**Criminalization of Nonexploitative and Noncoercive Sexual Behavior Between Consenting Adolescents: An Infringement Upon the Child’s Right to Privacy**

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Submitted by

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**INTRODUCTION**

Adolescence is a time where children begin to explore their identity. Social values, political leanings, and sexuality are just some examples of ways that humans develop during their teenage years. While the specific course of sexual development varies from person to person and culture to culture, the exploration of sexuality during the teenage years is a universal experience. However, although these behaviors are normal from a developmental perspective, the way that various countries protect — or punish — adolescents engaging in sexual behaviors is far from uniform. Although adolescents need to be able to safely and privately explore their sexuality in order to develop a healthy sexual maturity,[[2]](#footnote-2) sexual behavior among adolescents is severely punished in many countries. In lieu of a comprehensive consideration of the facts, viewed within the framework of adolescent development, courts are often made to enforce laws that hold defendants strictly liable for sexual conduct with a minor, even when the “offender” and “victim” are same-age peers engaging in consensual sexual activity. Oftentimes, laws regarding adolescent sexual activity do not allow for consideration of the specific circumstances of the case such as the consensual nature of the activity or the age parity between the alleged offender and victim.[[3]](#footnote-3) These laws may protect children from predatory adults, but in doing so they also punish and stigmatize non-exploitative, healthy, and consensual[[4]](#footnote-4) sexual activity where both parties are adolescents, thus denying these children the private space and opportunity to develop a healthy sexual identity.

To be clear, this submission is not advocating for any sort of right to exploitative relationships between adults and children, or among adolescents. Instead, it is calling for legal reform that promotes healthy adolescent development, protects fundamental rights and does not punish the very people that the law intends to protect. The legal reform called for is the decriminalization of consensual adolescent sex: as Paragraph 40 of Committee on the Rights of the Child General Comment 20 expressly says, “States should avoid criminalizing adolescents of similar ages for factually consensual and nonexploitative sexual activity.”[[5]](#footnote-5)

**PRIVACY RIGHTS OF CHILDREN**

The Universal Declaration of Human Rights (UDHR) states that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”[[6]](#footnote-6) Although the UDHR is not legally binding, it reflects the core principle that privacy is a right that should be guaranteed to all. International and regional treaties such as the Convention on the Rights of the Child,[[7]](#footnote-7) the International Covenant on Civil and Political Rights,[[8]](#footnote-8) the African Charter on the Rights and Welfare of the Child,[[9]](#footnote-9) and the American Convention on Human Rights[[10]](#footnote-10) have all similarly included a universal right to privacy.

**Allowing Consenting Adolescents The Private Space To Explore Their Sexuality Free From Criminalization Is Necessary To Realize Their Rights to Health and Development**

A child’s right to privacy should be read in conjunction with other guaranteed rights, including the rights to health and development. The Committee on the Rights of the Child has stated that the right to privacy is fundamental in guaranteeing the rights of health and development to adolescents and should be respected strictly.[[11]](#footnote-11) This Committee has further defined a child’s right to health as including “the right to control one’s health and body, including sexual and reproductive freedom”.[[12]](#footnote-12) The World Health Organization also recognizes the critical nature of the right to privacy in regards to the realization of sexual health.[[13]](#footnote-13) In order to ensure this right to sexual health and freedom, governments should create a safe and supportive culture for adolescents to build life skills and acquire information, all while respecting their privacy and providing for adequate health and educational services.[[14]](#footnote-14)

Although historically there has been a lack of research on normative sexual behavior for adolescents, existing studies from various parts of the world support the decriminalization of consensual sexual behavior between adolescents as a necessary way to guarantee their rights to privacy and healthy development.[[15]](#footnote-15) Regardless of the social stigma that in many places prevents open discussions of adolescents as sexual beings, the biological reality is that “sexual development begins well before adolescence.”[[16]](#footnote-16) Around age 10, when adrenal glands mature, many children begin to experience sexual curiosity, arousal, or desire.[[17]](#footnote-17) From age 10–13 is when sexual fantasies and masturbation can begin to become more frequent.[[18]](#footnote-18) Rather than an expression of dangerous or pathological behavior, the great majority of this sexual activity is a natural expression of children’s curiosity and biological maturation.[[19]](#footnote-19) Pairing off, dating, and sexual experimentation such as touching, kissing, and even oral sex can begin to occur around age 12 or 13.[[20]](#footnote-20) This nascent sexual curiosity is not limited to boy children. By age 13, “both genders experience a high level of sexual energy.”[[21]](#footnote-21)

**Countervailing Policy Interests Do Not Justify The Violation Of Adolescents’ Right To Privacy**

 The right to privacy is deeply intertwined with the belief that people should be protected from unwarranted government interference with matters that are fundamental to their personhood.[[22]](#footnote-22) Sexual development and exploration are very personal experiences. The UDHR states, “everyone shall be subject *only* to such limitations as are determined by law *solely* for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”[[23]](#footnote-23). This is a high bar to meet in order to justify limiting a human right. Although consensual sexual activity between adolescents falls within the ambit of their right to privacy, some may believe that there are countervailing policy interests that justify limiting this right. For those who believe that adolescent sexual activity is aberrant behavior that must be deterred, or from which sexually active adolescents need be rehabilitated, research shows that criminalizing consensual adolescent sexual activity is not an effective way to achieve either goal.

*Criminalizing Consensual Sexual Activity Between Minors is Not an Effective Deterrent*

Some individuals may believe that enacting harsh penalties on adolescents who engage in sexual activity will deter others from doing the same, therefore preventing valid risks like teenage pregnancy or the spread of disease. They may also believe that without these laws, states would be encouraging “immoral” or “inappropriate” sexual activity between teenagers. The evidence suggests that this method of control via “scare tactics” does not work, and therefore does not serve as an interest that outweighs the child’s right to privacy.

At age 11–14, children generally don’t consider the long-term risks and effects of their decisions.[[24]](#footnote-24) Even when teens reach the age range of 14–16, they may abstractly understand negative consequences to sexual behavior such as pregnancy or disease, but they often don’t have the cognitive ability to act consistently and responsibly when faced with making decisions.[[25]](#footnote-25) Since “scare tactics” generally don’t work on adolescents until they are above the common range of the age of consent (16–18)[[26]](#footnote-26), research shows that a more effective way to prevent teen pregnancy and the transmission of disease is to provide teens with comprehensive sexual education and have access to contraception and sexual health resources if they do choose to engage in sexual activity. Continuing to criminalize consensual adolescent sex may actually backfire from a health perspective, as the stigmatization associated with criminalizing adolescent sex pushes this behavior underground, impedes adolescents’ ability to make safe and informed decisions, and can prevent healthcare providers from legally being able to privately assist sexually active youth.[[27]](#footnote-27)

*Criminalizing Consensual Sexual Activity Between Minors is Not Effective Rehabilitation*

 Because consensual sexual activity between adolescents is most often age appropriate and developmentally normal, prosecuting children for such activity as a means to rehabilitate them is unnecessary. Further, such criminalization results in a host of negative collateral consequences. For example, having a criminal record greatly limits a young adult’s access to resources such as jobs, education, and housing.[[28]](#footnote-28) The associated stigma of being labeled a sex offender can result in ostracization from their community as well as other negative, long-lasting psychological effects including depression and social isolation.[[29]](#footnote-29) These lasting effects can actually lead to an increased likelihood that the young adult will be forced into other non-sexual criminal activity.[[30]](#footnote-30)

Although most youth who engage in consensual sexual activity with other minors are displaying developmentally appropriate behavior and do not need rehabilitation, there are situations where sexual behavior is a sign of a deeper problem. When sexual behavior includes threats, force, aggression, strong emotional reactions like anxiety or anger, involves children that have widely differing ages/abilities (teenagers and toddlers for example), or acts that are clearly beyond the appropriate developmental stage (such as a toddler trying to kiss an adult’s genitals), best practices in the field suggest that proper treatment with a licensed mental health professional should be sought out by caretakers.[[31]](#footnote-31) In extreme cases, such as when a child is showing signs of severe psychiatric disorders, highly aggressive sexual behavior, or specific plans/attempts to hurt themselves or others, inpatient care might be necessary.[[32]](#footnote-32) Even in these situations where rehabilitation is necessary, experts agree that addressing the root cause of the concerning behavior — such as the child being a victim of sexual abuse or having a psychiatric disorder — should be how rehabilitation occurs, not criminalization and punishment.[[33]](#footnote-33)

**CASE STUDIES**

**Malawi**

In Malawi, the median age of first sex for women who are currently aged 25–49 is 16.8 years old.[[34]](#footnote-34) 19% of those women had sex before age 15.[[35]](#footnote-35) Despite these facts, under Malawi Penal Code section 138, “any person who carnally knows any girl under the age of 16 shall be guilty of a felony and shall be liable to imprisonment for life.”[[36]](#footnote-36) This act, known as defilement, is a strict liability offense and applies to both adult men and boys under the age of 16. The only affirmative defense is if the offender reasonably mistook the girl’s age. Under Malawi Penal Code section 160B, any person who engages in “sexual activity” (defined as sexual contact other than sexual intercourse) with any child (person under the age of 16) is guilty of an offense and liable to imprisonment for 14 years.[[37]](#footnote-37) This law was enacted in 2011 and intended to cover the gap left by section 138, which only includes sexual intercourse.[[38]](#footnote-38)

We can see the impact of section 138 in the case of B.K., a 20-year-old young man who has been imprisoned for 3 years for violating the defilement statute.[[39]](#footnote-39) When B.K. was 16 years old, he began a consensual relationship with M., a girl who was in his grade at school. When M.’s mother began to hear rumors that her daughter was sexually involved with B.K., B.K.’s mother sent him to live with his uncle in a different village for a year to avoid trouble. When B.K. returned home, M. started coming over again, which upset her parents, so they went to the police. B.K. was then arrested for defiling M., despite both denying any sexual activity occurred. At trial, the only witnesses for the prosecution were M.’s parents and brother. The state did not provide any medical report showing sexual activity had occurred, and M. refused to testify. However, B.K. was still found guilty as a first-time offender and sentenced to 14 years imprisonment with hard labor.

A similar story can be seen in the case of T.L.[[40]](#footnote-40) When T.L. was 16 years old, he was in a consensual relationship with a 16-year-old girl named J. Unbeknownst to T.L., his mother and J.’s mother did not get along. When J.’s mother learned that her daughter was involved with T.L., she went to the police and claimed that T.L. had defiled her daughter. At trial, J. and her father both defended T.L. and J. admitted the sexual activity was consensual, but T.L. was nevertheless found guilty as a first-time offender and sentenced to 6 years imprisonment with hard labor. He is now a 20-year-old young man who, after being in prison for 3 years, has been transferred to a reformatory center.[[41]](#footnote-41)

Another example of criminalization of consensual sexual activity between adolescents can be seen in the case of S.A.[[42]](#footnote-42) When S.A. was 17 years old, he had consensual sex with his girlfriend, G., who was also 17 years old. When her parents found out and called the police, G. followed the orders of her parents and told the police she was only 13, thus putting her well below the age of consent. S.A. was then arrested and charged with both defilement and child abduction. S.A. pled guilty because he believed that he was admitting to having consensual sex with G., but did not understand that with that plea, he would be found guilty of defilement and child abduction and sentenced to 6 years imprisonment with hard labor.

Cases such as those above are not rare. The stories of these boys demonstrate several of the shortcomings of laws that criminalize sexual activity based on age without any consideration of the facts of the case. The most striking factors of cases like these are that boys under the age of 16 can be harshly prosecuted and subjected to extremely long sentences, such as the14-year sentence that B.K. is currently serving. Although imprisonment of children has been made illegal under Malawi’s 2010 Child Care, Protection, and Justice Act, in reality this law is often ignored or forgotten.[[43]](#footnote-43) There are also still several young adults who were incarcerated as minors, but not released when the law began to be enforced.[[44]](#footnote-44)

 Malawi’s defilement law, section 138, is also noticeably gendered: only carnal knowledge of an underaged *girl* is illegal. Since section 160B does not include sexual intercourse, no equivalent law to section 138 exists to protect boys from defilement by girls or women. This type of violation can still occur in cases where the boy is the younger of the two parties since there is no exception or defense for the parties being close in age. Under the law, a 15-year-old boy who has consensual sex with his 15-year-old girlfriend is treated the exact same as a 50-year-old man who has sex with an 11-year-old girl. And these punishments are not simply a slap on the wrist, they are years and years of horrible conditions while incarcerated: years where the boy is not in school, making friends, or otherwise developing normally. At best, gendered age of consent laws reflect outdated stereotypes of girls as the passive victim and boys as the aggressive initiator.[[45]](#footnote-45) At worst, the laws reflect the idea that women are the property of their fathers and their value is based on their virginity.[[46]](#footnote-46) Gendered laws yield unfair results when applied, as two adolescents can both consensually engage in the same activity, yet face drastically different punishments. While the girl may face punishment within the family unit, only the boy is subject to punishment by the State, regardless of who initiated the sexual contact. When an act engaged in by girls and boys only leads to the prosecution of boys, there is not equal treatment before the law, and is not in the best interest or welfare of either child.

Permanently branding a boy as a criminal for engaging in consensual, non-exploitative, developmentally appropriate sexual activity is an attack on his reputation and honour, thus violating his right to privacy. The boy is subject to the stigma of being a convicted felon and sex offender, both phrases that have very harsh and negative associations. Laws that do not allow for nuance or consideration of the facts of the case also leave potential for extremely biased applications. Without proper exceptions or defenses, the fact that this law is strict liability harms children, the very people it is intended to protect. Since this law is only applied when parents file complaints, not every teenager who engages in sexual activity (which is most teenagers) is treated the same. This can lead to unequal punishment where one boy is punished more for being poor, uneducated, or otherwise not a desirable partner for someone’s daughter than for any inherent wrongness of his actions. In T.L.’s case, a rivalry between mothers that had nothing to do with him led to imprisonment for consensual activity.

Laws that harshly criminalize behavior strictly based off of age are even more problematic in areas where age is not easily verifiable. Official identity papers such as birth certificates are very rare in Malawi, especially in rural villages.[[47]](#footnote-47) Instead, age is generally estimated based on memories of the year and season.[[48]](#footnote-48) Without proper age verification, Malawi is also infringing on the privacy rights of adolescents who are above the age of consent by investigating and punishing consensual sexual behavior that is in fact legal. The lack of ability to prove age, combined with a law that criminalizes consensual sexual activity based only on the age of the girl creates tremendous potential for abuse. Girls can easily lie about their age, whether by their own decision or through pressure from their parents. Even if the girl does not lie, pressure from parents on police to arrest a boy for having sex with a girl close to the age of consent can still lead to improper detention. This was what happened in S.A.’s case, turning what was consensual, legal sexual activity between adolescents over the age of consent (16) into a harshly penalized crime.

**United States**

Across the Atlantic Ocean, in a country with 18 times as many people[[49]](#footnote-49) and almost 2,800 times the GDP[[50]](#footnote-50) of Malawi, the United States of America has similar laws on the books that violate children’s privacy. Generally, the age of consent in the US ranges from 16 to 18, with 16 being the most common, then 17, then 18.[[51]](#footnote-51) Additionally, some states change their age of consent depending on the age of the child’s partner.[[52]](#footnote-52) In the United States, studies show that over half of teenagers are sexually active by age 18.[[53]](#footnote-53) With over 15 million teenagers in the United States, it is estimated that there are over 7 million incidents of statutory rape — just in the form of consensual sexual activity between minors — each year.[[54]](#footnote-54) Despite the prevalence of this offense, not all incidents are treated the same. Just in the year 2012, 461 children aged between 11 and 16 — and 40 children younger than 10 — were found guilty of statutory rape of other minors.[[55]](#footnote-55)

 In 2009, a 12-year-old boy, D.B., engaged in sexual activity with two of his friends, an 11-year-old boy and a 12-year-old boy.[[56]](#footnote-56) When D.B.’s father learned of the sexual activity, he sought counseling services from the county, which resulted in the county’s children’s services department contacting the sheriff.[[57]](#footnote-57) D.B. was later arrested, charged, and found guilty under the state’s statutory rape law.[[58]](#footnote-58) His appeal took 2 years and ultimately, the finding was reversed and the court deemed it unconstitutional to apply the statute to a child who is also under the age of consent.[[59]](#footnote-59)

 Not all cases like these are successful on appeal. In *People ex rel J.L.*, J.L. was a 14-year-old boy with a girlfriend just 15 months younger than him.[[60]](#footnote-60) When she was 12 and J.L. was 14, the two decided to engage in consensual sex which resulted in his girlfriend becoming pregnant.[[61]](#footnote-61) After the pregnancy came an investigation which led to the arrest of J.L. J.L. was eventually found guilty of rape under a statute that established an age of consent of 16, but only 13 if the perpetrator is less than 3 years older than the victim.[[62]](#footnote-62) Since the girlfriend was still 12, the sexual activity between the two children was not legal.[[63]](#footnote-63) This finding was confirmed by the South Dakota Supreme Court, thereby resulting in J.L. having to register as a sex offender for life and also face possible incarceration until his 21st birthday.[[64]](#footnote-64) Three justices in this case wrote a concurring opinion where they stated that while the facts did technically fit the statutory language and therefore they had no other option but to confirm, they still believed it was an extremely harsh result with little obvious rehabilitative effects.[[65]](#footnote-65)

 Similarly in *In re Ryan G.*, it was held that a 13-year-old boy committed rape when engaging in consensual sexual activity with his 12-year-old girlfriend, who was just 7 months younger than him.[[66]](#footnote-66) If the girl had been just a few months older, their actions would have fallen under a statutory exemption.[[67]](#footnote-67) In trial court and again on appeal, Ryan G. was adjudicated a delinquent child, fined $200 plus court costs, sentenced to indefinite probation, committed to the legal custody of the Ohio Department of Youth Services for an indefinite sentence between 1 year and until he reached 21 years of age, and ordered to undergo drug/alcohol assessment and sex offender treatment.[[68]](#footnote-68)

 Many of the same problems that are prevalent in both the text and application of Malawi’s defilement law can also be seen in American laws criminalizing consensual sexual behavior between youth. Adolescents are harshly punished and stigmatized. Some states, such as Colorado and South Dakota, require lifetime sex offender registration for juveniles who are adjudicated for unlawful sexual behavior, as was seen in *People Ex Rel J.L.*.[[69]](#footnote-69) The intensity of punishment seen in cases like *In re Ryan G.* can ruin the lives of young boys. In situations like these, harsh punishment exists even though the culpable behavior is developmentally normal and common.[[70]](#footnote-70) This was true in all three of the cases above, where the boys were engaging in consensual sexual activity with other similarly aged minors. Even the youngest defendant, 12-year-old D.B., was within the age range where it is normal for sexual experimentation to begin to occur. Although the age of consent is the same for boys and girls across the United States, the law is still disproportionately applied against boys.[[71]](#footnote-71) Statutory rape laws are also notoriously applied discriminatorily towards racial minorities and LGBTQ youth.[[72]](#footnote-72)

**Other Countries**

 Although Malawi and the United States were selected as focus countries for this piece, they are not at all the only countries infringing upon adolescents’ right to privacy by criminalizing consensual sexual behavior between adolescents. Across the world from India to Kenya to Chile, consensual sexual activity between adolescents is harshly criminalized and discriminatorily applied, thereby depriving children of the right to experience healthy sexual development.

 In India, the age of consent was raised from 16 to 18 in 2012 under the POCSO Act.[[73]](#footnote-73) There is no close-in-age exemption or other exemptions, so consensual sexual activity between two minors under the age of consent is just as strictly criminalized as situations with one adult and one minor.[[74]](#footnote-74) Although the language of the statute regarding age of consent is gender-neutral, in practice this law is most often only applied to boys, who are labeled “children in conflict with the law” instead of the label girls are given: “children in need of care and protection”.[[75]](#footnote-75) In fact, the gender pronoun of “he” is used throughout the POCSO act, which has led to the determination that although a victim can be a boy or girl, women cannot be found guilty of unlawful sexual intercourse, only unlawful sexual assault.[[76]](#footnote-76) Finally, proper age verification is a problem in Indian application of the POCSO act. Since the statute does not state which documents are appropriate for age verification, some children (even those with official forms of government ID) can be subjected to a bone oscillation test in order to get a rough estimate of age.[[77]](#footnote-77)

 In Kenya, a minor (regardless of gender) has no capacity to give consent before the age of 18, meaning that consent is not a defense to defilement (regardless of the age of the offender) and consensual sex between minors is illegal.[[78]](#footnote-78) The High Court of Kenya confirmed that consensual sexual conduct between adolescents is criminalized in order to protect children from harmful acts of sexual activity and protect the best interests of the child.[[79]](#footnote-79)The High Court of Kenya did admit that application of the law can be discriminatory regarding the over-prosecution of boys, but maintains that the law itself is not discriminatory as written because the prosecution could charge both parties in order to make the application of the law less discriminatory.[[80]](#footnote-80) While the High Court of Kenya has repeatedly upheld the defilement law, there are signs of future change. In *P O O (A Minor) v. Director of Public Prosecutions & Another*, a 16-year-old boy and 16-year-old girl engaged in consensual sex. When the girl became pregnant, her parents filed charges against the boy. After being found guilty, the boy appealed and the Judge stated that these are children who need guidance and counseling rather than criminal penal sanctions.[[81]](#footnote-81) The Judge also determined that the boy was discriminated against on the basis of sex since only he was prosecuted, that cases like these were not what the statute intended to govern, and that the boy was entitled to monetary damages for the violations of his rights.[[82]](#footnote-82) Despite the result in this case, the statute still allows for prosecution of minors for participating in consensual sex and has great potential for abuse.

 In Chile, the official age of consent is 18.[[83]](#footnote-83) For children within the age range of 14 to 18, consensual sexual behavior is not criminalized except for in the following situations: 1) one child is mentally “perturbed”, 2) there is a power imbalance such as if the offender is responsible for the caretaking of the child, 3) the offender has taken advantage of a severely neglected child, or 4) the offender takes advantage of the sexual ignorance/inexperience of the child.[[84]](#footnote-84) Although this statute does allow for some consideration of the facts of the case, it does not apply to homosexual activity. All homosexual activity is deemed illegal until age 18,[[85]](#footnote-85) thereby discriminating against LGBTQ youth and disproportionately punishing them for activity that otherwise would be legal if not for their sexual orientation. While heterosexual Chilean teens aged 14 to 18 are given the freedom and privacy for appropriate sexual development, LGBTQ teens are not.

**SUGGESTED BEST PRACTICES IN DECRIMINALIZATION OF CONSENSUAL ADOLESCENT SEX**

When it comes to appropriately addressing consensual sexual activity between adolescents, there are an abundance of factors to consider. Human rights such as the right to privacy and development, cultural values of morality, research on adolescent development, public health concerns, and a desire to protect children are all important factors when creating a law. However, the alternative to harsh punishment and strict liability is not lawlessness. In fact, there are several places around the world that have found a way to protect children from exploitation while still affording them adequate privacy and allowing them to develop into healthy adults.

 Laws regulating adolescent sexual activity should not have strict liability for minors.[[86]](#footnote-86) Adolescent sexual activity is developmentally appropriate and there is a wide range of what is normal and healthy behavior. Because in many cases, either party could be considered the victim or the offender, it is particularly important that the court has the ability to consider the nuances of each case and not just the age of the alleged victim.[[87]](#footnote-87) Laws regulating adolescent sexual activity must be applied fairly regardless of gender and sexuality. Privacy and development are basic human rights that should not be applied discriminatorily. It is not enough that the language of the statute is gender neutral, the application of the law should be equally fair. Some courts in the US have found that when it comes to consensual sex between two adolescents under the age of consent, there is no justifiable state interest to apply the state’s statutory rape statute against the minors.[[88]](#footnote-88) The judge in one of these cases emphasized that the statute should be used as a shield which protects minors, not a weapon which harms them.[[89]](#footnote-89) A tiered statutory framework that treats child “offenders” differently from adults is the best way to make sure that the rights to privacy and bodily autonomy are being protected, unless there is a greater interest in protecting one of the parties (such as when one party is significantly older than the other). UNICEF likewise recommends that laws take into account the age difference and possible power imbalances between minors.[[90]](#footnote-90)

Canada’s tiered statutory framework for regulating adolescent sexual activity allows judges much greater latitude to examine the facts of a case. In Canada, the age of consent is typically 16.[[91]](#footnote-91) If the minor’s partner is in a position of authority over the minor (i.e. their teacher, coach, etc.) or otherwise exploiting them, the age of consent is raised to 18.[[92]](#footnote-92) 14- and 15-year olds may consent to sexual activity as long as their partner is less than 5 years older than them and is not exploiting a position of authority, and 12- and 13- year olds may do the same as long as their partner is no more than 2 years older.[[93]](#footnote-93) Factors that are considered when determining whether a partner is exploiting another are: the young person’s age, the age difference between partners, how the relationship developed, and the presence of influence/control over the younger partner.[[94]](#footnote-94) This system protects the privacy of adolescents by allowing them space to develop while still protecting them from predatory adults.

South Africa’s penal code focuses on balancing the protection of the child with other interests by using a multi-stage consent framework.[[95]](#footnote-95) Sexual activities of adolescents are regulated as follows. First, sexual activity with a child under 12 is criminalized on the basis that the child has no ability to give informed consent. Second, non-exploitative, consensual sex between the ages of 12 and 16 is allowed with peers in the same age range. Third, sexual activities are allowed above the age of 16 as full consent can be provided. Finally, a “Romeo and Juliet”-style rule applies for persons within two years of age when one is above the age of 16 and one is below the age of 16.

Replacing strict liability with multi-tiered frameworks, such as in Canada and South Africa, allow for the protection of a private space for age-appropriate sexual experimentation and development while at the same time preventing exploitation and protecting children from predatory adults. This framework must allow for fact-specific determinations and close-in-age exemptions. A nuanced analysis of the facts of the case is especially important in countries where age verification can be difficult.

**CONCLUSION**

 After careful analysis of various laws regulating adolescent sexual behavior, it is clear that many countries are currently infringing upon adolescents’ right to privacy when it comes to sexual development. Sexual experimentation as a teenager is developmentally normal; however, laws criminalizing these activities have created harsh stigma and pushed consensual sex between adolescents underground. Criminalization due to concepts such as cultural notions of morality, children as property, and a desire to protect children from predatory adults has led to a legal structure that punishes the very people it should be protecting while making sexual activity more dangerous by limiting access to education, contraception, and sexual health resources. The punishments given to children found guilty of the statutory rape of another child are oftentimes unnecessarily harsh and applied disproportionately against boys who a girl’s parents deem as undesirable for their daughters or LGBTQ youth. In order to allow children the right to privately and safely explore their sexuality, laws should employ a tiered framework with close-in-age exemptions that simultaneously protect children from exploitation while recognizing sexual curiosity as age-appropriate behavior.

1. The Center for International Human Rights (CIHR) of Northwestern Pritzker School of Law (Chicago, USA) is dedicated to human rights education and legal and policy advocacy within the United States and worldwide. CIHR is in special consultative status with the United Nations Economic and Social Council (ECOSOC). The following individuals contributed to the preparation of this report: Carolyn Frazier, Isaac Green, Carmina Del Mundo, Kiana Outen, Matt Sieben. [↑](#footnote-ref-1)
2. J. Dennis Fortenberry, Handbook of Child and Adolescent Sexuality: Developmental and Forensic Psychology 171–92 (2013). [↑](#footnote-ref-2)
3. *See, e.g.,* Ariz. Rev. Stat. § 13-1405 (“A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.”) Malawi Penal Code [M.P.C.] § 138 (“Any person who unlawfully and carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment to life”). [↑](#footnote-ref-3)
4. Although people under the age of consent are not deemed capable of legally consenting, for this paper I will use the term “consensual” to describe behavior that both parties willingly agreed to participate in without force, threats, or pressure. Since I am only using the term in reference to sexual activity between two similarly aged minors, I will not consider the ability to “legally consent” to be a prerequisite for use of the term. [↑](#footnote-ref-4)
5. UN Committee on the Rights of the Child, *General Comment No. 20 (2016) on the Implementation of the Rights of the Child During Adolescence,* adopted 6 Dec. 2016, UN Doc CRC/C/GC/20, available at: https://www.refworld.org/docid/589dad3d4.html [accessed 21 September 2020]. [↑](#footnote-ref-5)
6. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). [↑](#footnote-ref-6)
7. United Nations Convention on the Rights of the Child, Nov. 20, 1989, https://www.ohchr.org/en/professionalinterest/pages/crc.aspx. (Article 16(1) provides that “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.”) [↑](#footnote-ref-7)
8. International Covenant on Civil and Political Rights, Dec. 16, 1966, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. (Article 17 provides that “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”) [↑](#footnote-ref-8)
9. African Charter on the Rights and Welfare of the Child, July 01, 1990, https://www.un.org/en/africa/osaa/pdf/au/afr\_charter\_rights\_welfare\_child\_africa\_1990.pdf. (Article 10 provides that “No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.” The African Charter on the Rights and Welfare of the Child also requires states to protect the development of the child and ensure their right to the best possible state of physical, mental and spiritual health. During adolescence, development and health should include age-appropriate sexual development and sexual health.) [↑](#footnote-ref-9)
10. American Convention on Human Rights, Nov. 22, 1968, https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm. (Article 11 provides that “1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks.”) [↑](#footnote-ref-10)
11. UN Committee on the Rights of the Child, *General Comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child,* adopted 1 July 2003, UN Doc CRC/GC/2003/4, available at: https://www.refworld.org/type,GENERAL,CRC,,4538834f0,0.html [accessed 29 September 2020]. [↑](#footnote-ref-11)
12. UN Committee on the Rights of the Child, *General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24),* adopted 17 April 2013, UN Doc CRC/C/GC/15, available at: https://www.refworld.org/docid/51ef9e134.html [accessed 29 September 2020] [*hereinafter General Comment 15*]. [↑](#footnote-ref-12)
13. World Health Organization, *Developing Sexual Health Programmes: A Framework for Action* (2010). [↑](#footnote-ref-13)
14. *General Comment 15,* *supra* note 12. [↑](#footnote-ref-14)
15. Godfrey D. Kangaude, *Adolescent Sex and ‘Defilement’ in Malawi Law and Society*, 17 Afr. Hum. Rts. J. 527 (2017). [↑](#footnote-ref-15)
16. Clea McNeely & Jayne Blanchard, Center for Adolescent Health at Johns Hopkins Bloomberg School of Public Health, *The Teen Years Explained: A Guide to Healthy Adolescent Development* (2009). R. Cacciatore, E. Korteniemi-Poikela, & R. Kaltiala, *The Steps of Sexuality—A Developmental, Emotion-Focused, Child-Centered Model of Sexual Development and Sexuality Education from Birth to Adulthood*, 31 Int. J. of Sexual Health 319, 323–324 (discussing common sexual behaviors and games engaged in by young children). [↑](#footnote-ref-16)
17. Yaniv Efrati, *Normal Versus Abnormal Sexual Behavior in Adolescents*, Psychiatric Times, Dec. 2019, at 9. [↑](#footnote-ref-17)
18. McNeely & Blanchard, *supra* note 16. [↑](#footnote-ref-18)
19. *See* David Finkelhor et al., *Juveniles Who Commit Sex Offenses Against Minors*, OJJDP Juvenile Justice Bulletin, at 4 (Dec. 2009). *See also* Phillippe Talavera, *The Myth of the Asexual Child in Namibia, in* Unravelling Taboos: Gender and Sexuality in Namibia 58, 61–66(Suzanne Lafont & Dianne Hubbard eds., 2007) (Discussing common games played by children that involve physical sexual acts, but are still considered by adults to be “unsexual)*. See also* National Child Traumatic Stress Network, *Sexual Development and Behavior in Children* (2009). [↑](#footnote-ref-19)
20. McNeely & Blanchard, *supra* note 16. This behavior is not limited to children raised in Western cultures. *See* Akinrinola Bankole et. al., *Sexual Behavior, Knowledge, and Information of Very Young Adolescents in Four Sub-Saharan African Countries*, 11 Afr. J. Reprod. Health 28, 32–34 (2007). [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)
22. *See* *Eisenstadt v. Baird*, 405 U.S. 438 (1972). *See also Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981). [↑](#footnote-ref-22)
23. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (emphasis added). [↑](#footnote-ref-23)
24. McNeely & Blanchard, *supra* note 16. [↑](#footnote-ref-24)
25. *Id.* [↑](#footnote-ref-25)
26. *Id.* [↑](#footnote-ref-26)
27. *See* Amnesty International, *Developing Principles to Address the Detrimental Impact on Health, Equality, and Human Rights of Criminalization with a Focus on Select Conduct in the Areas of Sexuality, Reproduction, Drug Use, and HIV* (2019). *See also In re G.T.*, 758 A.2d 301, 304 (Vt. 2000) (In this case, the judge discusses the mandatory reporting requirements of mental health professionals, counselors, teachers, and social workers in the United States. If consensual sexual activity between teenagers is a crime, then the aforementioned professionals may be required to report the illegal act or be subject to a misdemeanor themselves). [↑](#footnote-ref-27)
28. Brief of Amici Curiae Colorado Juvenile Defender Center, Juvenile Law Center, and Children’s Rights in Support of Juvenile-Appellant T.B. at 11–24, People in the Interest of T.B., 2019 WL 2528764 (Colo. Ct. App. June 20, 2019) [hereinafter Colorado Brief]. [↑](#footnote-ref-28)
29. For a deeper discussion of the impacts of labeling children as sex offenders, *see* Elizabeth J. Letourneau et al., *Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Examination*, 24 Psychol. Pub. Pol’y. & L. 105, 115 (2018). [↑](#footnote-ref-29)
30. Colorado Brief, *supra* note 28. [↑](#footnote-ref-30)
31. National Child Traumatic Stress Network, *Sexual Development and Behavior in Children* (2009). [↑](#footnote-ref-31)
32. National Child Traumatic Stress Network, *Understanding and Coping with Sexual Behavior Problems in Children* (2009). [↑](#footnote-ref-32)
33. *Id.* [↑](#footnote-ref-33)
34. National Statistical Office (NSO) & ICF, *Malawi Demographic and Health Survey 2015–2016* 210 (2017) [↑](#footnote-ref-34)
35. *Id.* [↑](#footnote-ref-35)
36. Malawi Penal Code [M.P.C.] § 138. [↑](#footnote-ref-36)
37. Malawi Penal Code [M.P.C.] § 160B. Under the 2010 Child Care Protection and Justice Act, children are not supposed to be imprisoned for any reason, however in practice this is often ignored. [↑](#footnote-ref-37)
38. GD Kangaude, *Adolescent Sex and “Defilement” in Malawi Law and Society* (2017) 17 Afr. Hum. Rts. L. J.527–549 [↑](#footnote-ref-38)
39. Interview with B.K. (October 2019) (Material on file with the authors). [↑](#footnote-ref-39)
40. Interview with T.L. (October 2019) (Material on file with the authors). [↑](#footnote-ref-40)
41. Reformatory centers were established under the 2010 Child Care Protection and Justice Act for the purpose of educating, training, and counseling children in conflict with the law. Currently there are only 2 in the country. [↑](#footnote-ref-41)
42. Interview with S.A. (October 2019) (Material on file with the authors). [↑](#footnote-ref-42)
43. Child Care, Protection, and Justice Act § 140 (2010). [↑](#footnote-ref-43)
44. In October of 2010, at least 7 boys like this were identified at Bvumbwe Prison, and there are likely others. (Material on file with authors). [↑](#footnote-ref-44)
45. Michelle Oberman, *Girls in the Master’s House: Of Protection, Patriarchy and the Potential for Using the Master’s Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 802 (2001). Guangxing Zhu & Suzan van der Aa, *A comparison of the gender-specificity of age of consent legislation in Europe and China: Towards a gender-neutral age of consent in China?* Eur. J. on Crim. Pol’y. and Res. 523, 526–527 (2017). [↑](#footnote-ref-45)
46. *Id.* Rita Eidson, *The Constitutionality of Statutory Rape Laws*, 27 UCLA L. Rev. 757, 761 (1980). [↑](#footnote-ref-46)
47. *Celebration, Identity for a Child: Giving a Birth Certificate*, United Nations Development Programme News Centre (Oct. 10, 2017), https://www.mw.undp.org/content/malawi/en/home/presscenter/articles/2017/10/10/celebration-identity-for-a-child-giving-a-birth-certificate.html. [↑](#footnote-ref-47)
48. *Id.* [↑](#footnote-ref-48)
49. *See* Population- Total (Malawi, United States),https://data.worldbank.org/indicator/SP.POP.TOTL?locations=MW-US [↑](#footnote-ref-49)
50. *See* GDP(current US$) - Malawi, United States, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=MW-US (last visited 29, Sep. 2020). [↑](#footnote-ref-50)
51. *Age of Consent by State Population*, World Population Review, http://worldpopulationreview.com/states/age- of-consent-by-state/ (last visited Sep. 28, 2020). [↑](#footnote-ref-51)
52. *Id.* [↑](#footnote-ref-52)
53. Gladys M. Martinez & Joyce C. Abma, *Sexual Activity and Contraceptive Use Among Teenagers in the United States, 2011-2015,* Nat’l Health Stat. Rep. no. 104 (2017). [↑](#footnote-ref-53)
54. Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape,* 48 Buff. L. Rev. 703, 718–29 (2000). [↑](#footnote-ref-54)
55. *See* Fed. Bureau of Investigation, Uniform Crime Report: Sex Offense Offenders, Statutory Rape, Sex and Race by Age, 2012, https://ucr.fbi.gov/nibrs/2012/table-pdfs/sex-offense-offenders-statutory-rape-sex-and-race-by-age-2012 (last visited Sep. 28, 2020). [↑](#footnote-ref-55)
56. *In re D.B.,* 950 N.E.2d 528, 529–530 (Ohio 2011). [↑](#footnote-ref-56)
57. *Id.* [↑](#footnote-ref-57)
58. *Id.* [↑](#footnote-ref-58)
59. *Id.* [↑](#footnote-ref-59)
60. *People ex rel J.L.*, 800 N.W.2d 720, 721 (S.D. 2011). [↑](#footnote-ref-60)
61. *Id.* [↑](#footnote-ref-61)
62. *Id.* at 723. [↑](#footnote-ref-62)
63. *Id.* at 724. [↑](#footnote-ref-63)
64. *Id.* [↑](#footnote-ref-64)
65. *People ex rel J.L.*, 800 N.W.2d 720, 725 (S.D. 2011) (Meierhenry, concurring specially). [↑](#footnote-ref-65)
66. *In re Ryan G.*, No. E–01–027, 2002 WL 484921, at \*1 (Ohio Ct. App. 2002). [↑](#footnote-ref-66)
67. *Id.*  [↑](#footnote-ref-67)
68. *Id.* [↑](#footnote-ref-68)
69. This law in Colorado is currently being reconsidered. *See generally* Jennifer Meckles, *Lawmakers Consider Changes to Colorado’s Juvenile Sex Offender Registry,* 9 News, Jan. 24, 2020. https://www.9news.com/article/news/local/local-politics/lawmakers-consider-changes-to-colorados-juvenile-sex-offender-registry/73-1cac1a21-5221-4ec8-b067-40d6413f99a1 [↑](#footnote-ref-69)
70. McNeely & Blanchard, *supra* note 16. [↑](#footnote-ref-70)
71. Cynthia Godsoe, *#Metoo and the Myth of The Juvenile Sex Offender*, 17 Ohio State J. Crim. Law 335, 343 (2020). [↑](#footnote-ref-71)
72. *Id.* at 338. [↑](#footnote-ref-72)
73. Protection of Children from Sexual Offenses Act, No. 32 of 2012, India Code (2019). [↑](#footnote-ref-73)
74. *Id.* [↑](#footnote-ref-74)
75. Mayank Tiwari, *Critical Analysis of India’s Protection of Children from Sexual Offenses Act 2012*, Jurist, (May 8, 2020), https://www.jurist.org/commentary/2020/05/mayank-tiwari-posco-act/. [↑](#footnote-ref-75)
76. *Id.* [↑](#footnote-ref-76)
77. *Id.* [↑](#footnote-ref-77)
78. The Sexual Offences Act (2009), No. 3 § 8. [↑](#footnote-ref-78)
79. *CKW v. Attorney General & Director of Public Prosecutions* (2014) eKLR, Petition 6 of 2013. [↑](#footnote-ref-79)
80. *Id.* [↑](#footnote-ref-80)
81. *P O O (A Minor) v. Director of Public Prosecutions & Another* (2017) eKLR, Petition 1 of 2017. [↑](#footnote-ref-81)
82. *Id,* [↑](#footnote-ref-82)
83. Cód. Pen. art. 362. (Chile). [↑](#footnote-ref-83)
84. *Id.* [↑](#footnote-ref-84)
85. Cód. Pen. art. 365. (Chile). [↑](#footnote-ref-85)
86. *See* Jean Strout, Divya Vasudevan, & Riya Saha Shah, *Protecting Youth from Themselves: The Overcriminalization of Consensual Sexual Behavior Between Adolescents*, 40 Child. Legal Rts. J. (forthcoming 2020). [↑](#footnote-ref-86)
87. Godsoe, *supra* note 71. [↑](#footnote-ref-87)
88. *See* *B.B. v. State*, 659 So.2d 256, 260 (Fla.1995). [↑](#footnote-ref-88)
89. *Id.* [↑](#footnote-ref-89)
90. UNICEF. *Legal Minimum Ages and the Realization of Adolescents’ Rights*, https://www.unicef.org/lac/sites/unicef.org.lac/files/2018-07/2.\_DIG.\_min\_age\_of\_sexual\_consent\_PDF\_BAJA\_0.pdf (last visited Sep. 28, 2020). [↑](#footnote-ref-90)
91. Criminal Code § 150.1–151, R.S.C. 1985, c. C.-46. [↑](#footnote-ref-91)
92. *Id.* [↑](#footnote-ref-92)
93. *Id.* [↑](#footnote-ref-93)
94. *Id.* [↑](#footnote-ref-94)
95. Criminal Law (Sexual Offenses and Related Matters) Amendment Act § 15–16 (Act No. 32/2007) (S.Afr.). *See generally* Godfrey D. Kangaude, *Adolescent Sex and ‘Defilement’ in Malawi Law and Society*, 17 Afr. Hum. Rts. J. 527 (2017). [↑](#footnote-ref-95)