is socially acquired does not automatically imply extending formal rights; it may imply that rights could potentially be extended, but should only be granted where appropriate forms of education or social support are available. Resources – including both learned skills and forms of competence, and material resources – are crucial.

‘Consent’ in the context of sexual behaviour presents particular dilemmas. These are discussed in David Archard’s book *Sexual Consent*, which provides one of the most sustained treatments of the issues (Archard, 1998, pp. 19–53). Particular forms of social inequality in access to forms of competence, power and resources exist between parties involved in sexual behaviour. Judgements of who is capable to give meaningful consent to a sexual act depend upon the kinds of competence in ‘consenting’ which one might regard as relevant. For example (as discussed above), ‘rational’ capacities are deemed important by some; others value a moral sense; skills in relating to others; and/or emotional sensitivity associated with an embodied self-awareness. Competence can be enhanced by relevant knowledge, including (for example) knowledge of the likely consequences of sexual behaviour, which can be provided by sex education; however, skills and emotional assurance in handling situations are also important, and can also in some respects be taught.

Feminist analyses of both ‘consensual’ and ‘non-consensual’ sexual behaviour have collectively examined gender dimensions of what can be termed ‘the social distribution of sexual consent’: who is conceived as capable of consent, who is recognised as such in law, and who in practice is able to engage in consensual sexual activity. Feminists have, in particular, examined the unequal distribution of power and pleasure in the context of critical analyses of socially institutionalised heterosexuality, including the ways in which women perform emotional and sexual labour for men in contexts structured by the risk of violence or economic dependence (for example: Rich, 1980). Some feminist campaigns have exaggerated the clarity of a distinction between consent and non-consent, as with some uses of the anti-rape slogan ‘yes means yes’ and ‘no means no’. However, other strands of feminism have conceptualised the existence of a continuum between fully ‘consensual’ heterosexual intercourse and rape. The notion of a continuum more adequately describes the experiences of women who may ‘submit’ to sex without giving a more ‘active consent’, implying greater agency (Holland *et al.*, 1998, pp. 131–132; Lacey and Wells, 1998, pp. 385–386). This is useful in conceptualising forms and degrees of consent in sexual behaviour involving children. It would appear that there is no absolute distinction between actions or subjective states of consciousness that could be taken to constitute consent