



## City Research Online

### City, University of London Institutional Repository

---

**Citation:** Hodson, N., Earp, B., Townley, L. & Bewley, S. (2019). Defining and Regulating the Boundaries of Sex and Sexuality. *Medical Law Review*, 27(4), pp. 541-522. doi: doi.org/10.1093/medlaw/fwz034

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

---

**Permanent repository link:** <https://openaccess.city.ac.uk/id/eprint/23231/>

**Link to published version:**

**Copyright:** City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

**Reuse:** Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

---

---

---

City Research Online:

<http://openaccess.city.ac.uk/>

[publications@city.ac.uk](mailto:publications@city.ac.uk)

---

## Defining and Regulating the Boundaries of Sex and Sexuality

Nathan Hodson, Brian D Earp, Lynne Townley, Susan Bewley

### Abstract

Sex and sexuality are contentious concepts, blending the deeply personal with the profoundly political. Sex, a biological classification of human and other mammalian and non-mammalian bodies, has extensive sociopolitical and cultural baggage beyond its putative function of referring to (and drawing divisions on the basis of) clusters of reproduction-related bodily features. Sexuality, by which we mean the whole landscape of one's sexual desires and activities, has also been decoupled from reproduction in various ways over the last half century or more. In this editorial we highlight some of the peripheries of sex as a category, including the embodiment of persons with a diversity of sex-related physical characteristics, as well as those who may seek to change such characteristics (for example, as a component of gender identity-affirming care). We then articulate a view of sexuality that integrates biological and psychosocial aspects, noting the complex interplay of these factors in human sexual experience. Finally, we suggest that law has a role to play in sex and sexuality and that it should aim to steer a path between (1) untethered individualism in how these concepts and categories are manifested in the public sphere, and (2) dogmatic conservatism, masquerading as realism, that artificially and oppressively constrains such manifestations. We focus on the UK context to frame our discussion.

### The Boundaries of Sex

For the purposes of this special issue, sex is a biological category that seeks to make a principled distinction between those members of a sexually-reproducing species such as our own who usually produce eggs (females) or sperm (males).<sup>1</sup> This division is not tidy (there are members of our species who are neither entirely male nor female along various dimensions, or who exhibit a mix of male and female sex-related features)<sup>2</sup> nor without controversy (the appropriate criteria for drawing sex-based distinctions in the first place are contested and have become increasingly unsettled in recent years).<sup>3</sup> The UK Equality Act 2010 describes sex as “a reference to a man or a woman”<sup>4</sup> but neither defines these categories nor indicates the features by which a ‘man’ or ‘woman’ is to be identified. In section 7 of the Act, the protected characteristic of “gender reassignment” is described in general terms as “reassigning a person’s sex by changing physiological or other attributes of sex”, but the only details given are that sex is something which has attributes and makes one a man or woman.<sup>5</sup>

Where, then, should one begin? To begin to see the contours of sex as a biological classification, we will start with some basics. Any complex organism, or collection of organisms, situated within a given physical and social environment or ecological niche has many potentially salient features. There is in principle myriad ways to classify such an organism on the basis of its features, either alone in or relation to its environment, and which features are most appropriate (e.g., useful) for grounding a

---

<sup>1</sup> In this respect sex is sometimes contrasted with gender, an equally if not more contentious concept, commonly taken to refer to psychosocial scripts, expectations, meanings, or relational experiences associated with, but nevertheless distinct from, sex or sex-based categorizations. For reasons of space we will not be able to explore the concept of gender in this editorial, but will instead focus solely on sex and sexuality.

<sup>2</sup> Jones, T. (2018). Intersex studies: A systematic review of international health literature. *Sage Open*, 8(2), 2158244017745577.

<sup>3</sup> Ainsworth, C. (2015). Sex redefined. *Nature News*, 518(7539), 288.

<sup>4</sup> The Equality Act 2010 s11a

<sup>5</sup> Ibid s7

given classification depends on the purpose(s) of the classification. Biological classifications of sexually—as opposed to asexually—reproducing organisms tend to be concerned with a certain kind of *explanation*: specifically, a physical or functional explanation of how sexual reproduction causally occurs, primarily at the level of cells, anatomy, and behaviour. Accordingly, the features or attributes of a sexually reproducing organism that are most salient to biologists—and judged to be most useful for grounding classifications for the purposes of their research—are those that, among other things, appear to best explain the phenomenon of interest at the desired level of abstraction.<sup>6</sup> For individual organisms whose physical development begins with the union of an egg and sperm, there is typically a set of functionally related features that cluster together (both structurally in anatomical space and mathematically in statistical space) into one of two main groupings; these feature-clusters are by linguistic convention referred to as male or female. The majority (but not all) humans will reproduce. Each of us gets our unique configuration from one egg and sperm (two particularly extreme and different cells).

The so-called primary sex characteristics typically associated with egg-producing (“female”) humans are ovaries, uterus and fallopian tubes, vulva and vagina. Most of these internal organs are not visible. The reproductive lifespan is marked by more visible signs; the onset and ceasing of menses (periods), interspersed by the non-ovulatory states of pregnancy and breast-feeding. Histologically, ovaries include follicles in which ova mature. The endocrine function of ovaries includes cyclical production of progesterone and oestrogen, as well as testosterone (albeit at lower levels on average than are usually produced by testes, see below). The clitoropenis of the egg-carrying (female) class of organisms is largely internal (including relatively recently understood complex erectile material),<sup>7</sup> with a small external part and a separate urethra.<sup>8</sup> As demonstrated by people without a second sex chromosome at all (so-called Turner’s syndrome, XO), nearly everyone without an SRY gene -- which is usually carried on the Y chromosome -- will count as biologically female on this classification system (i.e., the vast majority of those who do not have a Y chromosome, assuming typical development).

In the presence of an SRY gene, sperm-producing testes typically develop rather than ovaries. In addition to internal prostates, the primary sex characteristics of these SRY humans are testes and penises: these organs have been the most functionally salient components of the male feature-cluster for the majority of the time our species has consciously studied itself (in largely male-dominated societies). Testes are gonads (gamete producing organs) that include Sertoli and Leydig cells, which produce sperm and relatively high levels of testosterone. A penis is an external clitoropenis (the clitoris and penis start as the same structure in early fetal development and this structure typically only diverges in utero in response to the presence of testosterone). A necessary but insufficient condition for the sperm-conveying (“male”) organism to reproduce—that is, pass its genes to the next generation—without the aid of technology is that its penis must have a central urethra that opens

---

<sup>6</sup> Two points of clarification. First, there may of course be other legitimate purposes for which classification on the basis of other features—or the same features in a different way—would be more useful or appropriate than the purpose described here. Second, biologists, like all scientists, are historically-situated human beings operating within cultures. As such, the guiding assumptions of their research and associated means of pursuing and interpreting empirical findings, including those that may factor into their classification systems, are of course influenced by the beliefs and biases of the culture(s) in which they have been socialized and conduct their work. Thus, implicit or explicit sociopolitical factors have long affected biological research. For an excellent discussion of some of these factors in shaping biological sex categories, see Sanz, V. (2017). No way out of the binary: A critical history of the scientific production of sex. *Signs: Journal of Women in Culture and Society*, 43(1), 1-27. For further, related discussion, see Earp, B. D. & Shaw, D. M. (2017). Cultural bias in American medicine: the case of infant male circumcision. *Journal of Pediatric Ethics*, 1(1), 8-26.

<sup>7</sup> O'Connell HE, Sanjeevan KV, Hutson JM. Anatomy of the clitoris. *J Urol*. 2005 Oct;174(4 Pt 1):1189-95.

<sup>8</sup> Abdulcadir, J., Botsikas, D., Bolmont, M., Bilancioni, A., Djema, D. A., Demicheli, F. B., ... & Petignat, P. (2016). Sexual anatomy and function in women with and without genital mutilation: a cross-sectional study. *The journal of sexual medicine*, 13(2), 226-237.

near the tip of the organ through which semen (and urine) pass. This structural and functional arrangement typically follows from the presence, properties, and potential of the SRY gene (in concert with a host of other factors) which, as we noted, is normally carried on the Y chromosome. Hence, nearly everybody with an SRY gene – and therefore the vast majority of those who have a Y chromosome, assuming typical development – will count as biologically male on this classification system.

Although there has long been recognition of persons whose visible sex characteristics were neither clearly female nor male according to the prevailing mode of classification, during the 20<sup>th</sup> century interest in statistically less common and functionally atypical sex-development pathways grew. This led to a marked increase in research on individuals with one or more of a range of variations in genetic, chromosomal, hormonal, and gonadal sex-linked characteristics. Having been through a variety of nomenclature variously considered medicalizing and denigrating, these variations are now collectively referred to as differences of sex development (DSD).<sup>9</sup>

Some (but not all) people with some (but not all) recognized DSDs identify as “intersex.”<sup>10</sup> By “identify” we mean that they refer to themselves as such and typically take their embodied existence to be most appropriately characterized in such terms. Those who are unfamiliar with the biological dimensions of DSD but who hear the term “intersex” may think of a person whose sexual anatomy—primarily, external genitalia—are visibly indeterminate between (1) a characteristically female vulva, including the small, visible, external portion of the clitoropenis (or clitoris), inner and outer labia, and vaginal opening and (2) a characteristically male penis-and-scrotum. Or they may think of someone whose external genitalia are more or less characteristic of one sex, but whose internal sex-typed features (for example, chromosomes or gonads) are characteristic of the other sex. A proportion of those with DSD do indeed fit something like these descriptions, although precise estimates garnering widespread agreement among experts are not available. Nevertheless, current evidence suggests that the majority of those with DSD exhibit most, or in some cases, nearly all, of the relevant feature-cluster components corresponding to one sex category or the other, with only a small proportion of these components being either indeterminate or characteristic of the other sex category.

This biological picture places most humans, at birth, into one of two categories marked by the future projected production of binary gametes: egg or sperm. It therefore contrasts with the idea that biological sex is a spectrum, insofar as that phrasing suggests that the various components of the biological feature-clusters outlined above fall *evenly* along a gradient line, in a fully distributed mix-and-match fashion. That is not the case. Rather, the vast majority (likely above 99%)<sup>11</sup> of *Homo sapiens* exhibits a concordance of chromosomes, genes, hormones, and internal and external anatomy that positions them fairly unambiguously on one side of the spectrum or the other (or more accurately, within one of the two clusters of reproduction-related physical attributes occurring in multi-dimensional anatomical and biological space).<sup>12</sup>

Recent advances in technology make it possible to intervene in, and alter, some of the individual components of the sex-related feature-clusters we described above. In addition to surgical alteration of primary sex characteristics, such interventions may include alterations to secondary sex

---

<sup>9</sup> Historical literature and some in the medical community use DSD to mean “disorders” of sex development. We will use the value-neutral “differences” variant.

<sup>10</sup> Koyama, E. (2006, Feb). From “Intersex” to “DSD”: Toward a Queer Disability Politics of Gender. Retrieved 12 08, 2018, from Intersex Initiative: <http://www.intersexinitiative.org/articles/intersectodsd.html>

<sup>11</sup> See for example, Sax L. How common is intersex? a response to Anne Fausto-Sterling. *J Sex Res.* 2002 Aug;39(3):174-8.

<sup>12</sup> Hodson N. “Beyond Binaries, Beyond Spectrums” in Moore M. Brunskell-Evans H (eds) *Inventing Transgender Children and Young People*. Cambridge: Cambridge Scholars Publishing. 2019.

characteristics (whose development is typically completed by the end of puberty), via the differential hormone profiles that determine hair growth and distribution, breast development, onset of menses, voice changes, maturation of reproductive organs and brain development. The nuanced transitions of puberty and adolescence are understudied philosophical and legal entities. Complicating matters further, the boundaries of biological sex have become increasingly pliable and porous in modern times, with various types and degrees of intervention—social, psychological, behavioural, hormonal and surgical—now allowing for clear boundary crossing along certain dimensions of sex (commonly referred to as “sex reassignment”).

Due to the complex, interlocking nature of these biological and other dimensions, and given the current state of the technology, such interventions are not risk-free, whether from a physical, psychosexual, or mental health perspective (for example, they may risk negative effects on sexual pleasure or impair future fertility, either of which would count as a harm to someone who valued those experiences or capacities). Moreover, the background motivations, personal and social meanings, and consequences of the interventions for the affected individuals, their families and communities (both given and chosen), and society at large remain controversial and politicized. The existence of these internal and external risks and controversies suggests that a robust, fair-minded conversation about the appropriate policies and laws, ethical standards, and forms of regulation relating to medical interventions into biological sex-related features is needed.

### Defining Sexuality

In prevailing discourses, sexuality is often discussed, described, and (ostensibly) understood in terms of sexual *orientation*—another contested concept.<sup>13</sup> The UK Equality Act 2010 defines sexual orientation in a circular way:

Sexual orientation means a person's sexual orientation towards—  
(a) persons of the same sex,  
(b) persons of the opposite sex, or  
(c) persons of either sex.<sup>14</sup>

In addition to its circularity, another problem with this definition is that it rests upon the notion of “sex” which, as noted, the Act itself does not clearly or coherently define. A further problem is that it may very occasionally exclude those whose sex—by whatever reasonable biological or legal classification—is uncertain, or intervened upon (with early childhood surgeries) or DSD and neither exclusively male nor female. Consider, for example, a person with one or more DSDs whose sexed embodiment is, at least from their perspective, but perhaps also from the perspective of others, sufficiently ambiguous as to warrant the rejection of a binary (either male or female) sex classification. What would it even mean for this person to have a disposition to be attracted to someone of the “opposite” sex?<sup>15</sup>

---

<sup>13</sup> Diamond, L. M. (2003). What does sexual orientation orient? A biobehavioral model distinguishing romantic love and sexual desire. *Psychological review*, 110(1), 173-192. See also Earp, B. D. (2016). Can you be gay by choice? In D. Edmonds (Ed.), *Philosophers Take on the World* (pp. 95-98). Oxford: Oxford University Press; Earp, B.D., & Savulescu, J. (2020). *Love Drugs: The Chemical Future of Relationships*. Stanford: Stanford University Press.

<sup>14</sup> The Equality Act 2010 s12(1)

<sup>15</sup> For an extensive critique of current prevailing understandings and classifications of sexual orientation, see Dembroff, R. A. (2016). *Philosophers' Imprint*, 16(3), 1-27.

For the purposes of this special issue, sexuality will be understood as referring simply to “all the ways people experience and express themselves as sexual beings.”<sup>16</sup> We see this as a richer, broader concept which encompasses sexual orientation but goes beyond it to include various other aspects of a person’s sexual sensations, dispositions, and behaviour. For example, it includes qualitative experiences of desire or pleasure, pursuit of these in particular activities, and other facets. But what about these desires, activities etc., make them *sexual* as opposed to something else?

Legally in the UK, the realm of the sexual is defined broadly. On the reductive, negative side, S78 of the Sexual Offences Act 2003 defines two ways that activity can be sexual.

For the purposes of this Part (except section 71), penetration, touching or any other activity is sexual if a reasonable person would consider that

- (a) whatever its circumstances or any person’s purpose in relation to it, it is because of its nature sexual, or
- (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.<sup>17</sup>

This definition seeks to encompass a wide range of inherently sexual activities or phenomena as well as contingently or circumstantially sexual activities or phenomena, based upon what a “reasonable person” would consider to fall within the scope of the concept. This aspect of the definition gives room for judges and juries, for example, to interpret activities as sexual by their own lights and standards. In *R v H* the defendant sexually propositioned the victim, attempting to pull her towards him by the pocket of her tracksuit.<sup>18</sup> The Court of Appeal held that, in interpreting s78b, the jury had to consider two questions. Firstly, did the jury consider that the touching *could* be sexual? Secondly, in the circumstances of this particular touching, did the jury consider that it was sexual? Given s79(8c) of the Sexual Offences Act 2003 includes the touching “through anything”, contact with the victim’s clothes was within the scope of sexual assault.<sup>19</sup> Thus, the legal definition appears to be flexible and expansive enough to be useable for at least some important practical purposes (in this case, identifying a sexual assault).

Attempts to define “sexual” in a more substantive way have also been made. Primoratz, for example, argues that the concept has both a narrow biological and a more holistic (as in whole-person) dimension.<sup>20</sup> Most people are regarded (and regard themselves) as sexual beings in some sense, yet at the same time, there are certain specific body parts—including those that appear within the biological feature-clusters outlined above—that are widely regarded as sexual as well.<sup>21</sup> Primoratz attempts to link these body parts with the whole person to interpret the embodied sexuality of the self, arguing that sexual pleasure is best understood as “the sort of bodily pleasure experienced in the sexual parts of the body, or at least related to those parts in that if it is associated with arousal, the [experience of] arousal occurs in those parts.”<sup>22</sup> This definition accounts for both the sexual (body) parts and the sexual whole (person).<sup>23</sup> Likewise, Jacobsen offers a definition of the experience of

---

<sup>16</sup> Ferrante J. *Sociology: A Global Perspective*. 2014. Cengage Learning. p. 207. ISBN 978-1-285-74646-3.

<sup>17</sup> Sexual Offences Act 2003 s78

<sup>18</sup> *R v H* [2005] EWCA Crim 732

<sup>19</sup> The Sexual Offences Act 2003 s79(8c)

<sup>20</sup> Primoratz I, *Ethics and Sex*. 1999. London and New York: Routledge.p46

<sup>21</sup> Brussels Collaboration on Bodily Integrity. (2019). Medically unnecessary genital cutting and the rights of the child: moving toward consensus. *American Journal of Bioethics*, in press.

<sup>22</sup> Primoratz I, *Ethics and Sex*. 1999. London and New York: Routledge.p46

<sup>23</sup> Similar to the proposal regarding gender recently articulated by Alice Eagly, who asks how “social, self, and biological causes together produce the phenomena of gender.” Eagly, A. H. (2018). The shaping of science by ideology: How feminism inspired, led, and constrained scientific understanding of sex and gender. *Journal of Social Issues*, 74(4), 871-888.

sexual desire which is dependent upon sexual arousal, namely: “a subject’s desire for something—some activity, person, or object—in virtue of the effect that it is expected to have on the subject’s own states of sexual arousal.”<sup>24</sup> Such bridging of subjective sexuality (i.e., as experienced by the person) and bodily functions or sensations rooted in biology is a point of overlap between the two approaches.

In a similar vein, we see sexuality as an integration of a subset of the biological components of the reproduction-related feature-clusters described in an earlier section and various socially-mediated subjective mental states (desire, pleasure, and so on) that are experienced as being tied to or rooted in those biological features.<sup>25</sup> Needless to say, the biological and psychosocial dimensions of sexuality do not always cohere in a way that promotes the robust well-being of the person in whom they converge (or in some cases, the well-being of others).<sup>26</sup> In particular, tensions may exist between certain aspects of our physical sexual bodies and our socially-situated sexual selves. For example, some of the embodied beings discussed in this collection are especially vulnerable to acts, contexts and environments that facilitate or protect against acquiring the HIV virus (see **Weait**),<sup>27</sup> while others may be employed to gestate a baby that is intended to be handed over and raised by someone else (see **Hodson, Townley, and Earp**).<sup>28</sup> Some are attracted primarily to pre-pubescent children (**Danaher**),<sup>29</sup> while others may have come into being through statistically atypical processes of sexual development resulting in DSDs (**Reis**).<sup>30</sup> Still others may seek to actively intervene in their sexual development in order to harmonize certain aspects of their bodies and minds in a given social context—for example by pursuing hormonal therapy (**Murphy**).<sup>31</sup> Finally, each of these embodied beings has the potential to manifest their sexuality in ways that are socially, legally, ethically, or politically salient, in some cases raising the prospect of (some form of) regulation.

## Regulation of Sexuality

Regulation of (expressions of) sex and sexuality, especially by way of formal legislation, has become increasingly contentious in recent years. Apart from prohibitions on adult sexual contact with vulnerable young children, which are widely supported across the political spectrum, proposed or actual restrictions on adults’ putatively voluntary, consensual choices about what to do with (or what to have done to) their sexed bodies have been met with harsh resistance by more and more people—especially those of a progressive political mindset—ever since “liberation” became a watchword over the last 50 years. Improvements in contraception reduced the risk of pregnancy following vaginal-penile intercourse, meaning that sex outside of heterosexual marriages and for pleasure became ‘safer’ (in some senses) and more socially acceptable. Recognition of human rights for previously vilified sexual minorities has rapidly advanced. A new generation of women citizens was raised with the (relative) freedom to defy traditional sexual boundaries, including second-class positioning within social hierarchies. In the UK, the development of hormonal contraception was followed by the 1967 Abortion Act, which removed key social and health risks associated with sex-for-experimentation/pleasure/pleasing, including, for women, health-threatening pregnancies or bearing children at a

---

<sup>24</sup> Jacobsen R. *Objects of Desire*. in Foster G (ed.) *Desire, Love, and Identity: Philosophy of Sex and Love*. Don Mills, Ontario: Oxford University Press, 2017: 36

<sup>25</sup> Johnsdotter, S. (2013). Discourses on sexual pleasure after genital modifications: the fallacy of genital determinism (a response to J. Steven Svoboda). *Global Discourse*, 3(2), 256-265.

<sup>26</sup> See Earp, B.D. and Savulescu, J. (2020). *Love Drugs: The Chemical Future of Relationships*. Stanford: Stanford University Press.

<sup>27</sup> Weait M. **More Details**. *Medical Law Review*. 2019 **More Details**

<sup>28</sup> Hodson N, Townley L, Earp BD. **More Details**. *Medical Law Review*. 2019 **More Details**

<sup>29</sup> Danaher J. **More Details**. *Medical Law Review*. 2019 **More Details**

<sup>30</sup> Cite Reis E. **More Details**. *Medical Law Review*. 2019 **More Details**

<sup>31</sup> Murphy T. **More Details**. *Medical Law Review*. 2019 **More Details**



personally or socially unacceptable time.<sup>32</sup> The Sexual Offences Act of 1967 decriminalised male-male sex acts,<sup>33</sup> and was followed by further changes in citizenship, equal treatment in the law and formal relationships of civil partnership and marriage for persons of both sexes. These deregulations of sex and sexuality have been, by and large, both politically sound and morally necessary. It might be assumed that further deregulation can only enrich society.

However, significant regulation of sex and sexuality pertaining to legal minors, and especially to prepubescent children, still exists and—as noted—is widely supported. Attempts to elide paedophilia and newly deregulated expressions of sexuality have largely been unsuccessful. As society increasingly accepted homosexuality in the latter part of 20<sup>th</sup> century, pro-paedophile groups sought to realign themselves with ascendant movements. For example, prominent paedophile advocacy group, the North American Man/Boy Love Association, deliberately blurred the lines between gay rights and abuse, claiming “man/boy love is by definition homosexual”.<sup>34</sup> In the UK, the Paedophile Information Exchange advertised in *Gay News* and other gay newsheets which, over time, moved to exclude the organisation.<sup>35</sup> As society accepted sexual liberation of adults, culture and law remained resolutely opposed to sexual relationships between adults and children, although paradoxically often remaining deaf to the stories of abuse children would tell about family members, teachers, clergy and other exploiters.

In recent years, there have been some cultural moves towards an increased willingness to regulate sexuality and its potential harms more effectively. The #MeToo movement has highlighted how sexual behaviours between competent adults can still be problematic when steeped in certain power imbalances inherent to patriarchy and capitalism.<sup>36</sup> Historic child sex offenses have been pursued through the courts, highlighting endemic failures to believe children and to prevent abuse.<sup>37</sup>

Society thus appears to contain a mix of partially discordant motivations. On the one hand, there is reluctance to further deregulate various manifestations of human sexuality, but, in general, little cultural desire for a return to conservative sexual mores and heavily constrained social roles based on sex characteristics. An increasingly nuanced view of good sexuality has been developed by scholars such as Joseph J. Fischel and Rebecca Kukla. In her paper “That’s what she said: The language of sexual negotiation”, Kukla examines the speech acts involved in initiating sex. She claims that sex is usually initiated through an invitation or gift offer, and that ‘consent’ is an inappropriate response to either of these speech acts. She goes on to claim that focussing exclusively on consent wrongly implies that all unethical sex is rape and all sex that is not rape is ethical.<sup>38</sup> Similarly, Fischel argues that models which define good sex merely as consensual sex are inadequate for understanding what sex is good (or even fantastic). Fischel opposes the consent standard’s “capture of our imagination”, proposing that we should be open to incorporating other values into our definition of what makes sex valuable.<sup>39</sup> Instead of accepting overly simplistic or reductive answers, it is now time to work out where regulation of sex and sexuality are needed.

---

<sup>32</sup> Abortion Act 1967

<sup>33</sup> Sexual Offences act 1967

<sup>34</sup> Gamson J. Messages of Exclusion: Gender, Movements, and Symbolic Boundaries. *Gender and Society*. 1997. 11(2):178–199.

<sup>35</sup> Smith SA. PIE: From 1980 until its Demise in 1985. in Middleton W (ed) *The Betrayal of Youth: Radical Perspectives on Childhood Sexuality, Intergenerational Sex, and the Social Oppression of Children and Young People*. 1986. London: CL Publications. 215-245

<sup>36</sup> Minkina N. Can #MeToo abolish sexual harassment and discrimination in medicine? *Lancet*. 2019 Aug 3;394(10196):383-384.

<sup>37</sup> Smith A. They think they've got away: How to catch a historical sex offender. *BBC News*. 2016. URL: <https://www.bbc.co.uk/news/uk-england-nottinghamshire-36055744> [accessed 08/08/2019]

<sup>38</sup> Kukla R. That’s what she said: the language of sexual negotiation. *Ethics* 129 (October 2018): 70–97

<sup>39</sup> Fischel J. *Screw consent. A better politics of sexual justice*. 2019. UC Press.

In this special issue, several scholars articulate visions of appropriate, and limited, regulation of sexuality in relation to groups singled out for control. Surrogate mothers in the global south comprise one such demographic.<sup>40</sup> Becoming a commercial surrogate mother often involves entering into a contract signing away the right to have sexual intercourse; meanwhile the same woman often experiences a culture-bound manifestation of ‘slut-shaming’, as her surrogacy is construed as marital infidelity. The paper by Hodson, Townley, and Earp outlines the possibility that offering the option of commercial surrogacy has adverse consequences for women, even before they consent to participation. The criminalization of people living with HIV in North America, Western Europe and Australasia has marginalised another group; Matthew Wait argues that this is unnecessary given the extant regulation, **that the decriminalization of HIV is critical to eradicating the virus and should be a public health priority.**<sup>41</sup> Child sex robot technology is examined by John Danaher who attempts to balance regulation, rights, and interventions for paedophilia.<sup>42</sup>

Meanwhile, half of this special issue is devoted to boundary issues in the sexed nature of children’s bodies. Everyone has a sexed body, but as noted above, people, including children, with DSD may have an initially ambiguous combination of features. This often marginalized group, who could be described as inhabiting the boundaries of sex development, has been exposed to social and physical regulation in the form of pressure on families to expose their children to early genital operations. Elizabeth Reis argues that medical ethics failed to identify the ethical issues created by surgery to reduce the (appearance of) atypical sex-typed features of children’s bodies.<sup>43</sup>

As noted, the vast majority of children are born with relatively unambiguous male or female biology on the classification described earlier. Yet an increasing number of children now present later to healthcare services reporting dysphoria in relation to the sex characteristics of their bodies or impending puberty and/or the social expectations which pertain to those characteristics. Some children hear about and request, or are offered, interventions to prevent the normal sequence of puberty events, including acquisition of secondary sex characteristics, with a view to being perceived as – and on some views, becoming – either “non-binary” or a member of the “opposite” sex. These children potentially start on a lifetime of medical intervention. They risk compromising sexual pleasure and fertility (largely before passing through puberty to adulthood when these become more meaningful), raising heated debates about the appropriate policy response, especially driven by fears of self-harm and suicide. Heather Brunskell-Evans argues that the very phenomenon of children identifying as transgender may have had a different manifestation – one not so readily appearing to require medical intervention – without the framing which has emerged from adult transgender charities.<sup>44</sup> Meanwhile, Timothy F. Murphy argues that, where they have capacity, children ought to be permitted to consent to interventions allowing them to traverse sexual boundaries in keeping with their gender-identity.<sup>45</sup>

This special issue reveals the depth of analysis possible when entertaining limited and appropriate regulation of sex. Murphy, for example, does not argue that wholesale deregulation is desirable in itself, but rather refocuses the question on the capacity of the young person to give ethically valid consent. Brunskell-Evans does not aim or wish to preserve gender roles, but rather argues that

---

<sup>40</sup> Hodson N, Townley L, Earp BD. Removing harmful options: the law and ethics of international commercial surrogacy. *Medical Law Review*.

<sup>41</sup> Wait M. **More Details**. *Medical Law Review*. 2019 **More Details**

<sup>42</sup> Danaher J. **More Details**. *Medical Law Review*. 2019 **More Details**

<sup>43</sup> Reis E. **More Details**. *Medical Law Review*. 2019 **More Details**

<sup>44</sup> Brunskell-Evans. **The Medico-Legal ‘Making’ of ‘The Transgender Child’**. *Medical Law Review*. 2019, **More Details**

<sup>45</sup> Murphy T. **More Details**. *Medical Law Review*. 2019 **More Details**

changing sexed bodies in order to reflect a preconceived idea of male and female is itself a regulation of sex. Thus, she argues, imposing certain constraints on what can be done to the sexed bodies of children is a prerequisite for safely deconstructing social regulation of the sexes, specifically allowing children to grow up in ways that may violate social expectations of how “boys” and “girls” ought to look, feel, or behave, without the implication that medical intervention is appropriate.

The collected papers are novel, provocative, and eschew orthodoxy. They are relevant to their immediate topics and of wider theoretical relevance. The controversial, often personal experiences they cover are of importance to current law and policy, but still leave much of the wider field of sexual and reproductive health unaddressed. Nevertheless, these good faith attempts at engagement with contested positions constitute novel contributions to their respective fields. We hope they model a thoughtful, depolarised approach to old questions of bodily integrity<sup>46</sup> in a contemporary society where body parts can be bought and sold in the marketplace and where people are quick to politicize other people’s bodies.

---

<sup>46</sup> For a theoretical account and definition, see Earp, B. D. (2019). The child’s right to bodily integrity. In D. Edmonds (Ed.). *Ethics and the Contemporary World* (pp. 217-235) Abingdon and New York: Routledge.