

# The Age of Consent and Its Discontents: French Intellectuals and the Reform of Sexual Violence Law, 1968–1982



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<sup>1</sup> “Be young and shut up.” A Student Poster from May 1968 depicting President de Gaulle covering the mouth of a young person. Atelier populaire, *Soit jeune et tais toi*, 1968, printed poster, 48 x 34cm, Mucem, Marseille.

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## Introduction

In September 2017, an incident on the outskirts of Paris ignited a debate over the age of consent, or more precisely, over the fact that France, alone among Western nations, did not have one. After an eleven-year-old girl accused a twenty-eight-year-old man of rape, the attorney for the commune of Pontoise opted for a prosecution of the misdemeanor (*délit*) of sexual abuse (*atteinte sexuelle*) rather than the felony (*crime*) of rape. His reasoning made headlines: the eleven-year-old plaintiff had “consented” to a sexual liaison “without violence.”<sup>2</sup> French law had no concept of statutory rape, under which relations involving those below fifteen are deemed non-consensual and subject to rape charges. Instead, adults who had sex with those below fifteen, the age of sexual majority (*majorité sexuelle*), were subject to a variety of infractions by which judges distinguish moral degrees between rape and sexual abuse “without violence, constraint, threats, or surprise.”<sup>3</sup> Not only did these charges carry different penalties—a maximum of five years for sexual abuse versus twenty for rape—but the distinction also codified the possibility of consensual sex between adults and children. As a result, the investigation and trial focused on whether Sarah, the pseudonym under which the child came to be known, had consented to her own abuse.

In the following days the national press fumed with outrage. The first two articles in *Mediapart* and *Le Parisien* ballooned to a media spectacle. A petition with over 500,000 signatures circulated on Twitter demanding that the Ministry of Justice intervene.<sup>4</sup> On November

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<sup>2</sup> Michaël Hadjenberg, “Relation sexuelle à 11 ans: le parquet de Pontoise ne poursuit pas pour viol,” *Mediapart*, September 25, 2017. Marjorie Lenhardt, “Val-d'Oise: les abus sexuels 'consentis' sur une fillette de 11 ans font scandale,” *Le Parisien*, September 26, 2017. All translations are my own unless otherwise stated. Original text can be provided upon request.

<sup>3</sup> Article 227-25, Code Penal, (2017).

<sup>4</sup> Madeline da Silva, “Viol d'enfant: Changeons la loi car un enfant n'est jamais consentant,” September 2017. Change.com Petition to the Ministry of Justice. Accessed April 26, 2021 at <https://www.change.org/p/changeons-la-loi-un-enfant-n-est-jamais-consentant-à-une-relation-sexuelle-avec-un-adulte>.

11th, a second scandal renewed public fury: a twenty-two-year-old man who *had* been prosecuted for the rape of an eleven-year-old in Seine-et-Marne was acquitted by a jury on the premise that neither violence, constraint, threat, nor surprise—the grounds for rape under Article 222-23 of the Penal Code—could not be proven.<sup>5</sup> Protesters gathered at the Ministry of Justice. Within days, both President Emmanuel Macron and his Minister of Justice Nicole Belloubet had called for statutory rape at 15 to be included in a law in-progress against sexual violence and sexism.<sup>6</sup> Yet, when the law passed in August 2018, the Senate had dropped the statutory rape provision, deeming it a “brutal” and “arbitrary” simplification.<sup>7</sup> For the time being, France retained an age of sexual majority, not an age of consent.<sup>8</sup>

When the French #MeToo Movement arrived in paperback in 2020 and 2021, with the publication of Vanessa Springora’s *Le consentement* and Camille Kouchner’s *La familia grande*, the question of consent became one grounded in the intellectual history of post-1968 France.<sup>9</sup> An outraged public wondered how Gabriel Matzneff, the awarded author who wrote novels about his affairs with adolescents as young as twelve, and Olivier Duhamel, the president of the Institut d’études politiques de Paris (Sciences Po) whose sexual abuse of his stepson had become an open secret among his Parisian entourage by 2008, could not only escape legal repercussions but

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<sup>5</sup> “L’acquittement d’un homme jugé pour viol sur une mineure de 11 ans fait polémique,” *FranceInfo*, November 11, 2017. Accessed April 26, 2021 at [https://www.francetvinfo.fr/faits-divers/justice-proces/l-acquittement-d-un-homme-juge-pour-viol-sur-une-mineure-de-11-ans-fait-polemique\\_2463480.html](https://www.francetvinfo.fr/faits-divers/justice-proces/l-acquittement-d-un-homme-juge-pour-viol-sur-une-mineure-de-11-ans-fait-polemique_2463480.html)

<sup>6</sup> Christine Mateus and Nelly Terrier, “Abus sexuels : Nicole Belloubet veut ‘avancer vite’” *Le Parisien*, November 19, 2017. “Âge du consentement sexuel : la future loi proposera le seuil de 15 ans,” *L’Express*, March 1, 2018.

<sup>7</sup> Parlement français, Sénat, Group de travail sur les infractions sexuelles commises à l’encontre des mineurs, “Protéger les mineurs victimes d’infractions sexuelles,” February 7, 2018, 10. For the final law see Chapter II Article 2, Loi n° 2018-703, (2018).

<sup>8</sup> A new law promulgated on April 21, 2021 overhauled the treatment of sex with minors. Article 222-23-1 effectively established an age of consent at 15, below which all penetrative acts done by a major to a minor are considered rape. For acts done by a minor to a major, rape can be charged if there is at least a five-year age difference.

<sup>9</sup> Camille Kouchner, *La Familia Grande* (Paris: Éditions du Seuil, 2021); Vanessa Springora, *Le consentement* (Paris: Grasset, 2020).

be celebrated by mainstream intellectuals and politicians for decades.<sup>10</sup> The books' raucous reception provoked the condemnation of a whole tranche of French intellectuals and fed into revisionist criticism of post-1968 French literature and thought. Figures like Jean-Paul Sartre, Simone de Beauvoir, Roland Barthes, Michel Foucault, and Gilles Deleuze were posthumously condemned for signing a May 1977 petition in *Le Monde* that floated the "abrogation of sexual majority" and a petition from January 1977 calling for the freedom of three men accused of sex with boys and girls between age twelve and fifteen.<sup>11</sup> The socialist mayor of Paris went as far as to remove street signs in honor of Guy Hocquenghem, once considered a foundational gay liberation activist as the early leader of the Front homosexuel d'action révolutionnaire.<sup>12</sup> Some went as far as to ask if pedophilia was inseparable from the theories and biographies of post-1968 intellectuals: a colleague of Foucault alleged that he had raped boys as young as eight as a professor in Tunis.<sup>13</sup>

The onslaught of articles described an intelligentsia that, though open in its veneration of pedophilia, had had little exchange with the public or politicians up until this moment of moral populist reckoning. *The Atlantic* quoted Jean-Hugues Déchaux, a sociologist at the Max Weber

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<sup>10</sup> For the original coverage of the Affair Duhamel, see Ariane Chemin, "Olivier Duhamel, l'inceste et les enfants du silence," *Le Monde*, January 4, 2021. Soon after the release Springora's *Le Consentement* Mark Weissman, the former editor of *Les Inrocktibles*, argued it revealed the French literary elite had lost not only its "moral compass" after 1968, but its "literary compass" too. "Marc Weitzmann : Les écrivains sont responsables de la vague de discrédit populiste qui les frappe," *Le Monde*, January 9, 2020. Laure Marat reminded readers that Matzneff was welcomed to private meetings with François Mitterrand. "Laure Murat : Les femmes passent enfin d'objets à sujets," *Le Monde*, January 9, 2020. The fact that Matzneff had been awarded literary prizes as recently as 2013 prompted a slate of resignations from literary prize boards, like that of Bernard Pivot, the host of the popular television show *Apostrophes* who had welcomed Matzneff on the show through the 90s. "Les prix littéraires chahutés," *Le Monde*, January 23, 2020. For the American public the New York Times declared the entire French elite to be on charge with Matzneff. Norimitsu Onishi, "A Pedophile Writer Is on Trial. So Are the French Elites.," *New York Times* (New York: New York Times Company, February 11, 2020).

<sup>11</sup> "Un appel pour la révision du code pénal à propos des relations mineurs-adultes," *Le Monde*, May 23, 1977; "À propos d'un procès," *Le Monde*, January 26, 1977.

<sup>12</sup> "Paris retire une plaque en l'honneur de l'écrivain Guy Hocquenghem, ami de Gabriel Matzneff," *Le Figaro*, September 5, 2020.

<sup>13</sup> Matthew Campbell, "French Philosopher Michel Foucault 'Abused Boys in Tunisia,'" *The Sunday Times*, March 28, 2021, <https://www.thetimes.co.uk/article/french-philosopher-michel-foucault-abused-boys-in-tunisia-6t5sj7jvw>. Interview with Guy Sorman, who furnished no evidence for his claim but made a splash in the press nevertheless.

Center in Lyon, claiming the intellectual opinions of the 1970s “sa[id] nothing about public opinion itself and even less about the reality of social and family practice.”<sup>14</sup> Sylvie Brunel, a world hunger activist and geographer at the University of Paris IV, confidently wrote in *Le Monde* that the complaisance of the intellectuals reflected the “disconnect” of an “ungrounded elite, totally severed from the daily reality and problems of society.”<sup>15</sup> Decheaux and Brunel’s portraits of unhinged and impotent intellectuals left the link between the legal crisis of the Affaire Sarah and the cultural crisis of the Affaire Matzneff unexplained. How could it be that 1970s French intellectuals, well known for their public and political sway, could have *no* impact on law or grounding in culture when it came to the matter of sexual majority?<sup>16</sup> And what, then, had prevented France, even in 2018, from defining an age of consent?

This thesis will argue that the deliberation over sexual majority was by no means confined to the ivory tower. Though the contestation of sexual majority between 1968 and 1982 did not capture press coverage as often as the war in Vietnam, presidential campaigns, or the legalization of abortion, it offers a prism through which we may view the fertile relationship between popular opinion, debates among public intellectuals, and the production of law in France. The primary domestic crises of the post-1968 era—the legal denial of youth agency, penal abuse, and flagrant discrepancies between law and custom—undermined the tenability of sexual majority and opened the question of when the state should sanction mutually desired sex. Intellectuals, at the peak of their influence on the French political system, entered this discourse

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<sup>14</sup> Marie Doezema, “France, Where the Age of Consent Is Up for Debate,” *The Atlantic*, March 10, 2018.

<sup>15</sup> Sylvie Brunel, “Non, l’époque n’était pas complaisante !,” *Le Monde*, January 2, 2020.

<sup>16</sup> To take just one example of intellectuals’ cultural influence in 1970s France, between twelve to twenty percent of the television population (two to four million viewers) tuned into the academic and literary talk show *Apostrophes* every week. See Tamara Chaplin, *Turning on the Mind: French Philosophers on Television* (Chicago: University of Chicago Press, 2007), 132-138. Interaction with the public wasn’t limited to television: Foucault’s wide circulation in print might be demonstrated by the fact that his dense philosophical book on the production of knowledge, *Les Mots et les Choses*, sold five to six thousand copies a year between 1966 and 1989. Didier Eribon, *Michel Foucault*, (Paris: Flammarion, 2011), 282-283.

in 1977. They did so because they understood sexual majority to dispossess both children and homosexuals of their self-determination and equality in society and before the law. Five intellectuals even created their suggestions for sexual majority reform: Guy Hocquenghem, the philosopher of childhood René Schérer, the founder of France's largest homophile movement André Baudry, the Catholic child psychoanalyst Françoise Dolto, and Michel Foucault.

In the theoretical realm, these five thinkers disagreed over whether to recognize a division between populations capable of expressing and enacting their desire and those that were not. Their responses reflected broader tensions among the post-1968 French left as intellectuals incorporated sexuality into their socio-political criticism in both Marxist and liberal directions. Torn between whether to ground leftist politics in appeals to individual rights or social reorganization, those who favored the reformation of sexual majority politics hoped to respect an individual's right to sexual self-determination, while others hoped the abolition of sexual majority would tear down categories of social inequality. The former packaging of sexual majority held by Foucault, Baudry, and Dolto was ultimately successful not only because they were willing and able to wade into the legislative process and discuss the matter with the Ministry of Justice's newly-established Commission for the Revision of the Penal Code, but because they accepted both consent and the age of sexual majority as adequate proximations for the development of a will that could almost contractually agree to sexual exchange, a status that would be determined on an individual, secular, and rational basis.

The intervention of intellectuals, once mediated by the Ministry of Justice, entirely affirmed liberal notions of consent, individual rights, non-discrimination, and moral non-interventionism. When the Senate brought this liberal consensus to the floor in rape law reforms between 1978 and 1980, they adopted Foucault, Dolto, and Baudry's individualized and



rationalized conception of consent: the promulgated laws considered the possibility of consent between adults and minors to necessitate a lower charge than rape and sent such affairs to be correctionalized as misdemeanors instead of public trials before assize courts. In 1980, when conservative lawmakers refused to denaturalize heterosexuality and equalize the age of sexual majority, the politics of sexual majority returned to street demonstration and electoral politics, again underlining the firmly intertwined and multidirectional relationship between intellectuals, the public, and law.<sup>17</sup> Homosexual groups held protests attended by thousands, and for the first time, presidential candidates had to take a stance on sexual majority's discrimination against homosexuals.<sup>18</sup> When the left's victory brought equalization in 1982, it meant that all facets of Foucault, Dolto, and Baudry's plan—aside from the anchoring of sexual majority at thirteen—had been inscribed in law.<sup>19</sup>

### *Consent of the Gay and the Governed?*

As an egregious example of carceral power and state discrimination against homosexuals, sexual majority has primarily preoccupied historians of the gay rights movement. For these historians, both the criminalization of same-sex acts between thirteen and twenty-one in 1942 and the equalization of sexual majority in 1982 are either moments to measure the policing and stigmatization of gay life, targets of gay militancy, or steps in a march towards the end of discrimination. This framework of (non-)discrimination is in part historically justifiable; it reflects the very rhetoric put forward by some gay rights organizations and key political players

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<sup>17</sup> A record 10,000 attended the newly formed Comité d'Urgence Anti-Répression Homosexuelle's protest in Paris on April 4, 1981, Jacques Girard, "Lettre ouverte à Arcadie," *Homophonies*, March 1981. 15,000 attended a CUARH celebration of the left's victory on June 19<sup>th</sup>, 1981 "Le 19 Juin : 15,000," *Homophonies*, July-August 1981.

<sup>18</sup> During legislative elections the CUARH received responses from all the left and center's candidates for president on the equalization of sexual majority and encouraged their readers to "Votons contre les homophobes." *Homophonies*, June 1981. Feminist leaders also demanded candidates take a stance on the issue, see note 25.

<sup>19</sup> Loi no 82-683 du 4 août 1982 abrogeant le deuxième alinéa de l'article 331 du Code pénal. The law was promulgated on the anniversary of the abolition of feudal privileges during the French Revolution.

during equalization. Yet the sole emphasis on equality evades more radical arguments once made by militants. Take, for example, the intersection of pedophilic and gay liberationist interests in the late 1970s and early 1980s. For Anglophone historians like Julian Jackson, Scott Gunter, and Michael Sibal, this alliance risks a pink stain on the queer history of France, one to be dismissed only as a circumstantial response to the discriminatory 1942 law.<sup>20</sup> The pressing questions posed after 1968—the place and power of adolescents in society and when one may acquire sexual citizenship—take a backseat to a gay rights discourse, eschewing a radical truth: the quandary of sexual majority was more complex than the question of equalization. For some the goal had been the abrogation of sexual majority tout court, for others the complete refashioning of a myriad of precise legal processes to determine consent.

French historians and sociologists like Frederique Martel and Antoine Idier tell a story beyond equalization, elaborating on the thought behind calls to abrogate the age of consent that came from influential leaders of the gay rights movement.<sup>21</sup> Their intimate and granular studies still leave fertile ground for the intersectional study of the meaning of majority to feminist, Catholic, leftist, liberal, and other reformers. Sexual majority was not a gay issue alone; homosexuality was only mentioned in one of the three points of reform in the infamous 1977 petition to “reform laws governing sex between majors and minors.”<sup>22</sup> Dolto, to take a signatory of the petition, was no gay liberationist: the family-adulating psychoanalyst had publicly blamed

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<sup>20</sup> Scott Eric Gunther, *The Elastic Closet: A History of Homosexuality in France, 1942-Present* (New York: Palgrave Macmillan, 2009); Julian Jackson, *Living in Arcadia: Homosexuality, Politics, and Morality in France from the Liberation to AIDS* (Chicago, IL: University of Chicago Press, 2009); M. D. Sibal, “Homophobia, Vichy France, and the ‘Crime of Homosexuality’: The Origins of the Ordinance of 6 August 1942,” *GLQ: A Journal of Lesbian and Gay Studies* 8, no. 3 (January, 2002): 301–18.

<sup>21</sup> Antoine Idier, *Les Alinéas Au Placard : L’abrogation Du Délit d’homosexualité, 1977-1982* (Paris: Institut François Mitterrand, 2013); Frédéric Martel, *The Pink and the Black: Homosexuals in France since 1968* (Stanford, CA: Stanford University Press, 1999).

<sup>22</sup> “Un appel pour la revision du Code penal à propos des relations mineurs-adultes,” *Le Monde*, May 23, 1977.

a murderous case of teen delinquency on “latent homosexual desire” early in her career.<sup>23</sup>

Further, the equalization of sexual majority was first attempted in a law that totally rethought the definition, prosecution, reporting, and punishment of rape and sex crimes in France. When that effort failed to win equalization for homosexuals, it was the second wave feminist organization *Choisir* that pointedly asked François Mitterrand in 1982 if he would reform majority.<sup>24</sup> This project will inventory a multitude of militants’ interests in settling the question of sexual majority to understand the interplay between intellectuals, militants, the public, and legislators in the politicization of sexual majority.

This is not to say that sex crime legislation more broadly has only received tangential treatment. Georges Vigarello’s seminal *Histoire du viol* offers a genealogical and empirically rigorous history of the legal and social meaning of rape from the Ancien régime to the 1990s.<sup>25</sup> While the two drives that Vigarello observes throughout sexual violence’s fluctuating legal inscription in the modern era—the hierarchization of crimes and the theorization of moral harm to the victim—aid us in the study of sexual norms and law, his contribution to our understanding of the twentieth century life of sexual majority is limited by its jump between the early 20<sup>th</sup> century and 1980, precisely the moment when sexual majority is contested, as well as its disinterest in intellectual influence on the law. Two scholarly works have paid sustained attention to sexual majority between 1968 and 1982. The sociologist Pierre Verdrager has framed the question of the age of sexual majority as one legal point in a broader shift toward the “recognition” of pedophilia as a pathological, traumatizing, and thus necessarily criminal act.<sup>26</sup>

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<sup>23</sup> “Quand le bachelier moyen devient criminel (1949),” in *Les étapes majeures de l’enfance*, ed. Catherine Dolto (Paris: Gallimard, 1998).

<sup>24</sup> François Mitterrand and Gisèle Halimi, *Quel président pour les femmes ? Réponses de François Mitterrand compte-rendu de la rencontre avec François Mitterrand* (Paris: Gallimard, 1981), 90-93.

<sup>25</sup> Georges Vigarello, *Histoire du viol : XVIe-XXe siècle* (Paris: Seuil, 1998).

<sup>26</sup> Pierre Verdrager, *L’enfant interdit : Comment la pédophilie est devenue scandaleuse* (Paris: Armand Colin, 2013).

The historian Jean Bérard has situated the contestation of sexual majority amid post-1968 social movement's criticisms of the criminal justice system.<sup>27</sup> He traces gay and feminist activist's critiques of sexual majority, but not the visions of consent and sexual majority that they produced in law and culture. In placing sexual majority at its center, this thesis will document the extent of this debate and its impact on French law and culture. In doing so, I hope to reveal the links between activists' and intellectuals' contestation of sexual majority in the 1970s and 1980s and the law that came under fire in the twenty-first century.

The chapters that follow are structured to roughly reflect the social, intellectual, and legal subjects of interest to best detail the mechanics of the relationship between intellectuals, the public, and legislators when it came to the age of sexual majority. Scanning society as a whole, Chapter One traces trends in cultural history, legal philosophy, militant politics, and popular mentalities to ask not only why the age of sexual majority became a matter of concern in the intellectual and legal sphere, but to what extent it reflected or circulated among the public. I argue that sexual majority lay at the intersection of a post-1968 crisis of youth, criticisms of penal abuse, and a cross political panic over the growing gulf between mores and law, crises to which intellectuals and governments felt a need to respond to maintain their legitimacy. When minor figures and haphazard scandals first raised the matter of sexual majority, these crises lent sexual majorities' contestation credibility in the eyes of major intellectuals, legislators, and the broader public, whose responses were at best positive, or at worst indifferent.<sup>28</sup>

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<sup>27</sup> Jean Bérard, *La justice en procès. Les mouvements de contestation face au système pénal (1968-1983)*, Académique (Paris: Presses de Sciences Po, 2013).

<sup>28</sup> When *Libération* issued a poll to gauge support for a charter to secure the right of minors to determine their affective relationships, 88% of children and 73% of adult respondents affirmed their support. "Les enfants revendiquent leurs droits," *Libération*, February 20, 1977; When in 1978 the predecessor network of *France 2* reaired *Dossiers de l'écran*'s documentary on the government's prosecution of a teacher in 1968 for sex with her student, only five percent of polled viewers declared themselves against the "liberalization of adult-minor relations." Recounted in "Incroyable mais vrai!," *Libération*, March 23, 1978.

Chapter Two focuses on Hocquenghem, Schérer, Baudry, Foucault, and Dolto's intervention into this moment of sexual crisis, comparing both their visions for sexual majority and their understandings of the political and social significance of such reforms. I argue that these five intellectuals' proposals were torn between grounding sexual politics in consent, non-discrimination, and rational law, and pursuing a more radical project for social reorganization. The willingness of Foucault and Baudry to play "advisor to the prince" with the Ministry of Justice and the palatability of their proposals to the liberal reformers of Giscard's government shut out the more radical vision from the dialogue between intellectuals and legislators.<sup>29</sup>

Chapter Three offers a legislative and political history of the reforms of sexual violence law pursued between 1978 and 1980, and the equalization of the age of consent for heterosexuals and homosexuals in 1982. Finding echoes of Foucault and Baudry's exchanges with the Ministry of Justice, I follow the codification of their proposals, a process that had to contend with an extreme hesitancy on the right to relinquish moral interventionism in pursuit of the primacy of consent. I argue that both the mass politics engendered after the failure of Senator Henri Caillavet's amendment to equalize the age of sexual majority and the following abolition of sexual majority in 1982 demonstrate the extent to which public opinion and law ultimately reflected Foucault, Baudry, and Dolto's individualized and rationalized conception of consent.

The diplomatic historian E.H. Carr once wrote that "we view the past, and achieve our understanding of the past, only through the eyes of the present."<sup>30</sup> My study is necessarily situated within and motivated by today's global crises at the intersection of gender "relations" and sexuality. #MeToo has, in the United States as in France, simultaneously affirmed consent as the measure of illegal and legal sex and pressed for the organs of the penal system and state to

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<sup>29</sup> The term is developed in David Macey, *The Lives of Michel Foucault* (London: Hutchinson, 1993), 373.

<sup>30</sup> Edward Hallett Carr, *What Is History?*, 1962, 28-9.

finally rectify the violation of consent. In response, today's queer or feminist critiques of consent have given second thought to past critiques of Lockean consent's application to sex, like that of Catherine MacKinnon, and to decrivals of the exacerbation of inequality posed by carceral feminism, like that of Elizabeth Bernstein.<sup>31</sup> In the anglophone world, authors like Amia Srinivasan, Katherine Angel, and Joseph Fischer have asked whether law alone is up to the task of rectifying sexual inequality.<sup>32</sup> In France the same accounts of Springora and Kouchner that reignited a scrutiny of *la pensée 68* have reconsidered whether or not the framework of the liberal, rational, freely consenting individual is capable of capturing and expressing the inconsistencies of desire.<sup>33</sup>

Indeed, the legislatively mediated product of Foucault, Baudry, and Dolto's visions for sexual majority, which were reaffirmed with even more secular rational logic when the 1992 New Penal Code replaced mentions of "decency" and "good mores" with "sexual aggression" and "violence," seems to have now unraveled. The Penal Code had become so committed to the primacy of consent that it had developed elaborate and individualized procedures to determine whether an individual had been capable of consent. The way it accomplished that goal—approaching sex between majors and minors with a lower charge than rape and having judges in correctional tribunals determine consent on an individual basis—was protested in 2017 and finally undone by the institution of statutory rape in April 2021. In excavating the legal,

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<sup>31</sup> See Catherine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989), 146, 174; Elizabeth Bernstein, "The Sexual Politics of the 'New Abolitionism,'" *Differences*, Fall 2007, 128, 143.

<sup>32</sup> Katherine Angel, *Tomorrow Sex Will Be Good Again: Women and Desire in the Age of Consent* (New York: Verso, 2021); Joseph J. Fischel, *Screw Consent: A Better Politics of Sexual Justice* (Oakland: University of California Press, 2019); Amia Srinivasan, *The Right to Sex: Feminism in the Twenty-First Century* (New York: Farrar, Straus, and Giroux, 2021).

<sup>33</sup> Kouchner, *La familia grande*; Springora, *Le consentement*.

intellectual, and cultural history of sexual majority at its previous moment of contestation, I hope to join this rethinking of law and consent as the prime tools of progressive sexual politics.

## I: Sexual Majority and the Stew of the Après-Mai

In May 1977, a petition appeared in the French daily *Le Monde* entitled “A Call for the Revision of the Penal Code Concerning Adult-Minor Relations.” In total, eighty public intellectuals—including the members of what would come to be known in America as “French Theory”—called for an “update” to a “Penal Code that [did] not reflect the recent rapid evolution of mores” on the open question of “at what age children or adolescents could be considered capable of freely giving their consent to a sexual relation.”<sup>34</sup> Their petition followed months of press coverage of the prosecution of three adult men for sexual relationships with male and female minors, who had “willingly” returned their affection, and calls for a “charter of children’s rights” that included the “right to sexual self-determination.”<sup>35</sup> The petition fostered a half-decade long push to lower the age of sexual majority with support from prominent feminists, gay rights leaders, liberals, and socialists. Perhaps most perplexing to contemporary readers was that these reforms were at times advocated for and implemented alongside the expansion of sexual violence law. Why, and under what logic, did a generation of French intellectuals obsess over, at best, the sexuality of teenagers, or at worst, the legalization of pedophilia? Why were laws governing sex between adults and adolescents a recurring subject of media and intellectual attention in the 1970s and early 1980s?

How the age of sexual majority came to be a political question in 1970s France is a complex story. The issue seldom made the cover of *Libération* or *Le Monde* or held the attention

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<sup>34</sup> The list was a who’s who of the late 70s intelligentsia: Louis Althusser, Roland Barthes, André Baudry, Simone de Beauvoir, Gilles Deleuze, Jacques Derrida, Françoise Dolto, Michel Foucault, Félix Guattari, Gabriel Matzneff, Jean-Paul Sartre, Alain Robbe-Grillet, and Philippe Sollers, André Glücksmann, and Jacques Rancière, among others. “Un appel pour la révision du Code pénal à propos des relations mineurs-adultes,” *Le Monde*, May 23, 1977.

<sup>35</sup> *Libération* presents the most radical case. See “Des enfants revendique leur droits,” *Libération*, February 10, 1977; “La justice, le sexe, la morale, les adultes et les adolescents,” *Libération*, January 31, 1977. See notes 100 and 111 for more information on the scandals these articles covered.



of political leaders on its own. But seldom was not never: the center and left press covered, or themselves problematized, the age of sexual majority as both an infringement on the so-called affective “rights of children” and an over-criminalization of those “adults who loved them.” The historian Julian Jackson has characterized what he calls the “pedophile moment” as “one of the more extraordinary legacies of 1960s radicalism throughout the West”, but one that was ultimately a passing fancy.<sup>36</sup> However, the twenty-first century scandals mentioned in the introduction of this essay suggest that a cultural and legal tolerance for sex between majors and minors, meaning the recognition of consensual sex between individuals of the two groups, was at some point imprinted onto contemporary France. The 1970s was the moment in which that imprint first took place, and this section will explain the political currents that circulated such remarkable challenges to socially and legally enforced sexual difference between majors and minors.

In this chapter, I argue that the concept of sexual majority intersected with the primary domestic social and legal crises to which post-1968 governments, interested in preserving their legitimacy, needed to respond: the legal denial of youth agency, penal abuse, and flagrant discrepancies between law and custom. The concept of majority, whose origins lay in the royal recognition of full subjecthood and “the right to manage one’s property,”<sup>37</sup> took on new significance as post-1968 movements disputed the constriction of certain political subject’s self-determination under the Fifth Republic in the name of equality or individual rights—whether it was women’s reproductive autonomy, university student’s subjugation to strictly hierarchical universities, worker’s desires for self-management, powerless provincials’ calls for devolution from Paris, or political prisoner’s inhumane treatment by the Ministry of Justice.

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<sup>36</sup> Jackson, *Living in Arcadia*, 218.

<sup>37</sup> “Définition de majorité,” *Dictionnaire universel de Furetière*, 1690.

Sexual majority—set by article 331 of the Penal Code and influenced by corruption of a minor charges under article 356—sat at the confluence of political trends: the unsteady place of youth in society which had been prioritized after the student revolts of 1968 and led the Giscardian government to lower civil majority in 1974; critiques of the gross excesses of the penal system around prison conditions and the death penalty that had animated much of the French left since the post-May 1968 crackdown on Maoist political organizations and the founding of prison reform militant groups like the Group d'information sur les prisons (GIP) in the early 1970s; and that of a new gulf between law and mores which spurred a rethinking of the moral foundations of law and gave rise to liberal reforms of divorce, parental rights, and abortion. The breadth of these concerns enabled minor figures in 1976 to receive considerable public support when they began to push for reforms to the age of sexual majority. In sum, those who criticized sexual majority saw it as one piece of a larger and logical ongoing political reckoning with the unsteadily hierarchical social order of post-1968 France.

### *The Political and Sexual Rights of Youth*

May 1968 thrust students and youth into the political spotlight. At the beginning of the month, the University of Paris in Nanterre was closed after students had protested a mélange of concerns: the Vietnam War, capitalism, strictly single-sex dorms, and overcrowded and hierarchical universities. When students at the Sorbonne occupied their own campus in solidarity, the Paris police responded brutally, causing the situation to spiral into barricade assemblage, tear gas attacks, and thousands of arrests throughout the first two weeks of May. Word spread of the student uprising through newspapers, and critically, trade unions and factory workers joined in general strike on May 13th. The Communist and Socialist parties, though at first critical of the students, came around to support the strike. Ten to fifteen percent of the

French population struck, threatening the stability of the government by the last weeks of May.<sup>38</sup> De Gaulle, who had been president since the founding of the Fifth Republic in 1958, briefly left the country for Germany. He dissolved parliament upon his return and called new elections, which to the surprise of many, his party won. When he retired a year later, after losing a referendum to further expand his powers and reorganize the countries' regions, he was replaced by his prime minister George Pompidou.

May 1968 and its aftermath may not have brought about a Sixth Republic or the immediate end of Gaullism, but it radically altered the political priorities of France. While juvenile delinquency had once panicked politicians of the post-war period, May 1968 brought the political participation of people under twenty-one, who comprised a third of France's population and were then considered civil minors, to the forefront of public debate.<sup>39</sup> Pompidou restructured universities to respond to the students' requests (and to deconstruct the revolutionary hotbed), but the extension of political rights to students came after Valéry Giscard d'Estaing, a liberal center-right minister in Pompidou's government, won the presidency in 1974 after the sudden death of his predecessor. Giscard's razor thin victory could have been influenced by many promises, but his promise to lower the age of civil majority from twenty-one to eighteen and enable university students to vote likely helped.<sup>40</sup> The law passed in June 1974 with the president's guidance, despite warnings that his own party was unpopular with youths. Interestingly, this reform incidentally lowered the age of sexual majority for homosexuals to

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<sup>38</sup> Richard Venin, *1968: Radical Protests and Its Enemies* (New York: Harper, 2018), 253.

<sup>39</sup> Tony Judt, *Postwar: A History of Europe since 1945* (New York: Penguin Books, 2006), 331.

<sup>40</sup> Serge Bernstein and Jean-François Sirinelli, *Les années Giscard: Les réformes de société, 1974-1981* (Paris: Armand Collin, 2007), 80-81.

eighteen, a fact which did not escape Giscard's Ministry of Justice during its deliberations but was ultimately accepted.<sup>41</sup>

Political discourse after 1968 considered rights for minors that extended beyond electoral and civil to the sexual. Minors, particularly adolescents (though the press and activists often deployed the word "*enfants*"), needed sexual education and self-determination. Student revolutionaries may have covered Paris in anti-authoritarian and sexually-expressive graffiti—"It is forbidden to forbid," "*jouissez* (meaning both enjoy and orgasm) unfettered," "the more I make love, the more I want to make revolution. The more I make revolution, the more I want to make love"—but it was a year later, with the Gabrielle Russier Affair, that such rhetoric was filled with a tangible example of the denial of minors' affective capacity by sexual majority and criminal law.<sup>42</sup> In 1968, a 32-year-old lycée instructor in Aix-en-Provence was jailed after two university professors filed a complaint that she had "corrupted" their 17-year-old son, Christian Rossi.<sup>43</sup> After Russier committed suicide in September of 1969 and Rossi was sent to psychological confinement, their story became a cause célèbre. The beloved crooner Charles Aznavour wrote a song in their honor entitled *Mourir d'aimer*, which aired on national television in March 1971 with a full orchestral accompaniment.<sup>44</sup> The director André Cayatte, who had made his career covering the cruelties of the penal system, released a film of the same name in January 1971. Interviewed by regional television news at a showing in Strasbourg, he said:

"The scandal was simply the intrusion of the magistrature, the teaching system, the parents, and all those who have nothing to do with this story, and who behaved with total inhumanity [...] they behaved as an

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<sup>41</sup> Ministry of Justice evaluations of the legal proposal that became loi no 74-631 du 5 juillet 1974 fixant à 18 ans l'âge de la majorité, in Archives Nationales, Pierrefitte-sur-Seine, SGG doc 739.

<sup>42</sup> For an apt analysis of these slogans' since-effaced political significance see Kristin Ross, *May '68 and Its Afterlives* (Chicago, IL: University of Chicago Press, 2002), 100-104.

<sup>43</sup> Reader, Keith. "The Policing of Desire in the Gabrielle Russier Affair." *French Cultural Studies* 16, no. 1 (February 2005): 5–20.

<sup>44</sup> Performance found here: Charles Aznavour, "Mourir d'aimer" (Paris: Antenne 2), Institut national de l'audiovisuel, accessed March 24, 2022, <https://www.ina.fr/ina-eclaire-actu/video/i00018260/charles-aznavour-mourir-d-aimer>.

electronic machine would have done, setting the difference of age between the two and pronouncing a sentence according to the difference.”<sup>45</sup>

There was no critique to be made of the affair between teacher and student, only of judicial overresponse, the outdated “Napoleonic” legal inscription of paternal control, and the gap between law and custom that left punishments to be determined by unreasonable logic.<sup>46</sup> A potent and lasting example of the state’s moral puritanism and its frustration of minors’ desire, the affair was invoked for the next decade as a reason to liberalize laws governing sex between majors and minors.

Just who were the minors who needed these rights? Specificity of age was slippery. The potency of the discourse rights of minors likely stems from the fact that an enlarged post-War youth population collided with expansively defined boundaries of minority-status at twenty-one. But calls for the affective rights of minors dipped below the age of eighteen after civil majority was lowered in 1974. Seeking lower ages of civil and sexual majority, militants, intellectuals, and reformers asked whether the boundaries of childhood stopped at the onset of puberty, at the rational development signified by the accomplishment of Lycée, or at some point in between. The word *enfant* (child) was used more often than *mineur* (minor), and often in addition to *adolescent*, suggesting that the recipients of sexual rights extended beyond the late teens. Oft-cited Freudian concepts of children’s vivid and formulative experiences of sexuality from a young age brought the sexuality of pre-pubescent children into public discourse, but even the most radical of sexual majority activists usually kept their subjects above the onset of puberty.<sup>47</sup>

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<sup>45</sup> “Cayatte présente le film Mourir d’aimer” (Strasbourg: Alsace actualités, January 29, 1971), Institut national de l’audiovisuel, <https://www.ina.fr/ina-eclaire-actu/video/sxf01006034/cinema-cayatte-presente-le-film-mourir-d-aimer>; “Toulouse, André Cayatte présente, ‘Mourir d’aimer’” (Toulouse: JT Toulouse, January 2, 1971), Institut national de l’audiovisuel, <https://www.ina.fr/ina-eclaire-actu/video/rbf01025338/toulouse-andre-cayatte-presentemourir-d-aimer>.

<sup>46</sup> The civil code in force in 1969 had been drawn up under the Napoleonic Empire in 1804. For more on its proneness to charges of outmoded and paternalist law, see note 84 and 28-31.

<sup>47</sup> Gabrielle Matzneff, who defined adolescents as low as ten, was the exception. See note 97.

When sexual liberation movements mobilized in the early 1970s to debate abortion and homosexuality—first the Mouvement de libération des femmes (MLF) in 1969 and then the Front homosexuel d’action révolutionnaire (FHAR) in 1971—they articulated a “right” of minors to sex.<sup>48</sup> The MLF took issue with the denial of contraception to young women without parental affirmation.<sup>49</sup> When the FHAR took editorial control of Jean-Paul Sartre’s Maoist weekly *Tout!* in April 1971, the “rights of minors to free desire and its accomplishment” was one of three cover worthy demands alongside the “right” to abortion, contraception, and homosexuality.<sup>50</sup> The FHAR argued article 331 of the Penal Code frustrated the right of minors to mutually desired sex, especially homosexual youth. In doing so, they took issue with the instrumentalization of sexual majority during the interwar and immediate post-war years, during which legislators dodged republican legal norms that held private matters like sodomy beyond criminal reproach by exerting control over minors’ sex acts to discourage the “spread” of homosexuality and encourage sex within marriage.<sup>51</sup>

Gay youths under 21, who were effectively barred from sex with same-sex partners, thus became poster children for the severity of state-oppression. Some argued France’s sexual

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<sup>48</sup> For a history of the MLF and French Feminism in the 1970s, see either Antoinette Fouque, Michèle Idels, ed., *MLF-Psychanalyse et Politique: 1968-2018: 50 Ans de Libération Des Femmes* (Paris: Éditions des femmes, 2018); Françoise Picq, *Libération Des Femmes, Quarante Ans de Mouvement*, Nouvelles Ouvertures (Brest: Editions-dialogues.fr, 2011); or Bibia Pavard, Florence Rochefort, and Michelle Zancarini-Fournel, *Ne Nous Libérez Pas, on s’en Charge: Une Histoire Des Féminismes de 1789 à Nos Jours* (Paris: La Découverte, 2020), chapters IX and X. For a history of the FHAR and other post-1968 gay liberationist movements see Scott Gunther, *The Elastic Closet*; Frédéric Martel, *The Pink and the Black*; or Michael Sibalís, “L’arrivée de La Libération Gay En France. Le Front Homosexuel d’Action Révolutionnaire (FHAR),” *Genre, Sexualité et Société*, no. 3 (June, 2010).

<sup>49</sup> Pavard, et al, *Ne Nous Libérez Pas*, 302.

<sup>50</sup> “Oui, notre corps nous appartient !” *Tout!*, April 23, 1971.

<sup>51</sup> For evidence one could point to the Ministry of Justice officials who sketched a higher age of sexual majority for homosexuals at eighteen, and a raise of heterosexual majority to fifteen, in 1934, 1939, 1942, and 1945. Two examples are “Rapport du Substitut général médian à Monsieur le Procureur général, près la Cour d’appel de Paris,” Paris, June 10, 1939, and “Note sur article 334 du code pénal par M.B.” Vichy, January 7, 1942, in Archives Nationales, Pierrefitte-sur-Seine, 19950395/4 D 2718 60 SL. Their efforts ultimately led to article 334-3, which was moved to article 331-3 after liberation. For an account of the genesis of this law, see Michael Sibalís, “Homophobia, Vichy France, and the ‘Crime of Homosexuality,’” 301–18.

majority laws could even apply in instances when no adults were involved.<sup>52</sup> Indeed, it had been an active question in the courts of the Fourth Republic whether article 331 could be used to jail minors for sex amongst themselves, or whether both a minor and major could be prosecuted. The Court of the Seine had finally decided in 1955 that minors could not be charged, but in 1974, a leading legal review published an article arguing otherwise.<sup>53</sup> The confusion came down to the wording of acts committed “with,” rather than “on” a minor, which in the mind of some legal scholars implied shared moral responsibility between minors and majors.<sup>54</sup>

Such a determination would not be beyond the expectations of the French public, who had read with outrage in February 1971 that the headmaster of a lycée in Corbeil had punished a boy and girl caught kissing.<sup>55</sup> Even heterosexual sex could be subject to punishment. Sharing sexology with minors could entail censure too: after local doctor Jean Carpentier wrote and distributed a pamphlet entitled “Let Us Learn to Make Love” outside the school in Corbeil, he was barred from his medical association.<sup>56</sup> In response, Pompidou’s government created a Conseil supérieur de l’éducation sexuelle, which issued its first circular mandating “scientific” and “biological” sex education at lycées in February 1973.<sup>57</sup> The right to sex education may not equate the right to homosexual sex or the right to sex with adults, but each of these scandals highlighted examples of dated legal mechanisms that policed adolescent’s desire and set the table for a discourse of youth’s sexual rights. For the next decade, this framework would engender

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<sup>52</sup> The FHAR warned readers in 1971 that “two minors themselves—each older than eighteen—could be prosecuted” for a sexual affair. “Les Lois,” *Tout!*, April 23, 1971.

<sup>53</sup> Michèle Laure Rassat, “L’inceste en droit pénal” *Jurisclasseur périodique*, 1974, 2614-2615.

<sup>54</sup> Discussed in Jean-Jacques Passay, “L’incapacité juridique à la Plaisir,” which appears in “Fous d'enfance” *Recherches*, April 1979, 31.

<sup>55</sup> Jackson, 219.

<sup>56</sup> “Apprenons à faire l’amour,” pamphlet copy found in 51 C7 Éducation Sexuelle, Inspections générales des ministères de l’Éducation nationale et de l’Enseignement supérieur, Archives Nationales Pierrefitte-sur-Scène.

<sup>57</sup> 51 C7 Éducation Sexuelle.

calls to reform the Penal Code's definition of minors and punishment of those who had sex with them.<sup>58</sup>



Figure 1: (Left) *Tout Magazine*, April 23, 1971. “Yes, our body’s belong to us!: free and compensated abortion and contraception; rights to (be) homosexual and all sexualities; right of minors to freedom of desire and its accomplishment” Figure 2: (Right) Cover of *Libération*, February 23, 1977. “Children demand their rights: 2500 telephone calls and thousands of letters from children between nine and sixteen to elaborate for themselves a Charter of Children in the face of adults that still treat them like little animals.”

### *Justice on Trial*<sup>59</sup>

While May 1968 brought the affective and political rights of minors into question, representations of police brutality during May and the repression of far-left movements that followed grounded leftist politics and liberal reform in criticisms of the penal system. Sexual majority was criminal law’s lynchpin that allegedly reflected—but in fact enforced—the broader and newly besieged social distinction between adults and children. Hence the militant and intellectual discourses of the 1970s on justice, which labeled the penal system to be not only a

<sup>58</sup> In 1986, a successor to the FHAR asked legislative candidates to lower the age of sexual majority to recognize and expand the “freedom of minors.” “Questions aux candidates législatives,” *Homophonies*, January 1986.

<sup>59</sup> This wonderful phrase, originally in French, is Jean Bérard's, see his *La justice en procès. Les mouvements de contestation face au système pénal (1968-1983)* (Paris: Presses de Sciences Po, 2013).



buttress of state power but a crucial aspect of subject formation, furnished the scaffolding for defenses of adults prosecuted for sex with minors.

There were two dominant strands of critiques of the penal system informed by May 1968 that linked intellectual endeavor with militancy, both associated with signatories of the May 1977 petition to reform or abrogate the age of sexual majority. The first, generally associated with Jean-Paul Sartre and the Maoist Gauche prolétarienne (Proletarian Left), arose in the year following May, when an electorally emboldened government flooded jails with political prisoners by barring far-left organizations and prosecuting those who merely attended protests with incidental violence or property damage under a new Loi Anticasseurs (Anti-Wrecker Law).<sup>60</sup> The experience firmly rooted their vision of the justice system as a tool for a “repressive state” engaged in class warfare, which would not have been an especially novel concept without their subsequent determination to challenge the state’s monopoly of force with what Sartre called “popular justice.”<sup>61</sup> In February 1970, local militants put the theory into practice when they hurled Molotov cocktails at the headquarters of a mining firm in Pas-de-Calais department to avenge the death of sixteen coal miners in a workplace accident.<sup>62</sup> After the swift arrests of the assailants, Sartre spearheaded a “popular tribunal” in the local city hall, prosecuting local managers and politicians before some five hundred locals in protest of the comparative lackluster prosecution of white-collar crime. Some observers considered his pretrial intent to reveal the assassins to local miners and deliver “executory” sentences to amount to little more than mob

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<sup>60</sup> Bérard, 43

<sup>61</sup> Jean Paul Sartre, BDIC Poster, Fonds Bernanrd Leroy, cited in Bérard, 51.

<sup>62</sup> For an account of Sartre’s “popular tribunal” in the village of Lers, see Pascal Marichalar, Gerald Markowitz, and David Rosner, “Sartre as Prosecutor of Occupational Murder: Notes from a People’s Tribunal in a French Mine (1970),” *International Labor and Working-Class History* 99 (2021): 167–76.

violence, and in the following months positive mentions of “popular justice” failed to gain traction in the mainstream press.<sup>63</sup>

In 1971, a second strand contested the overdetermination of criminality and the abuse of prisoners, complicating the Sartrian focus on political prisoners and class warfare. A series of hunger strikes by inmates demanding access to the privileges of recognized political prisoners escalated into solidarity strikes at Lycées and attacks on police prefectures. The treatment of political prisoners and the wellbeing of prisoners became an issue of interest to the French intellectual scene. In 1971, a group of intellectuals led by Michel Foucault founded the Group d’Information sur les Prisons (GIP), hoping to send members and questionnaires to prisons to gather alternative-information from the government’s reports on conditions and allow “prisoners to speak for themselves.”<sup>64</sup> Ultimately the group’s aim was to produce publications, not to directly advocate to politicians for reforms, and their questionnaires were published in *Enquête dans vingt prisons* in June 1971. In 1972, the Comité d’action des prisonniers was formed under similar auspices, publishing a monthly magazine.<sup>65</sup> Another incident highlighted the arbitrary abuse of prisoners in the fall of 1971, when inmate Roger Bontems was sentenced to death after the inmate with whom he had partnered to hold a prison guard and nurse hostage murdered the two without his assistance or consultation. A new anti-capital punishment movement mobilized in response to the sentence, horrified at both the severity of the punishment and its disregard for Bontem’s intent. When the Minister of Justice retaliated against all prisoners with a systemwide

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<sup>63</sup> Bérard, 53.

<sup>64</sup> Introduction to Group d’information sur les prisons, *Enquête dans vingt prisons*, (Paris: Éditions Champ Libre, 1971), 3-4. Cited in Macey, *The Lives of Michel Foucault*, 269. For a collection of intellectuals’ writing on the prison system during their time with GIP, see Michel Foucault et al., eds., *Intolérable: Writings from Michel Foucault and the Prisons Information Group, 1970-1980* (Minneapolis: University of Minnesota Press, 2020).

<sup>65</sup> Bérard, 63-97.

ban on Christmas packages, the GIP steeled its will to make the cruelty of penal administration known.

The GIP—which ultimately had 3,000 active members throughout France—disbanded in 1974, but the emphasis it put on the prison as a site of nefarious discipline and state abuse lived on. On the intellectual level, it reoriented Foucault’s understanding of society and power.<sup>66</sup> In 1972, Foucault dedicated his popular weekly lectures at the College de France to “disciplinary societies.” In 1975, he published *Discipline and Punish: The Birth of the Prison*, a historical study which took the prison as a model for understanding a disciplinary power present throughout other realms liberal society. As for general mentalities and politics, the GIP’s shift from a critique of the penal system based on popular justice to one advocating penal reform opened the door to the reconsideration and valorization of apolitical, common, crimes like those prosecuted under articles 331 and 356.<sup>67</sup> One anecdote for the interconnectedness of criminal defense and sexual violence reform was the recurring role of Robert Badinter, the anti-capital punishment law professor who defended Bontems in 1974 that personally took on the project of reforming sexual majority once he was appointed Minister of Justice in 1981. Scrutinizing the punishment of majors and minors for sex acts relied upon a second front that extended beyond the right of minors to sex: the cruelty of punishment against prosecuted majors.

Though the violence of the Sartrian strand of penal critique quickly marginalized itself within political discourse, the Foucauldian strand concerned some legislators of the right enough to pursue reform projects. Historians of 1968 like Boris Gobille have argued that public opinion in general “seemed to have largely perceived the strength of the forces of order and their authority

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<sup>66</sup> Macy, 322-325. For an account of how the GIP shaped Foucault’s philosophy of power see Stuart Elden, *Foucault: The Birth of Power* (Malden, MA: Polity, 2017), 129–57.

<sup>67</sup> Bérard, 57-62.

as illegitimate,”<sup>68</sup> and it was indeed the concern of the reformist right to secure government legitimacy under attack by the inhumanity of the penal system. Like his stance on civil majority, Giscard cast himself as a reformer of criminal law who would turn away from the brutality of Gaullism and bridge the gap between French society and its imprecise or outdated Code. Not only did he slow the pace of executions after his victory in May 1974, but his administration also formed the Commission for the Revision of the Penal Code (CRCP) in November 1974.<sup>69</sup> The commission was composed of nine members—all judges or professors of law—who worked alongside the Ministry of Justice to identify areas in need of revision and in turn suggest new laws to the government. They produced a report in July 1976 outlining general reflections on criminal law, and in the fall of 1976, they turned to the definition of infractions, which would include sex crimes and invite a lecture from Foucault himself.<sup>70</sup>

The caveat to this current of criticism and the slow creep of government reform projects was the emergence of sexual violence as a feminist political project that decried under prosecution. In 1974, a rape case triggered the feminist mobilization in favor of broadly defined and harshly punished rape law. Two young Belgian women, Anne Tonglet and Aracelli Castellano, who were nude camping in outside of Marseilles, were raped by three local men between twenty-two and twenty-nine. The men’s lawyer had the audacity before the court to declare that “the girls were very happy about it,” evidenced by their “faint resistance” and the night-long duration of the crime.<sup>71</sup> On October 15, 1975, after a first conviction for assault and battery, the lower court considering the matter in Marseilles declared itself unqualified to try the case in protest of the laxity of the charges. A few months later, the appeals court confirmed that

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<sup>68</sup> Bérard, 37-8. Quote from Boris Bogille, *Mai 68*, (Paris: La Découverte, 2008), 83.

<sup>69</sup> Idier, *Les Alinéas Au Placard*, 61.

<sup>70</sup> CRCP Volumes 1-23, Archives Nationales, 20000007/2-7. See Chapter Two for an account of Foucault’s report.

<sup>71</sup> Frederic Martel, *The Pink and the Black*, 83

the acts merited a felony charge and sent the rapists to an Assize court, where they were prosecuted by Gisèle Halimi in the famed Aix-en-Provence Trial. The founder of the reproductive justice advocacy organization *Choisir*, counsel for the Algerian National Liberation Front, and future member of the National Assembly, won the case on behalf of the women in 1978. One of the men was sentenced to six years at hard labor, the two others to four years in prison. Result in hand, she could declare “rape is a *crime*” triumphantly to the press.<sup>72</sup> Women’s groups that took up the criminalization of rape as an issue flourished across France, calling upon Socialist and Communist leaders to press to reform rape law to recognize marital and homosexual rape, then unrecognized by article 332 of the Penal Code. Their concerns centered on the lesser prosecution of non-consensual sex with adults as *Attentat à la pudeur avec violence* (roughly translated as a violent attack on one’s decency), or the failure of local prosecutors to try allegations at all.

Immediately, however, some leftist organizations began to critique feminists’ embrace of the judicial system. *Libération*’s coverage of a trial similar to Aix-en-Provence mentioned the “bittersweet” realization that someone would be sent to jail.<sup>73</sup> Some worried that rape law would be applied discriminately against immigrants. After a criminal court in Isère sentenced an immigrant convicted of rape to twenty-five years in prison in the Spring of 1978, journalist Françoise Picq commented, “the judicial machine was set in motion, it couldn’t be stopped. Women wanted to use the justice system, and it used them. The campaign against rape served as an excuse for repression and fueled the discourse of law and order.”<sup>74</sup> Guy Hocquenghem was one voice among many on the left who doubted the beginnings of what Elizabeth Bernstein has

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<sup>72</sup> “Viol, les mots en trop,” *Libération*, 4 May 1978.

<sup>73</sup> “Viol, le piège de l’enfermement,” *Libération*, 28 February 1978.

<sup>74</sup> Martel, 87.

called “carceral feminism,” “a law and order agenda and [...] a drift from the welfare state to the carceral state as the enforcement apparatus for feminist goals,” at its inception.<sup>75</sup> He warns in his 1977 book *La dérive homosexuelle* that, injured or not, a radical movement “do[es] not have the right to resort to bourgeois justice.”<sup>76</sup> In sum, in the decade following May 1968 the French justice system fell under fire both for its gross excesses in punishment and its unwillingness to punish sexual violence, as activists articulated contradictory prosecutorial severity on the question of rape.

### *The “Liberalization of Mores”*

A single phrase repeatedly appears in much of the 1970’s journalistic and governmental reports on the age of sexual majority: the “liberalization” or “evolution” of mores (*mœurs*).<sup>77</sup>

Liberalization had a twofold meaning: one, that the population’s attitudes toward issues of divorce, filiation, and homosexuality had shifted in tandem with the efforts of social movements like the MLF, Arcadie, and the FHAR; and two, that this shift in attitudes opened a gap between law and custom that threatened law’s legitimacy. Informed by these concerns, legislators and bureaucrats of the late 1960s and 1970s reformed the Code in the realms of divorce, parental rights, adoption, contraception, and abortion. It was under this rubric that intellectuals and the Commission for the Revision of the Penal Code took up the issue of sexual majority in 1977.

The idea that public attitudes would instruct criminal and civil law was somewhat novel in French republican legal history. The 1804 Civil Code, still in force with modification, had in

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<sup>75</sup> Elizabeth Bernstein, “New Abolitionism,” 128, 143.

<sup>76</sup> Hocquenghem, *La dérive homosexuelle*, 151.

<sup>77</sup> To name a few examples: Letter from André Baudry (founder of homophile league Arcadie) to Ministry of Justice, Archives Nationales, AN SL 1320-17; *Dossier’s de l’écran’s* anniversary report on the Affaire Russier; CRCP subcommittee report on sexual majority, June 1977, Archives Nationales, D 10256; Matzneff et al, “A propos d’un procès,” *Le Monde*, January 26, 1977; and “Un appel,” *Le Monde*, May 24, 1977.

the words of its author, Jean-Étienne-Marie Portalis, been a “source of mores” that would provide a “palladium of property and guarantee public health and safety.”<sup>78</sup> Law may not have created mores from scratch, instead locating “favorable” and “natural” behaviors and attitudes to “sanction and protect,” but the elevation of certain mores, like the “spirit of the family,” “tied mores to laws,” rather than reflecting the sociologically-observed norm in law.<sup>79</sup> These were ambitious social projects that sought to implement larger political visions. To continue with the family example, the Civil Code of 1804 repealed the French revolution’s liberalization of divorce laws and equal recognition of children born out of wedlock, seeing paternally led nuclear families as the securing “mediator,” as Camille Robcis has put it, of individual rights and social cohesion.<sup>80</sup> In short, the origins of republican law hoped to shape, rather than reflect, public opinion.

Key to the legal accommodation of changing mores was a shift in the republican conception of law as a force that modeled morals to a set of regulations founded on the existing mores of the population in the 1960s. The policy-crafting bureaucrats of the Fifth Republic argued that civil and criminal law’s unidirectional and instructive relationship to society was no longer tenable.<sup>81</sup> In the words of the pioneer of this legal movement, Jean Carbonnier, a professor of law and dean at the Sorbonne from 1955 to 1976, such a theory made France’s own Code hostile or “foreign” to its own people.<sup>82</sup> Carbonnier instead practiced a form of law called

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<sup>78</sup> Pierre-Antoine Fenet and François Ewald, *Naissance du Code civil: la raison du législateur travaux préparatoires du Code civil* (Paris: Flammarion, 1989), 36-37.

<sup>79</sup> Fenet and Ewald, 68.

<sup>80</sup> Camille Robcis, *The Law of Kinship: Anthropology, Psychoanalysis, and the Family in France* (Ithaca, NY: Cornell University Press, 2013), 22.

<sup>81</sup> Some leftist legislators were earlier participants in this legal revolution, like Leon Blum’s rethinking of the relationship between marriage, monogamy, and divorce law in *Du mariage*, (Paris: Paul Ollendorf, 1907). For a discussion of the shift from normative to social law, see Irène Théry, *Le démariage: justice et vie privée* (Paris: Editions O. Jacob, 1993).

<sup>82</sup> Jean Carbonnier et al., eds., *Jean Carbonnier, Renato Treves et La Sociologie Du Droit: Archéologie d’une Discipline: Entretiens et Pièces*, Droit et Société 12 (Paris: L.G.D.J, 1995), 72.

“juridical sociology” that was interested in empirically ascertaining the daily practices and attitudes of the population, so as to “guarantee that the norm [of law], wherever it comes from, is not a foreign body within the social environment.” To determine what the “mores” of society were, Carbonnier and his team probed the public with surveys, polls, and observations to gather data to drive reforms, efforts that excelled after 1968 revealed a torrid state of social relations.<sup>83</sup>

Their work identified “outdated” conceptions of marriage, parenthood, and sexuality that had been codified in the early 19<sup>th</sup> century: runaway paternal power, weak legal rights for women, mothers and children, and compulsively reproductive sexuality. It was with Carbonnier that the Ministry of Justice partnered to write the *avant-projets* for the successful reforms of guardianship and incapacity in 1964, the institution of parental (no longer paternal) authority in 1970, the change of legal filiation from “legitimate” paternal recognition to “natural” biological parenthood in 1972, and the legalization of divorce by mutual consent in 1975.<sup>84</sup> These “family law” reforms were justified by the fact that they “only adapted civil law to the change in mores” and that “new mores [were] reflected in the new law.”<sup>85</sup> Hence the Civil Code of 1804 remained with modification, but the legal theory of moral instruction that originally propelled its laws of family and sexual relations was discarded. The recognition that the 19<sup>th</sup> century moral order preserved by the Napoleonic Civil Code (which equated bastardry and divorce with the social disintegration of the Terror)<sup>86</sup> was out of date snowballed to grant leaders of more marginal

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<sup>83</sup> Carbonnier et al., 34. For more information on their data collection process, see Noreau, Pierre, André-Jean Arnaud, and Martha-Marie Kleinhans. “The Sociology of Law in France: Trends and Paradigms.” *Journal of Law and Society* 25, no. 2 (1998): 257–83.

<sup>84</sup> Robcis, *The Law of Kinship*, “Chapter 4: The Quiet Revolution in Family Policy Law”, 153-167.

<sup>85</sup> Jean Carbonnier, *Essais sur les lois* (Paris, Répertoire du notariat defrénois, 1978), 167-170.

<sup>86</sup> For an account of the link between the social disintegration of the terror, family law, and notions of gender and sexuality in the Code Civil, see Irène Théry, Christian Biet, and Jean Carbonnier, *La Famille, la loi, l'État: de la Révolution au Code civil [actes du séminaire, Paris, 1989]* (Paris: Centre Georges Pompidou, 1989); or Suzanne Desan, *The Family on Trial in Revolutionary France*, Studies on the History of Society and Culture 51 (Berkeley: University of California Press, 2004), 249-311.



groups grounds for appeal. When André Baudry wrote to the Minister of Justice in 1976 to urge the abrogation of a separate homosexual age of sexual majority, he could cite Carbonnier's reforms as evidence of a "egalitarian tendency" under which the evolution of mores had shown "inscriptions of discrimination [against homosexuals] to be bare of any foundation." Baudry argued this shift would ultimately culminate in the removal of homosexuality from the Penal Code, where it appeared in public indecency law and sexual majority.<sup>87</sup>

While legislators' philosophy of law changed from moral to sociological foundations, the government gradually moved to recognize the sexual freedom of women within and outside of the family via the legalization of contraception and abortion. The Neuwirth Law of 1967 legalized contraception, though it did not grant social security coverage for the medications. In 1975, the Veil Law legalized abortion in the same manner after five years of protest by the Mouvement de libération des femmes. The activist group, which included members like de Beauvoir, Halimi, and the writer Hélène Cixous, presented contraception and abortion as methods for women to win equality with men.<sup>88</sup> Potential for equality aside, the effect of reproductive reforms was to completely unlink sex from procreation, pulling yet another thread from the phantasmic moral order of the nineteenth and early twentieth century.

Like the feminist movement, homosexual organizing, representation, and public reception flourished in the 1970s. Arcadie, the gay social club and literary review ran by André Baudry that had been the sole homosexual organization in France since its founding in 1954, was joined by an explosion of radical, conservative, commercial, and artistic gay organizations in Paris and throughout the Hexagon. At the occupied Sorbonne in May 1968, two students led a short-lived Comité d'action pédérastique révolutionnaire (Committee for Revolutionary Pederastic Action);

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<sup>87</sup> Letter from Baudry to Ministry of Justice, Archives Nationales, AN SL 1320-17.

<sup>88</sup> Bibia Pavard, et al., *Ne Nous Libérez Pas, on s'en Charge*, 285-295.

The FHAR was founded in 1971 after it disrupted a popular live radio show discussing “homosexuality: this painful problem”; the women of the FHAR left to form the Gouines Rouges (Red Dykes) in the summer of 1971; Catholic homosexuals founded the organization David et Jonathan in 1972; and in 1974 the Groupes de Libération Homosexuelle (GLH) broke with the FHAR’s alliance with Trotskyist and Maoist groups but continued its anti-sexual majority stance.<sup>89</sup> These new organizations often discussed legal discrimination against homosexuals in two realms—doubled fines for public indecency and the separate age of consent for same sex partners—but their organizing efforts were confined to protests and publications to augment gay visibility in society and within the political left.<sup>90</sup> Magazines—political and otherwise—proliferated: Arcadie’s review was joined by the FHAR’s rival reviews *Antinorme* and *Fléau social* in 1972, the cultural magazine *Dialogues homophiles* in 1976, and *Agence tasse* in 1976. Though its monopoly on gay culture was contested by more radical organizations, Arcadie had grown to 30,000 members by 1975.<sup>91</sup> Baudry could appear on television shows with influential politicians, thinkers, and psychoanalysts to positively portray homosexuals; in 1975, he debated the matter for the first time in front of nineteen million viewers on *Dossiers de l’écran*.<sup>92</sup> The effect of homosexuals’ new visibility on public opinion is unclear: in four polls conducted by national papers in 1975, 1979, and 1980 only between twenty-four and twenty-nine percent of respondents described homosexuality as an “acceptable way to live one’s sexuality.”<sup>93</sup> Though

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<sup>89</sup> For an overview of the more radical groups see Scott Gunther, *The Elastic Closet*, 45-66. For an account of the origins of David et Goliath, see Julian Jackson, *Living in Arcadia*, 214-15.

<sup>90</sup> For example, the second major organizing event of the FHAR was their controversial participation in the associated leftist parties’ and unions’ May Day Parade.

<sup>91</sup> Pierre Fontanié, “Vie en province,” *Arcadie*, no. 265 (January 1976).

<sup>92</sup> Recounted in Jackson, 207. A transcript of the debate appears in Arnand Jammot, *Les homosexuels aux dossiers de l’écran* (Paris: Robert Laffont, 1975). The debate had been scheduled for 1973 but was cancelled by the Elysée.

<sup>93</sup> *L’Express* Conducted the first poll, see Jérôme Bernay, “Le sondage,” *Arcadie*, no. 256 (April 1975): 222–30. IFOP conducted the second; see “Les Français face à l’homosexualité,” *Arcadie*, no. 304 (April 1979): 285–368. The *Nouvel Observateur* conducted the third; see “Ce qu’acceptent et ce que refusent les Français,” *Nouvel Observateur* no. 819 (July 19–25, 1980): 22–26.

this was an improvement on the 85 percent of people who considered homosexuality to be either an illness or vice in 1962, it was far less than a 1979 IFOP poll that claimed 55 percent of people thought that homosexuality was “a fundamental human right.”<sup>94</sup> Whether it was a quarter or half of the public that considered homosexuality to be normal, it was significant given that in 1960 the French parliament had proclaimed near-unanimously that homosexuality was a “social plague” on the level of alcoholism.<sup>95</sup>

As sexuality—feminine, homosexual, and otherwise—coursed through public discourse in the early 1970s, a group of men styling themselves as twentieth century Marquise de Sades or Dom Jauns began to publish pedophilic literature and receive recognition in literary circles. These men—Tony Duvert and Gabriel Matzneff—were both little known writers before they made their careers between 1973 and 1975 releasing celebrated novels and essays that described affairs with minors in detail. Matzneff’s *Les moins de seize ans* (The Under Sixteens) lauds sex with adolescents as an act of sexual liberation to protest the moral order and publishes letters from his young lovers as proof of their enjoyment.<sup>96</sup> Matzneff was welcomed on the television show *Apostrophes* in 1975 to promote the book and articulate an ethics of individual development that arose out of the sex lives of minors.<sup>97</sup> For him, the “strength and novelty of the affective and sexual impulses” of “children between ten and sixteen” opened a “fertile” field of sexual possibilities—both with people of their own age or an older lover—that would allow them to “discover themselves, the beauty and richness of the world and its creation.”<sup>98</sup> Riding his

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<sup>94</sup> Cited by Raymond Forni, *Débats Parlementaires*, Assemblée Nationale, 2e séance du 11 avril 1980.

<sup>95</sup> For an account of the genesis of the Mirguet amendment, see Gunther, 35-38.

<sup>96</sup> Gabriel Matzneff, *Les Moins de Seize Ans* (Paris: Julliard, 1974).

<sup>97</sup> *Apostrophes* averaged two to four million viewers on the network Antenne 2. Chaplin, *Turning on the Mind*.

<sup>98</sup> Gabriel Matzneff on Bernard Pivot, “Gabrielle Matzneff : Les moins de seize ans,” *Apostrophes* (Paris: Antenne 2, September 15, 1975), Institut national de l’audiovisuel, <https://www.ina.fr/ina-eclairage-actu/video/man2121063652/les-declarations-de-gabriel-matzneff-sur-son-amour-des-mineures>.

celebrity, Matzneff soon commanded a column at *Le Monde*, which he would use in the storming of the lycée to come.

### *The Storming of the Lycée*

From December 1976 to May 1977, the discursive and political trends of post-1968 France crystalized in a full-throated call for “the liberalization of laws governing affairs between minors and adults.” Two major media events drove the focus: one, the popularity of a new radio show that rallied for the “rights of children,” including their “sexual liberties”; two, a mobilization of intellectuals by the writer Gabriel Matzneff in defense of men who had been jailed for three years for sex with minors.

In November 1976, Matzneff used his *Le Monde* column to draw the eyes of the French intelligentsia to a little-known *affaire des mœurs* in the outskirts of Paris. Printed under the headline “Is love a crime?,” Matzneff came to the aid of three men who had been arrested in 1973 for sex with and photography of two boys and a girl in between twelve and fifteen at a camp that they ran.<sup>99</sup> Reflecting the axis of post-1968 thought, he presented the issue as a matter of penal cruelty and the frustration of the rights of minors. Held for three years without trial, Matzneff described the men as “broken, burned alive, and revoltingly treated.” The five-to-ten-year prison sentence that they faced under *Attentat à la pudeur sans violence* (the charge for violating the age of sexual majority) was the “justice of Père Ubu,” a reference to the ludicrously cruel king of the 1897 modernist play *Ubu roi*. Such a penalty was especially unwarranted not only because of the “free consent” of the minors, but because “a romantic relationship, when it is founded on confidence and tenderness” was “the great motor of the physical and spiritual

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<sup>99</sup> Matzneff, “L’amour est-il un crime?,” *Le Monde*, 8 November 1976.

awakening of adolescents.”<sup>100</sup> Extending sexual liberty to children, who in both Freudian and popular conception experienced extreme sexual desire, would enrich the development of individuals at both a material and metaphysical level. Echoing early 1970’s gay and women’s liberation organization’s criticisms of organized communist parties, Matzneff also denounced the “demobilization” of the left when it came to “matters of love,” who in reality “were uninspired by the sexual liberty of children and adolescents” because “Lenin needed chaste disciples for class struggle.”

Matzneff’s column made little splash in the media sphere, but when the men were given a trial date in January of 1977, he ramped up the effort and enlisted other intellectuals. On January 26<sup>th</sup>, a petition appeared in *Le Monde* on behalf of the three, who were to be tried before the Assize Court of Yvelines that week.<sup>101</sup> Seventy intellectuals—almost a third of whom were women—signed the petition, including Aragon, Sartre, De Beauvoir, Barthes, Deleuze, Guattari, Hocquenghem, Schérer, Philippe Sollers, and the founder of Doctors without Borders Bernard Kouchner, and future Minister of Culture Jack Lang. They were joined by doctors, psychoanalysts, and psychiatrists, who claimed that:

Such a long pre-trial detention to examine a simple affair of *mœurs*, where the [involved] children were not victims of the slightest violence, but to the contrary, have clarified to the presiding judges that they were consenting (although the judicial system currently denies them any right to consent), such a long jailing seems to us to already be scandalous. [But] today [these three men] risk conviction and a heavy prison sentence, either for having had sexual relations with these minors, boys and girls, or for having encouraged and photographed their sexual games. We consider there to be an obvious disproportion, on one hand, in between the designation of a crime which justifies such severity, and the nature of the reproached facts; and on the other hand, between the outdated character of the law and the daily reality of a sociality which is moving toward the recognition among children and adolescents the existence of a sexual life (if a thirteen year old girl has the right to the pill, what for?). French law contradicts itself when it recognizes the ability to discern in a minor of thirteen or fifteen that it can judge and convict [in instances of crime committed by minors], whereas it refuses the child this capacity when it concerns their sexual and affective life. Three years in jail for caresses and kisser is enough. We would not understand, if on January 29<sup>th</sup> [the day of their trial], Dejager, Gallien, and Burckhart [the accused] do not find their freedom.<sup>102</sup>

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<sup>100</sup> Gabriel Matzneff, *Les Moins de Seize Ans* (Paris: Julliard, 1974).

<sup>101</sup> Matzneff et al, “Apropos d’un procès.”

<sup>102</sup> Matzneff et al, “Apropos d’un procès.”

Though the three men were ultimately found guilty and sentenced to five years in prison, the press campaign took off. Jean-Luc Hennig, a signatory of the petition, had *Libération* print the petition along a cover story on “Childhood, Surveilled Zone: Children’s Sexuality on Trial,”<sup>103</sup> and the journal soon became the press home of the anti-Sexual Majority movement. Hennig covered the trial in *Libération*’s justice section throughout the week, focusing on the fact that one of the minors “enthusiastically affirmed” his consent before the court while the others were “visibly tense, staked down by the judicial machine than by the games that justice declares so traumatizing.”<sup>104</sup> From February 7<sup>th</sup> through 9<sup>th</sup>, *Libération* ran a story on “Sexuality on Trial”, in which Jean-Luc Hennig recounts that the paper received hundreds of letters from concerned readers, some who now newly self-identified as “persecuted” pedophiles. He also published an open letter from a newly established Front de libération des pédophiles, who advertised that “faced with a liberal Giscardian society of prison, execution, and exclusion we propose that all individuals who love children contact us.”<sup>105</sup>

A mania for pedophile apology—if not advocacy—overtook *Libération* in 1977. Majors in their twenties and thirties wrote ads explicitly searching for lovers as young as twelve in *Libération*’s famed “Cheri je t’aime” (Darling, I love you) section. For this and graphic illustrations of minors practicing fellatio on adults by the illustrator Sexpol that it published under the title “teach love to our children,” the paper ultimately was sanctioned for three thousand francs by the government and found guilty by a court in 1979.<sup>106</sup> True to their sexual rights of minor’s rhetoric, the paper also published letters from minors, like one from a Jean-Michel, a sixteen year old boy in love with a twenty-five-year-old man, who claimed he was

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<sup>103</sup> “La sexualité des enfants en procès”, *Libération*, January 26, 1977.

<sup>104</sup> “La justice, le sexe, la morale, les adultes et les adolescents”, *Libération*, January 31, 1977.

<sup>105</sup> “La sexualité en Procès,” *Libération*, February 7-9, 1977,

<sup>106</sup> *Libération* reprinted the media under prosecution in “Les outrages de Libération,” *Libération*, March 1, 1979.

surveilled and kept at home by his parents and was subject to *Attentat à la pudeur*'s heightened age of majority for homosexual acts. While *Libération* published a few articles against the veneration and defense of pedophilia, like one from Paule, a lesbian from Normandy,<sup>107</sup> they were outweighed by an onslaught of articles that assimilated the judicial and social repression of pedophilia to racism or homophobia. Pedophiles were, in Matzneff's words, the new Jews,<sup>108</sup> as evidenced by proposals in Germany to "lobotomize" them and their "hunting down" in the education system.<sup>109</sup> This incredible assimilation extended beyond the pages of *Libération*: when Gilles Deleuze's review, *Recherches*, published a collection of pedophile-apologetic writing in April 1979, it was followed the next month by an issue entirely dedicated to a "Catalogue of the Jews of now."<sup>110</sup>

While the intelligentsia and leftist press staged defenses of pedophiles, "*La charte des enfants*," (the Children's Charter) a radio show started in late 1976 by journalist Bertrand Boulin received widespread attention while centering the frustrated desires and parental abuse of children.<sup>111</sup> After he announced his interest in compiling a list of "rights" for which children between eleven and eighteen wished, Boulin received over 2500 telephone calls and letters from adolescents across the country.<sup>112</sup> He published a three-hundred-page collection of these interviews in early 1977, capped off with a "charter of children's rights" that called for, among other reforms, the "abolition of *Détournement de mineur* (kidnapping) laws paired with the

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<sup>107</sup> "Ne touchez pas aux enfants," *Libération*, May 7, 1977

<sup>108</sup> *Les Soleils révolus* (Paris: Gallimard, 2001), 526. Cited in Pierre Verdrager, *L'enfant interdit*, 29-30. Matzneff worded the claim this way in retrospect as late as 2001, but it began in the 1970s, and took on ferocity after his downfall from *Le Monde* in 1982 over the Affaire Sigala. For more on the Affair, see Chapter Three.

<sup>109</sup> "Lobotomie et Sexualité," *Libération*, October 18, 1977

<sup>110</sup> Catalogue pour des juifs de maintenant, *Recherches*, September 1979.

<sup>111</sup> Boulin was also the son of the prominent government minister Robert Boulin.

<sup>112</sup> "Les enfants revendique leurs droits," *Libération*, February 10, 1977.

expansion of rape law [to recognize non-penetrative non-heterosexual rape]” and affirmed that “children should choose their own affective relationships after age fourteen.”<sup>113</sup>

If minors needed to be protected, it was from the surveillance and restriction of their lives (sexual and otherwise) by their families, educators, and government, not the propositions of pedophiles. Throughout the mid to late 1970s the justice section of *Libération* was filled with cases of murder and rape of adolescents by parents, or horrendous cases of neglect.<sup>114</sup>

Testimonies from minors in *La charte des enfants* are abound with accounts of parental violence and coercion. Joel, eighteen, was confined to a psychological asylum rather than a hospital against the advice of his caretakers on the wishes of his father.<sup>115</sup> Lilliane, fourteen, wondered what recourse she has against her drunkard father who “beats me often.”<sup>116</sup> François, eleven, lived with other “boys” rather than the hell of her “family” after the death of her father.<sup>117</sup>

Several of the children opined that “upticks in delinquency, suicide, and drug use are the fault of parents.”<sup>118</sup>

*La charte des enfants* provides some of the best evidence that this discourse of minor’s rights gained traction outside the Parisian intelligentsia. When *Libération* issued a poll to gage support for the charter, which it had featured on its cover under the headline “Children Demand Their Rights,” 88 percent of children and 73 percent of adult respondents affirmed their support.<sup>119</sup> The show stirred such trouble that a National Assembly member wrote to the Prime Minister asking the government to take steps against its transmission, on the basis that “full rights for fourteen to eighteen year-olds would undermine the development of duty and morality in children and

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<sup>113</sup> Bertrand Boulin, *La Charte des enfants* (Paris: Editions Stock, 1977).

<sup>114</sup> For a few examples see *Libération’s* series “*La vie familial*,” February 11, March 16, and March 24, 1977.

<sup>115</sup> Boulin, 73.

<sup>116</sup> Boulin, 19.

<sup>117</sup> Boulin, 23.

<sup>118</sup> Boulin, 21.

<sup>119</sup> “Les Enfants revendique leurs droits,” *Libération*, February 20, 1977.



undermine parental authority.”<sup>120</sup> The government declined to act on the complaint. A year later, when *Antenne 2* reaired *Dossiers de l'écran*'s documentary on the Russier Affair, only five percent of polled viewers declared themselves against the “liberation of adult-minor relations.”<sup>121</sup> At moments when—as we will see—the most radical intellectuals and activists called for the dismantling of the age of sexual majority, the public seemed to respond, if not favorably, with indifference.

Perhaps this public affirmation was in response to how the question was framed: the push for children's rights was a *coup* from below, the triumphant expression of long-silenced adolescent's own desire. Boulin gave children a platform on the radio, and the cover of his book trumpeted the virtues of “children speaking for themselves” and not being “spoken for.” *La charte des enfants* was an iteration of the politics of testimony that had flourished in the leftist press in the early 1970s when Maoists, *Tout!*, and the GIP “allow[ed] those to speak who silence themselves or have been reduced to silence.”<sup>122</sup> Though intellectuals, journalists and activists organized efforts at conscious raising or political reform, it was described as the unvarnished voice of children coming through.

On the other hand, a positive or indifferent public may have responded to the breadth of concerns addressed by the minors' rights movement. Though sexual liberty was one of “three essential axes of proposals” reported in Boulin's *Charte*, they were part and parcel of a larger program that called for the enlargement of children's privacy, legal power, and the abolition of corporal punishment.<sup>123</sup> The charter published in *Libération* included sixteen points. It suggested

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<sup>120</sup> *Journal officiel* cited in *Libération*, 12 December 1976.

<sup>121</sup> Guy Hocquenghem, “Incroyable Mais Vrai!,” *Libération*, 23 March 1978.

<sup>122</sup> For more on the politics of testimony's valence at *Libération* see François Samuelson, *Il était une fois Libé* (Paris: Flammarion, 2007), 101.

<sup>123</sup> Boulin, 30.

legal reforms to recognize the rights to children to navigate parental choice in newly opened divorce and adoption laws as they wished; to appeal in courts and be recognized as witnesses; to choose their psychoanalysts, lawyers, and doctors; and to work on vacation and weekends. It called for “mentality changes” that would recognize a right to privacy in medicine and schooling; to choose their religion, hair length, clothing, and reading; and to live free from corporal punishment. The sexual rights of minors were only one front of the battle.

In sum, by the turn of 1977 a small group of writers, intellectuals and journalists began to overtly politicize the age of sexual majority. They targeted the trial of men who had sex with minors in the national press and conducted large-scale reports on the abuses and frustrations minors faced in daily life, including sexual frustrations. Their efforts reverberated within and beyond the Parisian intelligentsia because the age of sexual majority intersected with the three axes that had propelled protest and reform in the post-May 1968 period: the rights of youth, the excesses of the justice system, and the need to match outdated civil law to a post-procreative, post-paternal, and sexually heterogeneous social reality. These concerns perfectly circumscribed the age of consent. For that reason, concerns over the sexual “rights” of minors; the power of parents in determining the affective lives of their children (who were legal minors well beyond puberty or maturity); the prosecution and treatment of those who violated the “law of the generations,” as Guy Hocquenghem put it;<sup>124</sup> and sexual majority’s blatant discrimination of the age of consent against a rising homosexual minority coursed throughout France’s intellectual and political fields. It was an open question whether Giscard’s government would respond, and what model of legal differentiation between adults and minors they would pursue. In May 1977 intellectuals of greater consequence than Matzneff and Boulin stepped up to answer the question.

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<sup>124</sup> Guy Hocquenghem, “Le droit de vivre des moins de seize ans,” *Libération*, 23 March 1978.

## II: Intellectual Visions for Sexual Majority

While the idiosyncrasies and injustices of French law and societies' treatment of the sexual affairs of minors had been a recurring discussion in the decade since the *Affaire Russier*, it was only with the petition of May 1977 that a broad coalition of prominent intellectuals sharpened critical discourse into targeted dissent. Their letter's direct appeal to Giscard's policymaking Commission for the Revision of the Penal Code (CRCP) was example of reform-minded political intervention—and not just exhibitionism—by the intelligentsia, and it defined three specific targets. First, there was article 356, *détournement de mineur*, a misdemeanor that threatened up to five years of imprisonment to anyone who "without fraud or violence, remove[d] or convinced a minor" to leave a place where their family had placed them.<sup>125</sup> In the petition's telling this could jail an adult for "housing a minor for only a night."<sup>126</sup> Second, the signatories protested article 331, *attentat à la pudeur sans violence*, the then-felony that effectively "prohibited sexual relations with children under fifteen," though it should be noted that the crime was not considered rape and faced lesser, but by no means trivial, punishment.<sup>127</sup> Third, they denounced article 331-2, which prohibited "homosexual relationships when they involve[d] minors between 15 and 18." In their telling, these articles were relics with "aberrant consequences" that only continued to justify "police harassment." Instead of proscription by the Penal Code, the signatories suggested that "society" still needed to decide "at what age children or adolescents could be considered capable of freely giving their consent to a sexual relation." The specific legal mechanisms for determining and enforcing sexual majority were under debate, and the intelligentsia was leading the charge.

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<sup>125</sup> Article 356, Ancien Code Pénal, (1977).

<sup>126</sup> "Un appel," *Le Monde*, May 24, 1977.

<sup>127</sup> "Un appel," *Le Monde*.

To criticize sexual majority as it stood in 1977 was relatively easy given its Vichy roots and discriminatory content. To offer a positive alternative was another matter, one that divided the signatories of the petition. Different signatories offered their own proposals, making the late seventies a time of radical possibility for legal visions of sexual violence law. Reformers responded to open categorical questions on the future of sexual majority. First, they had to answer the foundational question of whether sexual majority as a concept should exist: did the law need to recognize categories of subjects to protect one from the abuses allegedly engendered by disparities in power and development? If they believed some individuals could not articulate their own sexual desires or engage in sex without traumatic abuse, did that warrant a blanket interdiction corresponding to age, or should the division between sexual majority and minority be alternatively rationalized and individually applied? If sexual majority was individualized, how would courts determine mutually desired sex? Did specific behaviors, like homosexual or sadomasochistic sex, face higher bars to be considered consensual? Was the question of protection a red herring itself?

In this chapter, I will argue that, torn between whether to ground the sexual politics of leftist politics in appeals to individual rights or social reorganization, intellectuals' responses reflect larger tensions among the post-1968 French left as intellectuals incorporated sexuality into their socio-political criticism in both Marxist and liberal directions. Some have understood a politics based on class versus a politics informed by sexual and gender identity to be fundamentally oppositional, but intellectual debate around the age of sexual majority conveys how sexual politics were a theater—not the antithesis—of the struggle between Marxist and liberal tendencies among the French left.<sup>128</sup> Intellectuals took on the difficult questions circling

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<sup>128</sup> For an example of a claim otherwise, see Judt's acclaimed *Postwar: A History of Europe since 1945* (New York: Penguin Books, 2006), Chapter 15: "Politics in A New Key."

the age of sexual majority because they believed its contestation be a politics for justice, seeing sexual majority as a symbolic and practical subjugation of either children, homosexuals, or both. All grappled—often unsuccessfully—with how to conceive of social equality, sexual violence, and bodily autonomy. René Schérer and Guy Hocquenghem believed sexual interdictions patrolled the borders of categories of socially unequal persons, and hence the transgression of these categories would not only redistribute pleasure but contribute to substantive equality and emancipation. Michel Foucault, Françoise Dolto, and André Baudry saw the age of sexual majority as a useful approximation for the moment in which the state could recognize an individual right to consensual sex.

Larger political implications aside, just how did these five thinkers answer the quandary of sexual majority? At the permissive end of the spectrum, Hocquenghem and Schérer argued for the total abrogation of the age of sexual majority on the basis that to deny even young adolescents the possibility of consensual sex rejected their personhood and subjected children to second class citizenship. Both were influenced by the Austrian Freudian-Marxist Wilhelm Reich, for whom sexual ‘rights’ were integral to human flourishing and their denial a fascistic trope. At the other end, Dolto proposed an individualized form of sexual majority that measured the psychological and biological development of the child, that which she saw as more rational than a blanket interdiction based on age. Baudry sought only the equalization of the age of sexual majority for homosexuals and heterosexuals, which had been unequal since 1942. Somewhere in the middle, Michel Foucault sought a program of “nuanced protection” under thirteen, an idea which he brought before CRCP in late May.

Ultimately, it was Foucault, Dolto, and Baudry’s vision that won reception by legislators in the late 1970s and early 1980s, but their thought was ultimately flattened by appeals to

individual rights, non-discrimination, and consent. The centrality of consent in the ethics of the law governing sexual rapports presented a rejection of the meaning of majority in the early 20<sup>th</sup> century, when the age of majority for homosexual acts was changed to further the biopolitical shaping of children into procreative and maritally bound mothers and fathers. Now sexual majority was be the individualized process of determining which minors were able to consent without respect to the sex of their partner. While this discourse valorized consent as a penal yardstick, it also contained a lasting tension on the workability of consent in sexual matters. Indeed, the “contractual notion” of consent never quite fit perfectly onto any of the signatories’ models of thinking about sex—whether Foucauldian pleasure, Deleuzian desire, or Dolto’s psychosexual development.<sup>129</sup>

*Hocquenghem and Schérer: Minorité against Social Emancipation*

Since the founding of the FHAR in 1971, Guy Hocquenghem had staked the issue of sexual majority on the right of minors to sex. As mentioned in Chapter One, the FHAR abstractly advocated the “rights of minors to free desire and its accomplishment,” but Hocquenghem biographically broached the issue when he described a formative, “pleasurable”, affair at fourteen with his at-the-time Lycée instructor, Schérer, in the *Nouvel observateur*.<sup>130</sup> It was, of course, a matter of concern to Hocquenghem that article 331-2 of the Penal Code established a higher age of consent for homosexual acts, but in his telling, any effort to equalize the age of majority between homo- and heterosexuals would remain a “liberal illusion” without the entire dismantling of legal difference between majors and minors.<sup>131</sup> Intolerance of homosexuals was

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<sup>129</sup> Hocquenghem and Foucault agree that consent is a contractual, liberal notion in Foucault and Hocquenghem, “La loi de la pudeur” in “Fous d’enfance,” *Recherches*, April 1979, 81-82.

<sup>130</sup> Hocquenghem in *The Nouvel Observateur*, January 10, 1972. Schérer was described but not named in the article.

<sup>131</sup> Libération, “Le Droit de vivre des moins de seize ans,” March 23, 1978.

certainly evident, but it was only given the occasion to legal inscription by the subjugation of minors.

Hocquenghem and Sherer were thus concerned by fellow critics of majority who advocated for stronger state “protection” of minors. In his 1978 book *Une érotique puérile*, Schérer argues that the protectionary rhetoric that both opponents of changes to sexual majority and the Children’s Rights movement employed was a complex front for maintaining the definition of the child and their subsequent disqualification from the full personhood.<sup>132</sup> He thus rejected Boulin’s quest for the rights of minors as a misunderstanding of the social apparatus surrounding the child. His study was not concerned with the “severe and unhappy childhoods” collected by Boulin, “but those that [were] huddled (*agglutinée*)” in affective rapports with their parents.<sup>133</sup> Schérer suggests that “there is not a one-way subordination of children to adults, an antagonistic confrontation [...] but an interaction, a clarification of one by the other, a reciprocal disciplinarization.”<sup>134</sup> All of his contemporaries’ methods of power are reflected in the role of the child: Althusserian interpellation in the child’s response to interdictions or the recognition of areas reserved for themselves, like playgrounds; the Deleuzian territorialization and identity formation in their affective mooring to ‘mommy and daddy’; and a Foucauldian will to know in which modern man tries to locate psychoanalytic truth in childhood. Schérer says these mechanisms of power work doubly: they define “the individual as a person, and the child as a *personne en formation*.”<sup>135</sup> They were the lynchpin of what he calls the “modern judicial fiction,” that “permits the denial of certain liberties to the child in the name of the rights of his

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<sup>132</sup> René Schérer, *Une Érotique Puérile* (Paris: Éditions Galilée, 1978), 9-11.

<sup>133</sup> Schérer, 12.

<sup>134</sup> Schérer, 11. Though here he is clearly influenced by Foucault’s understanding of power as not repressive but productive (he cites *Discipline and Punish*) Schérer used the term “panopticon” to describe a surveillance and discipline of children before Foucault had in 1975. See René Schérer, *Émile perversi; ou, Des rapports entre l’éducation et la sexualité* (Paris: R. Laffont, 1974).

<sup>135</sup> Schérer, *Une Érotique Puérile*, 12.

person, its protection and formation,” and the “source of the illusion that the immaturity of a person necessitates a suspension of the liberty of that individual and of its expression [of that liberty] in consent.” In other words, were intellectuals, militants, and activists interested in freeing children and adults to act upon their desire, it was their division as subjects that needed to be questioned, not the permissiveness of the law when it comes to parental abandonment and abuse.

While Schérer draws the link between the larger categories of majority and minority and the legal rejection of the latter’s consent, the recognition of an individual’s desire is not the end of sexual politics, rather a foundation for the leveling of social inequality. Here it is interesting to think about the peculiar sexual revolutionary politics of the period, which saw desire as a site of radical political potential. It was not just that revolution would end with, as the FHAR had put it in 1971, the “total subversion of mores,” but that the sexual subversion of mores would in turn upset hierarchical structures—whether colonial, racial, ableist, or generational.<sup>136</sup> Equality demanded the demise of sexual taboos, and the breaking of said taboos would bring about equality. To take an example, Jean Genet could raise the mantle of anti-colonial politics in declaring in 1968 that “perhaps if I hadn’t gone to bed with Algerians, I might not have been in favor of the FLN. [...] Perhaps it was homosexuality that made me realize Algerians are no different from other men.”<sup>137</sup> Todd Sheppard has shown that “sex talks” about Arab men did not go unnoticed in public discourse. The wider press’s response to the publication of *Tout no. 12*—the first time that article 331 was publicly protested—focused on the erotization of Arab men. Hocquenghem’s FHAR had parodied the feminist petition of the 343 “sluts,” women who declared they had undergone abortions, to say he and his comrades had been “fucked” (*enculé*)

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<sup>136</sup> *Tout* !, April 23, 1971.

<sup>137</sup> Todd Shepard, *Sex, France, and Arab Men, 1962-1979* (Chicago, IL: University of Chicago Press, 2017), 65.



by “Arabs.” Some respondents decried the FHAR’s “confusion of the political and sexual fields” and the “dubious eroticization of Arab men,” clearly marking the ideological question of leftism to be whether, in the words of historian Todd Shepard, “sex acts and desire not only linked ‘homos’ and ‘Arabs,’ but connected ‘revolutionary homosexual action’ to other forms of revolutionary politics.”<sup>138</sup>

This revolutionary valence of sexuality, interested in the expression of solidarity or the negation of social difference by sexual means, lived on into the 1980s in areas beyond ethnicity. In 1984, the journal of the Comité d’urgence anti-répression homosexuelle (CUARH), *Homophonies*, wrote a cover piece investigation on “gay racism,” that probed “how many among us would sleep with the blind or disabled?”<sup>139</sup> Daniel Guérin, a member of Arcadie, the FHAR, and a Trotskyite organizer, proposed during the first homosexual summer university in Marseille to create, “according to the Fourierist model, a sexual service for young people for the elderly.”<sup>140</sup> What had caused an outcry in the young audience was applauded by *Homophonies* in 1984 as a method to upset “the traditional schema that wants sexuality to be exclusive to youth and adulthood.” Guérin echoes what Hocquenghem had once wrote in *Le désir homosexuel*, where he argued that a revolutionary homosexual politics would start by overturning the first hierarchy: “the generational.”<sup>141</sup> Out of this discursive field rises the pedophile movement’s brazen self-justificatory rhetoric: you only respect minors as equals if you are willing to sleep with them.

Contemporary readers will recognize obvious counterarguments to the prescription to sexually challenge social hierarchies: the fact that material and social inequality will not only

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<sup>138</sup> Shepard, 76

<sup>139</sup> *Homophonies*, January 1984

<sup>140</sup> Reported in “Dossier vieillir: les résignés du sexe” *Homophonies*, September 1984, 29-30.

<sup>141</sup> Guy Hocquenghem, *Le désir homosexuel* (Paris: Fayard, 2000), 160.

outlast a sexual interaction but coincide with an inequality of the distribution of pleasure within the relationship; or, crucially, that the social positioning of one individual often enables them enforce their desire over another (FHAR members were “decolonial” for their willingness to be “fucked” by Arabs, but what of the sexual tourists who penetrated young impoverished North Africans?). As discussed in Chapter One, feminists articulated these concerns as reason to pursue heavy sentences and more efficient punishment of sexual violence, rape, and child prostitution. Hocquenghem and Sherer, however, paid little attention at first to the traumatic or violent possibility of sex, for like many in the Gay liberationist movement, they saw the aggravated horror of rape over other kinds of assault as a continuation of puritanism. To take an example, the journal *Agence tasse* argued that the move to prosecute rape more severely than assault “suggest[s] that it is not only violence but also profanation, and thus that a woman’s body is a sacred vessel. In short, it relies on Judeo-Christian values that are the exact opposite of revolutionary struggle.”<sup>142</sup> Hocquenghem too diminished the possible violence of sex, writing in a March 1977 *Libération* article, “I can’t get it into my head of a slight wound, inflicted with the blunt instrument called a prick, could be more serious than painful burns or dangerous assaults.”<sup>143</sup>

Why were Schérer, and Hocquenghem in particular, so blind to the potential moral violence of sexuality? Crude misogyny certainly made it easier to dismiss the women who articulated such violence. One can only grimace when Hocquenghem cruelly describes women who seek the criminal punishment of their rapists as “steely amazons [...] without humanity.”<sup>144</sup> When the social science journal *Recherches* published the transcript of a radio conversation

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<sup>142</sup> “Éditorial,” *Agence tasse*, Apr. 20, 1977, as cited in Martel, *The Pink and the Black*, 98.

<sup>143</sup> Guy Hocquenghem, “Viol,” *Libération*, March 29, 1977, appears in Guy Hocquenghem, *La Dérive Homosexuelle* (Paris: J.-P. Delarge, 1977).

<sup>144</sup> Hocquenghem, “Viol,” *Libération*, March 29, 1977.

between Hocquenghem and Foucault on their efforts to reform the age of sexual majority, their edits had kept all but two audience member's comments: the women. One woman had expanded upon on their criticism of the protective scheme applied to children and argued it would soon expand to women, which "could lead to a regression in law and an incapacity to consider [women] as majors." Another argued that Foucault and Hocquenghem's understanding of pederasty failed to consider affection between women and minors, to which Jean Danet, the lawyer that appeared alongside Foucault and Hocquenghem, responded that "lesbian homosexuality did not exist in the eyes of judges [until the 20<sup>th</sup> century]."<sup>145</sup>

On the other hand, the view of the relationship between the individual and the social that Hocquenghem articulated in his philosophical writings sought to use sexual politics to not only create the conditions for equality and emancipation but untie the very individualist organization of the social on which anti-sexual violence activists staked their claims. Hocquenghem was greatly influenced by Deleuze and Guattari, whose concept of "desiring machines" invested the body with rebellious potential for "deterritorialization," or the severing of the typical relation between a body, its habitat, and its determined consciousness.<sup>146</sup> Where Deleuze and Guattari argued the schizophrenic was he who constantly challenged his subjectivity and situation, Hocquenghem's *Le désir homosexuel* stressed a similar possibility for the homosexual. Homosexual subjecthood could radically reimagine society. Hocquenghem suggests that the modern subject develops out of an early Freudian realization in which the anus is recognized as a "private" and "shameful" orifice,<sup>147</sup> which corresponds with the "Oedipal" division of the

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<sup>145</sup> "Il y avait très peu de cas dans les 19e et 20e siècles... l'homosexualité féminine pour les juges, ça n'existait pas," Jean Danet, "L'intégralité de l'émission 'Dialogues' Avec Michel Foucault, Guy Hocquenghem, et Jean Danet," *Dialogues* (France Culture, Recorded in 1977 and transmitted in 1978), Accessed April 5, 2022 at <https://www.franceculture.fr/societe/quand-des-intellectuels-francais-defendaient-la-pedophilie>.

<sup>146</sup> Gilles Deleuze et al., *Anti-Oedipus: Capitalism and Schizophrenia*, Penguin Classics (New York: Penguin Books, 2009), 294-322.

<sup>147</sup> Hocquenghem, *Le Désir Homosexuel*, 160.

individual from the social, and then trained limitation of sexual desire to the phallus. Just as private property underwrote social inequality, private ownership of the body corresponded with authoritarian social organization. A revolutionary homosexual politics would aim for the “groupalisation of the anus,” and in doing so would “undermine phallic [social] hierarchies and the individual-social double-blind,” achieving an egalitarian and emancipated society.<sup>148</sup> When it came to sexual violence, though, the alienation experienced by victims of rape would be a kind of false consciousness, an effect of a sexual taboo, for in the Hocquenghem-Deleuzian world the deterritorialized body would have no owner who could be traumatically dispossessed.<sup>149</sup>

Further, Hocquenghem rejected the valorization of consent as a sexual norm for good and bad sex on which the concept of sexual violence dependent. To “translate a relationship into terms of juridical consent” was “an absurdity,” for the duration and complexity of a relationship could not be broken down into moments of contractual exchanges of sex.<sup>150</sup> By late 1977 Hocquenghem had decided to stop using the word consent, disapproving of such an “ensnarement” that analogized relationships to contracts.<sup>151</sup> He describes his only use of the word “consenting” in the petition of 1977 as a shortcut for describing affairs between minors and adults in which “there was no violence or maneuvers to wrench from them affective or erotic rapports.”<sup>152</sup> Contracts and consent were foreign concepts to the libidinal and anti-rational Hocquenghemian subject.

The question of sexual violence aside, Hocquenghem and Schérer’s theory and activism stands out for their beliefs that sexual behavior bolstered and maintained economic, racial, and

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<sup>148</sup> Hocquenghem, *Le Désir Homosexuel*, 118.

<sup>149</sup> For a collection of writings on the Deleuzian conception of sex, sexuality, subjecthood, and their intersection, see Frida Beckman, *Deleuze and Sex*, Deleuze Connections (Edinburgh: Edinburgh University Press, 2011).

<sup>150</sup> Guy Hocquenghem, “La loi de la pudeur,” in “Fous d’enfance,” *Recherches*, 81.

<sup>151</sup> Hocquenghem, “La loi de la pudeur,” *Recherches*, 81.

<sup>152</sup> Hocquenghem, “La loi de la pudeur,” *Recherches*, 81.

agist hierarchies; that the “brutal sexualization of the sexual field” would undo these categories;<sup>153</sup> and their insistence on social equality as the ends of sexual politics. In their radical desire for equality, we might consider them emblematic of a radically egalitarian and Marxist use of sexual politics. This may appear counterintuitive, given the furor with which representative philosophers of the assorted French communist parties condemned the anarchist and sexual-liberationist beliefs of Hocquenghem and Schérer in the early 1970s as distractions from serious materialist politics, but the justification for the abolition of sexual majority which Schérer and Hocquenghem proposed mirrors the theoretical stances of far-left parties in their interest in the implication of substantive equality (though by sexual means) and their suspicion of consent as a workable norm (in labor for the PCF and sex for Schérer and Hocquenghem).

*André Baudry: Majorité as Anti-Homosexual Discrimination*

While Hocquenghem and Sherer’s abolition of sexual majority would tear down the divisions of society between adult and child, rich and poor, and citizen and alien, André Baudry was only interested in contesting one category of difference: hetero- and homosexuals. Neither was Baudry interested in the larger questions of youth’s liberties, the determination of consent, nor claims that homosexuality posed a radical potential. Only the fact that sexual majority treated homosexuals and heterosexuals unequally made them the site of his political activism in the 1970s. Emboldened by the social upheavals of 1968 and Giscard’s promises of liberalization, Baudry protested the age of sexual majority on the grounds of non-discrimination against homosexuals.

For Baudry and Arcadie, the issue of adolescent sexuality and article 331 had once been taboos to be carefully discussed. Though Baudry declared upon the journal’s start in 1953 that

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<sup>153</sup> Hocquenghem, *Le Désir Homosexuel*, 172.

France was entering “a struggle for true Equality” in which the Arcadie would “serve our minority,” he avoided political conversation.<sup>154</sup> 1950s and 1960s France has been characterized as an especially repressive time for homosexuals worldwide, and though France did not have a sodomy ban as did its transatlantic neighbors, it was no exception.<sup>155</sup> Baudry quickly encountered censorship when Arcadie was banned from sale to minors in 1954 and prosecution for an “Offense Against Good Mores” (*Outrage aux bonnes mœurs*) in March 1955 for seven articles that described adolescents’ homosexual affairs.<sup>156</sup> The historian Julian Jackson has complicated Arcadie’s remembrance as a conservative respectability-obsessed organization, calling attention to the genre of adolescent romance literature which Baudry allowed to proliferate in the Journal, like that of the celebrated contemporaneous homosexual author Roger Peyrefitte.<sup>157</sup> Regardless of these literary depictions, there were no public movements by Baudry or Arcadie to influence law, neither were there sympathetic essays on adult-adolescent or adult-child relations between 1960, when Baudry asked an Assemblyman who had unexpectedly rallied the National Assembly to declare homosexuality a plague to clarify what policies he envisioned, and 1972, when Baudry began to directly lobby of the Ministry of Justice.

May 1968 transformed what was possible in the eyes of Baudry and Arcadie. Though the immediate aftermath of the *gauchiste* revolt was not gay liberation (some student groups were notoriously homophobic), it posed questions to Gaullist moralist interventionism that convinced Arcadie’s leaders a shift was underway. In 1969, the journal sent a letter to “a range of writers,

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<sup>154</sup> Jackson, *Living in Arcadie*, 73-4.

<sup>155</sup> Jackson characterizes the 1950s and 60s in France as not only the time of great repression but a “historiographical dark hole” of gay history. Jackson, 7.

<sup>156</sup> Jackson, 84

<sup>157</sup> Jackson, 218. Roger Peyrefitte was a perpetual offender, and at the publication of his 1956 *Jeunes Proies*, transparent of his autofictional inclinations to pederasty, Baudry surprisingly reviewed it sympathetically as a book revealing the “personal drama of ... all those who love children.” Baudry, “Réponses,” *Arcadie*, no. 34 (October 1956), 12.

politicians, clerics, journalists, and doctors to elicit their ideas about homosexuality.”<sup>158</sup> Even the typically anti-political Baudry went public with calls “for a repeal of the discriminatory laws of 1945 and the Mirguet amendment of 1960,” in September 1970.<sup>159</sup> Emboldened by heightened visibility of homosexuals and his growing public stature, Baudry sent a letter in November 1972 to the Ministry of Justice decrying aggravating circumstances for homosexuals in cases of public indecency and asking that the age of homosexual majority be lowered to eighteen.<sup>160</sup> It is remarkable that at this time Baudry still thought it too controversial to directly ask the Minister for the equalization of homosexual and heterosexual sexual majority.

Between 1972 and the election of the left in 1981, Baudry sent more than five letters to the Ministry of Justice asking for the erasure of mentions of homosexuality in the Penal Code. All mentioned the equalization of the age of sexual majority at fifteen after 1976, just two years after it had been lowered to eighteen. These appeals, especially after the ascent of Giscard’s liberal reformism in 1974, staked their intervention “on the name of the foundational principle of the equality of all before the law.”<sup>161</sup> In other words, they appealed to the formal equality that liberalism was supposed to guarantee. In 1972, Baudry received a response from the Minister of Justice himself; in 1976 his letter was advanced all the way to the Prime Minister, whose assistant assured Baudry that the CRCP was reviewing the matter.<sup>162</sup> When Arcadie sent similar letters to the members of the Parti socialiste, Mouvement radical, Parti communiste français, and Fédération nationale des républicains et indépendants, all responded favorably to the abolition of

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<sup>158</sup> Jackson, 109

<sup>159</sup> Baudry, “Dix-huit ans,” *Arcadie*, no. 201 (September 1970): 370–74, cited in Jackson, 182.

<sup>160</sup> Letter from André Baudry to René Pleven, November 10, 1972, Archives Nationales, SL 1320-17

<sup>161</sup> Letter from André Baudry to the Minister of Justice, July 19, 1976, Archives Nationales, SL 1320-17.

<sup>162</sup> Response to Mr. Baudry, October 26, 1976, Archives Nationales, SL 1320-17.

330-2, and all except for the FNRI promised to “discuss” the matter of discriminatory sexual majority.<sup>163</sup>

While movements like the FHAR and the GLH refused to view homosexual’s concerns as distinct from the capitalist woes and sexual interdictions of the public, Baudry sought to add homosexuals to the anti-discrimination law passed in 1974 because they were a distinct “sexual minority.” As such, homosexuals would be entitled to judicial protection to counteract individual discrimination from assailants, employers, and landlords. Baudry struggled with whether pedophiles qualified as sexual minorities in need of protection from societal discrimination too. He allowed such propositions to be covered extensively in the journal throughout the 1970s, and even swore that for “twenty-two years *Arcadie* has defended and illustrated pedophilia,” alongside a review of Gabrielle Matzneff’s *Les moins de seize ans* in 1975.<sup>164</sup> Yet, by the time the Senate began to discuss the equalization of the age of sexual majority in 1978, when it became clear legislators were concerned with the protection of minors and the anchoring of the age of consent, Baudry no longer hinted at any sympathy for another sexual minority. His decision in 1982 to close *Arcadie* after the equalization of sexual majority while, as we will see in Chapter Three, rival gay rights organizations continued to press to lower sexual majority to thirteen, or lower, put the nail in the coffin for Baudry and *Arcadie*’s’ considerations of an alliance between the homosexual and pedophile movements. Formal equality for homosexuals had been won—little else mattered to Baudry.

### *Foucault’s “Nuanced Protection”*

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<sup>163</sup> Baudry, “Les Elections,” *Arcadie*, cited in Jackson, 213.

<sup>164</sup> Baudry, “Livres anciens, livres nouveaux: Les moins de seize ans,” *Arcadie*, January 1, 1975.



In early May 1977, just as he was coordinating the publication of the May 23rd *Le Monde* petition, the CRCP invited Foucault to present on the “subject of moral infractions.”<sup>165</sup> Then a professor at the prestigious College de France, Foucault had been suggested to the committee by a colleague, just a year after he had released *The History of Sexuality, Volume One*. In this volume, Foucault had briefly broached the topic of sex between majors and minors, telling the story of the Lorraine peasant name Jouy, a “village half-whit” who “would give a few pennies to the little girls for the favors the older ones denied him.”<sup>166</sup> For Foucault, Jouy’s subsequent arrest, analysis, trial, and commitment illustrates the staggering mobilization of expertise and judicial power, which he characterizes as a shockingly “petty” prosecution and overemphasis of once “inconsequential bucolic pleasures.”

Feminist academics in the 1990s had a field day with this callous dismissal of molestation’s (*Attentat à la pudeur*) significance. No less than a dozen articles questioned the *History of Sexualities*’ ramifications for sexual violence.<sup>167</sup> Critics like Linda Martín Alcoff concluded that Foucault could not see the need for the protection of minors in law because his folly was to consider pleasure—unlike sexuality—as a field of experience outside of power. However, when Foucault presented to the CRCP, nuanced protection was the center of his suggested system’s logic. Most writings on Foucault’s stance on the age of sexual majority have

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<sup>165</sup> Letter from Christian Feuillard, Magistrat à la direction des Affaires criminelles et des Grâces, to Michel Foucault, May 11, 1977, Archives Nationales, D 10256.

<sup>166</sup> Michel Foucault, *History of Sexuality, Volume 1: An Introduction*, trans. Robert Hurley (New York: Vintage, 1990), 32.

<sup>167</sup> A few examples include: Linda Martín Alcoff, “Dangerous Pleasures: The Politics of Pedophilia,” in *Feminist Interpretations of Michel Foucault*, ed. Susan J. Hekman, Re-Reading the Canon (University Park: Pennsylvania State University Press, 1996); Susan Bordo, “Feminism, Foucault, and the Politics of the Body,” in *Reconstructing Foucault: Essays in the Wake of the 80s*, ed. Silvia Caporale-Bizzini and Ricardo Miguel-Alfonso, Postmodern Studies 10 (Amsterdam: Ed. Rodopi, 1994); Winifred Woodhull, “Sexuality, Power and the Question of Rape in Foucault,” in *Feminism & Foucault: Reflections on Resistance*, ed. Irene Diamond and Lee Quinby (Boston, MA: Northeastern University Press, 1988); Caroline Ramazanoglu, *Up against Foucault: Explorations of Some Tensions between Foucault and Feminism* (London: Routledge, 1993).

focused on a joint *France Culture* interview he gave with Hocquenghem in 1978 and overlooked his much more extensive presentation to the CRPC. In doing so, they not only flatten his stance with the radically pedophile-apologetic and pro-abrogation stance of Guy Hocquenghem, but, as we will see in Chapter Three, mischaracterize the driving intellectual force behind sexual violence reforms.<sup>168</sup>

For Foucault, the age of sexual majority was a useful legal abstraction for the moment when an individual could participate in sex without a heightened specter of coercion. But to truly ascertain whether a subject was capable of consent, the age of sexual majority needed to be rationalized and suspend matters of morality. Minority would function as a level under which judges would be hypersensitive to the possibility of coercion. It would not be a universal line beneath which a lack of consent would be assumed; it could not differentiate between heterosexual or homosexual partners. In both his affirmation of consent as a workable concept, his acceptance of the narrative of the development of the willing subject as too entrenched to be challenged, and the need for rational and secular law, Foucault seemed remarkably liberal when policymakers asked him to distill his thought into legislative prescriptions.

Foucault went to the CRPC on the morning of May 11<sup>th</sup> as a historian, not a philosopher, for the "prospective of a legislative reform" demanded an analysis of "the historical processes that undergird the texts of the Code," before the commission could then "take up the evolution of society that new laws should reflect."<sup>169</sup> In search of dramatic breaks in the justificatory ideals of sex crimes, Foucault sketches a Revolutionary and Counter-Revolutionary period. From the

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<sup>168</sup> It is likely this flurry of exegeses did not consider the report because it was not published, unlike Michel Foucault et al., "La loi de la pudeur," in *Dits et écrits: 1954-1988*, vol. 3, 4 vols., Bibliothèque des sciences humaines (Paris: Gallimard, 1994), 763–76.

<sup>169</sup> "Dans la perspective d'une réforme législative, il convient d'analyser le processus historique qui sous-tend les textes du code pour dégager ensuite l'évolution de notre société que les lois nouvelles devront refléter." *Audition de M. Foucault dans le résumé de la 55ème séance plénière de la CRCP*, May 27, 1977, Archives Nationales, D 10256, 4.

Enlightenment to the Napoleonic Penal Code of 1810, legislators decriminalize taboo sexual conduct like adultery or sodomy, while in the nineteenth and twentieth centuries the regulation and prosecution of sexual conduct proliferates in what he calls a “juridification of sexuality.”<sup>170</sup> The age of sexual majority, which appeared in the second period, was a product of the development of a biopolitics that made childhood a privileged site of state attention for its developmental importance and the growth of the surveillance apparatuses that made such regulation possible.

The most recent rupture in Foucault’s telling had been the rise of a “new penal system,” which, taking up the twentieth century’s concerns about youth and sexuality, abandoned the 19<sup>th</sup> centuries’ rhetoric of a general defense of the “public order or social morality” and narrowed its targets to populations vulnerable to “certain manifestations of sexuality that are susceptible to carry threats to the [their] physical or mental health.”<sup>171</sup> Parts of the Code had not caught up with this new discursive reality, and accordingly he advocates for the decriminalization of *Attentat aux bonnes mœurs* (translated as violations of morality, or indecent offenses) and aggravating circumstances for homosexuals under public indecency law. If the CRCP were to proceed with decriminalizing general interdictions, however, Foucault argues that the CRCP must equally interrogate “which categories of the population to protect.”<sup>172</sup>

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<sup>170</sup> “Cette juridification de la sexualité correspond à un phénomène historique qui reflète les grands axes de notre société. Elle révèle des processus profonds et complexes parfois irréversibles. Parmi eux il est possible d’indéterminer deux: le premier, plus modifiable et d’ordre institutionnelle : l’effet d’entraînement dû aux surveillances policières. [...] Le second, plus fondamentale: le développement d’une bio-politique.” Résumé, *Audition de M. Foucault*, 3.

<sup>171</sup> “L’intervention de la loi est justifiée, non plus au regard d’un “ordre public” ou d’une “morale sociale” à protéger, mais parce que certaines manifestations de la sexualité sont susceptibles de porter atteinte à la santé physique ou mentale de la population,” Résumé, *Audition de M. Foucault*, 4.

<sup>172</sup> “Se pose [...] le problème des modalités de protection de certaines catégories de la population : les femmes, les enfants, les handicapés physiques ou mentaux.” Résumé, *Audition de M. Foucault dans le résumé de la 55<sup>ème</sup> séance plénière de la CRCP*, 4.

Foucault lays out who demands protection. Mindful of feminist efforts to repress sexual violence, women are the first recipients of protection. In Foucault's telling, the "desegregation" of women and their growing presence in the workplace has exposed them to new heights of male sexual aggression, begging for new legislation if formal equality is ever to be reached. Though rape had been criminally punished since 1789,<sup>173</sup> its elusive definition as a penetrative act against an unmarried woman not only resulted in lesser or entirely evaded consequences for perpetrators who committed sexual violence against members of their own sex, wives, or only committed non-penetrative acts, but also betrayed the justificatory moral order behind it:

The overcriminalization of rape compared to *attentat avec violence* was the reflection of a society that attributed a great price to virginity, forbidding abortion and reserving less favorable treatment for illegitimate children; these values revealed a certain image of the woman, considered less a subject of law than an object, a component of the tryptic marriage-procreation-family. This cartography must be eliminated if we wish to make the woman a subject and assure to her an effective right to sexual liberty. *All forms of sexual violence must be foreseen and reprimanded by a single text* [sic]; it will be left to tribunals to decide the applicable sentence by considering, notably, the nature of the act, the number of actors, and the nature of their relationship to the victim.<sup>174</sup>

This extensive conversation around sexual violence against women makes evident that Foucault saw it as intertwined with the age of sexual majority. In discussing majority, he did not simply avoid the question of sexual violence, though he does refuse the assimilation of sexual violence with all sex acts involving minors. Rather, as we will see, Foucault argues that an uneven and illogical standard had been applied in the case of both women and children, one that betrays a natalist Penal Code which treated them as objects.

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<sup>173</sup> Vigarello, *Histoire du Viol*, 87.

<sup>174</sup> "La sur-pénalisation du viol par rapport à l'attentat avec violence était le reflet d'une société qui attribuait un grand prix à la virginité, interdisait l'avortement et réservait un sort moins favorable aux enfants illégitimes ; ces valeurs étaient révélatrices d'une certaine image de la femme, considérée moins comme un sujet de droit que comme un objet, une composante du triptyque mariage – procréation – famille. Il convient d'éliminer cette "cartographie" si l'on souhaite faire de la femme un sujet et lui assurer un droit effectif à la liberté sexuelle. Toutes les formes de violences sexuelles doivent être prévues et réprimées par un texte unique ; il appartiendra aux tribunaux d'apprécier la peine applicable en tenant compte, notamment, de la nature du comportement, du nombre des auteurs, des liens avec la victime." Résumé, *Audition de M. Foucault*, 4.

Children are the second category of individuals needing protection, given their “their state of little resistance, their relative incapacity to give free consent and the repercussions of certain behaviors on their future.”<sup>175</sup> Foucault does not believe in the total abrogation of sexual majority. He does, however, extensively criticize sexual majority as it stood in 1977 as an unsatisfactory system of “over protection.”<sup>176</sup> Laws like *Attentat à la pudeur* and *Détournement de mineur* assumed children to be asexual, a “pure object,” rather than a “subject” with their “own sexuality.” These laws also failed to account for the fact that an individual could be equally “wounded” from sexual majority’s “interdictions.” Such a system was incongruent with the ongoing “emancipation” of the child by the increasing availability of erotic mass media and sexual education. Minors needed to be protected, but to deny those at the boundaries of adolescence any agency or the legal possibility of willful desire through the presumption of victimhood and non-consent posed significant flaws.

Foucault accordingly sets out on a search for “nuanced but absolute protection,” a system that could weigh the power indifference between majors and minors against the true desires of adolescents.<sup>177</sup> Such a system would focus on those under thirteen, but leave judges “able, beyond this age, to find opportunities for sentencing.” Foucault’s choice of thirteen was influenced by Scandinavian counties’ liberalization process as an example to follow, which had

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<sup>175</sup> “Les enfants — leur état de moindre résistance, leur relative incapacité de donner un consentement libre et les incidences de certains comportements sur un avenir font des enfants une catégorie spécifique appelant une protection particulière.” Résumé, *Audition de M. Foucault*, 5.

<sup>176</sup> “Le système actuel de ‘surprotection’ n’est pas satisfaisante, la loi ne tenant pas compte : de la sexualité propre de l’enfant, qui est à cet égard un sujet et non pas un pur objet ; des blessures résultant des interdits ; du « désenclavement » de l’enfant par les dispositifs de consommation, de masse médias, d’éducation sexuelle” Résumé, *Audition de M. Foucault*, 5.

<sup>177</sup> “Or la loi doit protéger la sexualité de l’enfant dans sa spécificité et son développement. La fausse présomption de non-sexualité de mineur est à rejeter, de même que la simulation abusive des actes commis avec l’enfant et sur l’enfant. Il convient à cet égard de distinguer les comportements selon qu’il résulte d’une violence ou d’une intimidation, ou qu’ils ont été consentis par la victime. Cette *sur-protection nuancée* [emphasis mine] mais absolue doit être réservée aux mineurs de 13 ans, le juge pouvant toutefois, au delà de ce seuil, apprécier l’opportunité d’une condamnation. Enfin, des règles de procédure doivent être prévues, qui laisseront l’enfant à l’abri de la machinerie pénale.” Résumé, *Audition de M. Foucault*, 5.

been reported on in the French press as early as 1973,<sup>178</sup> and was also a region he spent time in as a professor at the University of Uppsala between 1955 and 1958.<sup>179</sup> Though it approximated the age of thirteen as a milestone in the subject's development, his approach would reject the Anglo-American model of statutory rape, instead applying an evaluative approach on a case-by-case basis. Foucault explains:

The law must protect the sexuality of the child in its specificity and development. The false presumption of the asexuality of the minor is to be rejected, as is the abusive assimilation of acts committed *with* the child and *on* the child. It is necessary in this regard to *distinguish behaviors* which result from *violence* or *intimidation*, or that are *consented to* by the victim.<sup>180</sup>

The overly broad and unsatisfactory nature of sexual majority or a statutory rape component was often cited by Foucault, and it is indeed one of the motivating arguments of all the signatories. In his discussion on *France Culture* in 1978 with Guy Hocquenghem, whose distinct vision of sexual legislation we will come to, Foucault reiterated that a “barrier of an age fixed by the law made little sense,” not only because of the possibility of precocious children, but also because such a law has nothing to say about minors over fifteen or eighteen who are “obliged” by those in positions of power over them to sexual acts.<sup>181</sup> In this telling, statutory rape, in focusing on the nature of the victim, distracts sexual legislation from its true mission: prohibiting and punishing mutually-undesired sex.

Notes from the Commission hearing show that Foucault's Presentation was well received. Members were particularly convinced by the ambiguous possibility of younger adolescent's consensual participation in sex, which was a “delicate matter” that indeed needed revision. Foucault's recommendation to individualize the process at correctional tribunals rather than

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<sup>178</sup> “Le danemark va avoir la "majorité sexuelle" la plus basse d'europe: quatorze ans,” *Le Monde*, February 19, 1973. Foucault suggests Scandinavian countries as an example, and his surprise at the susceptibility of the CRCP in an interview with Gai Pied editor Jean Le Bitoux in June 1979.

<sup>179</sup> Macey, 73

<sup>179</sup> Résumé, *Audition de M. Foucault*, 5.

<sup>181</sup> Foucault, “La loi de la pudeur,” in “Fous d'enfance,” *Recherches*, 81.

create an age of consent along the lines of statutory rape was seconded by an attendee who remarked that “given the uncertainty of consent, I prefer an arbitrary decision by a judge rather than an arbitrary law.”<sup>182</sup> When the philosopher of power met the legislators, the question of sexual majority became one of reasoned reform, not radical revision.

*Françoise Dolto: Majorité at the Center of Psychoanalytic Development*

Françoise Dolto signature on the May 1977 petition was a surprise. Foucault, Baudry, Hocquenghem, and Sherer were all known critics, but as a family-adulating child psychoanalyst who early in her career publicly blamed a murderous case of teen delinquency on “latent homosexual desire,” Dolto was an unexpected fellow traveler. Born in Paris to a bourgeois family in 1908, Dolto became known in the 1950s as the founder of a parental training school, the Ecole des parents. A popularizer of the psychoanalytic theories of Jacques Lacan, she gained outright celebrity in the 1970s by advising parents over the radio on how to best raise their children by respecting them as near adults, but in a way that reinforced normative notions of the development of healthy children, families, and communities.<sup>183</sup> Thus Dolto’s presence was shocking. It was only to her that the far-right daily *Minute* felt the need to respond, amused that *France Radio* would allow her to host her show *Lorsque l’enfant paraît* after she had signed a leftist petition to “decriminalize homosexual and heterosexual relations between children and adults.”<sup>184</sup> Foucault and Hocquenghem held up her support as a sign of broad ideological convergence with their mission.<sup>185</sup> In 2001, after the *Le Monde* petition had been problematized

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<sup>182</sup> Comments relayed in Antoine Idier’s *Les alinéas au placard*, 77 but can also be found in Archives Nationales, D 10256.

<sup>183</sup> Camille Robcis, *The Law of Kinship: Anthropology, Psychoanalysis, and the Family in France* (Ithaca, NY: Cornell University Press, 2013), 125-140. For more on Dolto, see Richard Bates, *Psychoanalysis and the Family in Twentieth-Century France: Françoise Dolto and Her Legacy* (Manchester: Manchester university press, 2022).

<sup>184</sup> “Specialiste,” *Minute*, June 22, 1977.

<sup>185</sup> Foucault et al, “La loi de la pudeur,” in “Fous d’enface,” *Recherches*, 69.

in a round of child abuse news, Dolto's own daughter was still trying to publicly make sense of her mother's signature, suggesting that she may have been "tricked" into signing the proposal.<sup>186</sup>

In her own writing, Dolto articulated a critique of sexual majority and a vision for the future Code that was distinct from her cosignatories in its wish to protect children from sex with adults, but similarly identified sexual majority's imprecision as a source of social subjugation of certain developed children. When an accused pedophile assumed upon reading the petition that she might testify on his behalf as an expert, she passionately declined by letter in November 1977, which was published the following year.<sup>187</sup> Her suggested reforms are best characterized by an individualized application of psychoanalytic and biology-informed developmentalism. She coincided with Foucault on three points: one, that mutual desire should govern the line between legal and illegal sex; two, that the homosexual or heterosexual nature of unwanted acts should have no bearing on their punishment by the legal system; and three, that the penal interrogation of mutual desire should take place on an individualized and case by case basis, rather than broad interdictions in the style of statutory rape. She broke with Foucault in privileging psychoanalysis as a legal tool, arguing that all relationships between adults and youth are traumatic, and suggesting an expansion of sexual education from primary school.

Dolto was most interested in honing sexual majority along individual and development-based terms. Defending herself to *Minute*, she explains that sexual majority at fifteen "makes no distinction between children minors, prepubescent minors, adolescents, and the young men and women who are sexually adults." Rather than a developmental phase like nubility or puberty, the law chooses the age of fifteen, something Dolto finds as arbitrary as "becomes responsible enough overnight to vote at eighteen." She finds it equally as disturbing that the law would treat

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<sup>186</sup> Catherine Dolto, "Pédophilie: des amalgames irresponsibles," *Le Monde*, March 10, 2001.

<sup>187</sup> Françoise Dolto, Response to *Minute*, July 8, 1977.



a major having sex with a post-pubescent fourteen-year-old in the same manner as a pre-pubescent child, finding it “urgent that the law cease to put all minors on the same level whatever their age is.”

Echoing the concerns of Bertrand Boulin and the *Charte des enfants*, the possible use of sexual majority as a tool for parental domination motivates Dolto’s critiques. Ever the normative psychoanalyst, Dolto argued that if children were to develop properly, law needed to be repudiated as a tool of parental power, which allows “numerous parents to *sadiser* their children and without their freedom” or “file charges against their friends, whether sexual or not, frustrating the development of healthy bonds.”

Dolto was interested in the sexuality of children as a moment for state intervention in the form of education, which will not only prevent the individual trauma of incest, which she claims is ever present and, on the rise, but also youth delinquency. Sex Education—which had just been introduced into the French curriculum in 1973—from primary school on would teach children that their “siblings and parents do not have the right to their body,” and encourage the development of “responsibility in the domain of sexuality.”<sup>188</sup>

It should be noted that though Dolto lent her name and expertise to the petition of May 1977, her participation in the political process did not mirror that of Foucault’s. Her interventions were limited to sexual education reform and public discussion of the contradictions of sexual majority. Though the CRCP’s commission on “attacks on sexual liberty” discussed its interest in speaking with Dolto in March 1977 as it planned to meet with Foucault, it seems Dolto never took the offer.<sup>189</sup> She also vehemently distanced herself from the pedophile apologetic aspects of

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<sup>188</sup> Dolto, “Extraits d’une lettre à propos d’un procès en cours,” November 11, 1977, printed in “Fous d’enfance,” *Recherches*, 86.

<sup>189</sup> Handwritten notes from CRCP Sous-commission, March, 25 1977. Archives Nationales, D 10256.

the movement, declaring that “relationships between adults and minors are always traumatizing,” but maintaining her stance that the age of sexual majority enforced by article 331 had little biologically or psychoanalytically-supported logic to it and was in dire need of reform.<sup>190</sup>

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<sup>190</sup> Dolto, “Extraits d’une lettre,” in “Fous d’enfance,” *Recherches*, 84.

### III: Codifying Consent: Legislators and the Liberalization of Sexual Majority

In the afternoon of the 28<sup>th</sup> of July 1978, the Socialist senator for the region of Gard Edgar Tailhades invoked the mantle of humanist struggle against “barbarism” to present his committee report on a bill for “the repression of rape”

“Is rape—of which the details are always odious, which leads to so many tragic situations, and which provokes so much physical and moral trauma—not in truth one of the terrible evils from which the human community, judging its ravages unbearable, undertakes the faultless and vigilante mission to protect itself? [...] It has become evident [...] that the current legislation on rape is incontestably maladjusted to do so.”<sup>191</sup>

So opened a chorus of denunciations in the Palace of Luxembourg, with Senators across the political spectrum eager to name this “odious and intolerable crime,”<sup>192</sup> to protest a “judicial laxism”<sup>193</sup> that had unleashed a new “social plague” of sexual violence, and to articulate efficient “methods of social prevention.”<sup>194</sup> Rape loomed large, but the legislation before them—a conglomeration of proposals by the Ministry of Justice, independent centrists, the Parti socialiste, and the PCF—was only dedicated to the matter in part. This was a discussion of all realms of sexual violence: rape, sexual assault, and the age of sexual majority. What had now been a culturally contested issue for a decade was taken up by legislators. Less we be fooled by their outrage against “laxity,” their proposal was not an unbalanced lunge toward carceral feminism. In fact, as Tailhades and his fellow committee members expounded on their legal solutions, one thing became clear: Foucault’s words—transmitted by the CRCP—were in their mouths.

This chapter argues that the product of legislator’s reconsideration of sexual violence, the Law of December 23, 1980, reflected the proposals of Foucault, Dolto, and Baudry in staking sexual violence on the violation of consent, reorganizing the punishment of such crimes to reflect degrees of coercion, and determining the severity of such coercion on an individual basis before

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<sup>191</sup> Edgar Tailhades, *Débats Parlementaires*, Séance du 27 juin 1978.

<sup>192</sup> Robert Schwint, *Séance du 27 juin 1978*, 1790.

<sup>193</sup> Edgar Tailhades, *Débats Parlementaires*, Séance du 27 juin 1978.

<sup>194</sup> Monique Pelletier, *Débats Parlementaires*, Séance du 27 juin 1978.

magistrates instead of full courts. The move to make consent the cornerstone of sexual violence law became a struggle when it came to the matter of Baudry's non-discrimination: The center and right hesitated to extend the primacy of consent to gay youth and retained sexual minority as an illiberal tool of law to coerce adolescents into specific familial and sexual practices.

This denial of consent to gay teens brought the politics of sexual majority to the street and ballot box after the failure of the 1980 law to equalize the age of sexual majority, as thousands marched for the abrogation of article 331-2 and politicians clarified their stances. After the election of pro-abrogation François Mitterrand and a socialist majority in the Summer of 1981, sexual majority was equalized on the promise that it would be anchored at fifteen. Despite the continued clamoring of some gay rights groups who shared Hocquenghem and Schérer's vision of sexual majority as a nefarious and unfounded denial of freedom to children, this would not change. What remained after 1982, and was reinscribed in the New Penal Code of 1992, was almost identical to Foucault's vision of nuanced protection.

### *From Foucault to French Law*

As discussed in Chapter II, the CRCP had well received Foucault's presentation in May 1977, especially convinced by his equation of violence or constraint with non-consent, his prognosis of the difficulties this definition engendered when it came to certain at-risk groups, and his subsequent recommendation to individualize the process at correctional tribunals rather than create an age of consent. They thus suggested his "nuanced protection" in a legislative proposal to the Ministry of Justice with one exception: the age where this protection would start would stay at fifteen.<sup>195</sup> The Senate Commission headed by Tailhades took up sexual violence from an

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<sup>195</sup> CRCP, 56ème séance plénière. Archives Nationales, D 10256.

original feminist interest in ameliorating the prosecution of rape, but when Tailhades' Commission of Laws began its work in 1977 it merged proposals for rape reform with the broader recommendations of the Ministry of Justice, whose input was delivered by Monique Pelletier, the Ministry's head of Family and Feminine Condition Policy.

Despite the broadening of the legislation's focus, the primary concern of legislators remained the definition of rape, for it had none statutorily recorded. article 332 of the Penal Code, which had been written in 1791 and put into its contemporaneous form in 1810, only stipulated that "whoever commits the *crime* of rape will be punished by a sentence of ten to twenty years in prison," opening a tautological definition to be decided by the courts.<sup>196</sup> Jurisprudence had since filled the ambiguity, defining rape as "illicit coitus with a woman known to not have consented."<sup>197</sup> "Illicit" disqualified married women from rape victimhood, and the legal gendering of the victim as a woman relegated any alleged sexual aggression including a male victim to the category of *Attentat à la pudeur* (literally an attack on one's decency), which carried far lesser penalties. The law of 1980 would specify that "all acts of sexual penetration, no matter their nature, committed on another by violence, constraint or surprise, constitute a rape."<sup>198</sup>

If rape was no longer about the violation of a married woman, the relationship between rape and its lesser cousin, *Attentat à la pudeur*, needed to be reclarified. Article 331 and 332-1 split *Attentat à la pudeur* into two categories: those committed "without violence" and "with violence." *Attentat à la pudeur avec violence* was a subject of consternation, for its definition was nearly the same as the envisioned rape reform's and in the past had been used to prosecute

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<sup>196</sup> Georges Viragello, *Histoire du viol*, 118.

<sup>197</sup> Georges Viragello, *Histoire du viol*, 248.

<sup>198</sup> Loi n 80-1041 du 23 décembre 1980 relative à la répression du viol et de certains attentats aux mœurs.

sexual violence against unmarried women and homosexuals with lesser charges, leading some to argue that it was evidence of the Code's irreverence for sexual violence that did not threaten the honor of fathers. Robert Schwint called the distinction between the two a "relic of reproduction" as the rubric of sexual legislation.<sup>199</sup> Both Foucault and the CRCP recommended *Attentat à la pudeur avec violence*'s repeal in 1977.<sup>200</sup> Because it allowed for the prosecution of non-consensual non-penetrative sex acts, it was ultimately retained so as not to deprive prosecutors of a "tool" in the "repression of sexual violence."<sup>201</sup> The legislature never considered entirely abandoning *Attentat à la pudeur sans violence*, but both the CRCP and the Communist proposal discussed renaming the crime to reflect a shift away from morally justified law, though the CRCP decided to recommend the temporary "maintenance of the terminology that was sufficiently generic and the signification of which remains clear for the public," a recommendation which the senate affirmed.<sup>202</sup>

The maintenance of *Attentat à la pudeur* entailed sustained reflection on whether to maintain varieties' designation as a *crime*, the highest level of infraction in the Penal Code, rather than a *délit*, the French equivalent of a misdemeanor. The significance stemmed from the disparate prosecutorial procedures for *crimes* and *délits*. *Crime* was tried before a full Assize Court, often including a jury, and allowed for higher penalties; *délits* were put before a magistrate, who decided a closed case with sentencing restraints. The law "correctionalized" (*correctionnaliser*) *Attentat à la pudeur*,<sup>203</sup> that which Both Foucault and the Senate Commission of Laws had

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<sup>199</sup> Robert Schwint, Séance du 27 juin, 1791.

<sup>200</sup> CRCP, 56ème séance plénière, Archives Nationales, D 10256.

<sup>201</sup> Sénat rapport, 13 mai 1980, Archives Nationales, SL 1154.

<sup>202</sup> CRCP, 56ème séance plénière, Archives Nationales, D 10256.

<sup>203</sup> Sénat rapport, 13 mai 1980, Archives Nationales, SL 1154.

recommended, believing the complicated, semi-public, and long-lasting procedures of assize courts often traumatized young victims more than the original encounter.<sup>204</sup>

Preserving and clearly defining rape for the first time, *Attentat à la pudeur avec violence*, and *Attentat à la pudeur sans violence*, the Senate and Assembly then discussed sentencing reform. Though the intent of the law was the prevention and reduction of sexual violence, French legislators—particularly in the Senate—did not pursue the augmentation of penalties. Instead, they sought, in the words of Socialist Senator Louis Virapoullé, to “hand to the judiciary a softer *scale* of penalties that are better adapted, more balanced, and in doing so, better applicable.” Tailhades’ pronouncement that “if the sword of law falls too heavily on the guilty, those who must wield it will hesitate to use it,” elicited a “très bien!” from the UDF senator and morality hawk Étienne Daily.<sup>205</sup> The Senate’s first bill lowered the penalty for rape to five to ten years, down from ten to twenty, though that duration was preserved for rapes involving “the vulnerable.”<sup>206</sup> Halimi, a year after her victory at Aix-en-Provence, had to step in in the press to say that “as long as other crimes receive 20 years in Prison, rape should too.”<sup>207</sup> Ultimately 10 to 20 years, with life in prison for abuse of the vulnerable, was decided upon. The Senate and National Assembly lowered the maximum sentence for *Attentat à la pudeur avec violence* to 10 years, and *Attentat à la pudeur sans violence* to five.

In addition to “balanced” penalties, legislators sought to dismantle a “system of disqualification” to augment the reporting of rape that accomplished Foucault’s interest in leaving victims “safe from the penal machinery” and press’s horrors.<sup>208</sup> Though Socialist and

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<sup>204</sup> For an example of the psychological impact of pre-1980 prosecutions of *Attentat à la pudeur* as a crime and not délit, see Jean-Jacques Passay, “L’incapacité juridique à la Plaisir,” which appears in “Fous d’enfance,” *Recherches*, 31.

<sup>205</sup> *Débats Parlementaires*, Sénat, Séance du 27 juin 1978, 1787.

<sup>206</sup> Loi n 80-1041 du 23 décembre 1980 relative à la répression du viol et de certains attentats aux mœurs.

<sup>207</sup> “À la demande des féministes: Les députés vont débattre du viol,” *Le Monde*, 4 April 1980.

<sup>208</sup> Résumé, *Audition de M. Foucault*, 5.

Communist proposals had entailed material investments in hospitals and local prefectures to put women to work in rape crisis centers, speed up crime analysis, and disseminate information, the final law took a purely legal approach. For one, it encouraged current doctors to report rape by loosening patient privacy laws to allow them to report directly to the prefecture prosecutor with simple affirmative consent from their client. Second, the law combatted the “fear of humiliation” held by potential accusers by attempting to build a robust victim’s right to privacy.<sup>209</sup> The National Assembly amended the Press Law of 1881 to bar the publication of victims’ identities, and the Senate gave victims full control in establishing or rejecting a closed case in rape proceedings. In addition, the final law allowed organizations that “had a stated interest in the fight against sexual violence” assist victims in court as a civil party.<sup>210</sup> Associations like Halimi’s *Choisir* could now coordinate and advocated on behalf of sexual violence victims, rather than leaving them alone to navigate the penal system.

All in all, the policy proscriptions of the law of 1980 accorded with the recommendations Foucault had made to the CRCP. In that sense, the May 1977 petition had not been a cry from the ivory tower into the void. But Foucault and Baudry’s shared goal, the abrogation of a separate age of sexual majority, faced choppy waters that reflected both an unwillingness by the right to give up moral interventionism, and a battle for what the overarching justification of sexual violence laws would be after the filiation’s demise.

### *Consent versus Dignity: Gay Teens and the Persistence of Moral Interventionism*

Lawmakers had offered an exposé of their motives before presenting their actual proposed reforms to articles—and they each began by articulating a new justificatory logic for

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<sup>209</sup> Pelletier in Débats Parlementaires, Séance du 27 juin 1978, 1788-89.

<sup>210</sup> Loi n 80-1041 du 23 décembre 1980 relative à la répression du viol et de certains attentats aux mœurs.



the prosecution of sexual violence. To Tailhades, seconded by Pelletier, the harsh punishments and narrow definition of rape by the old Penal Code betrayed its motivation to be “the preservation of the family” rather than the dignity or bodily integrity of victims.<sup>211</sup> Since an “evolution of mores” had discarded the relevance of paternal control and pure filiation, and the advent of contraception had severed sex from the reproductive matrix, the definition of Rape needed new ideological anchoring.<sup>212</sup>

When the bill reached the National Assembly, the age of sexual majority drew the bubbling dispute over these principles to the surface. Raymond Forni, the socialist Assemblyman from Belfort-Campagne, argued the reform’s overarching principle was “the right to pleasure,” under which homosexuals over fifteen had just as much of a right to consensual sex as their heterosexual counterparts. The law “only needed to intervene” when the “right to free use of one’s own body” was violated by rape, understood under this principle as an “attack on the liberty of others.”<sup>213</sup> Other legislators, like Jean Foyer of Maine-et-Loire and Nicholas About of Yvelines placed emphasis on the law’s attempt to reinforce “dignity and respect of the person,” deemphasizing the logic of liberty and sexual rights. Foyer cites the nineteenth century theologian Laccordaire, “between the strong and the weak, it is the law than emancipates and liberty that oppresses,” suggesting any reforms ought to reset scales to recognize and protect victims of sanctioned forms of sex.<sup>214</sup>

Combined with a rhetoric of dignity, proponents of the preservation of a distinct homosexual age of sexual majority assimilated the preservation of *any* fixed age with the maintenance of a discriminatory one. When Paullette Fost, a communist assemblywoman from

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<sup>211</sup> Edgar Tailhades, *Débats Parlementaires*, Séance du 27 juin 1978, 1785.

<sup>212</sup> Edgar Tailhades, *Débats Parlementaires*, Séance du 27 juin 1978, 1785.

<sup>213</sup> Raymond Forni, *Débats Parlementaires*, Assemblée Nationale, 2e Séance du 11 avril 1980, 328.

<sup>214</sup> Jean Foyer, *Débats Parlementaires*, Assemblée Nationale, 2e Séance du 11 avril 1980, 341.

Seine-Saint-Denis, open debate to oppose the lower age of consent floated in the press by intellectuals, saying “problem of certain chants of liberty [...] that under the cover of the rights of individuals, including children, to live their sexuality as they wish, assimilate this claim with the “tolerance” on practices like pedophilia and even the prostitution of minors,” Jean Foyer seamlessly switched the subject of debate to 331-2 and discuss minors above fifteen.<sup>215</sup> Therein Foyer puts a politics of disgust on full display— it was “repugnant” to him to think that despite “establishments receiving feeble, handicapped, and mentally ill minors from fifteen to eighteen, the sanctions those who commit homosexual acts there on minors would be abrogated under the current law.”<sup>216</sup> The government, still represented by Pelletier, who had endorsed the abrogation of 331-2 in the Senate, agreed and “submitted itself to the wisdom of the assembly” to determine the question.<sup>217</sup> Assemblyman About reminded the Socialist opposition that “one is still an adolescent between fifteen and eighteen,” and that the senators “do not have the right to permit an adult to profit upon the vulnerability of a child or adolescent, you with the duty to preserve [the child’s] personage and future.”<sup>218</sup>

The question of abrogating the higher age of sexual majority for homosexual acts thus became in part one of the (in)adequate protection of minors. Socialists and Communists argued that adequate protections existed for minors between fifteen and eighteen without the discriminatory article against homosexuals, since language punishing those who abused their authority or involved minors in prostitution remained in the Senate law. Further, if Foyer and the right were truly concerned about the personhood and dignity of minors over 15, why would they not protect women who had sex with older men? In the words of Phillipe Marchand, why could

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<sup>215</sup> Paulette Frost, *Débats Parlementaires*, Assemblée Nationale, 2e Séance du 11 avril 1980, 339.

<sup>216</sup> Foyer, *Débats Parlementaires*, Assemblée Nationale, 2e Séance du 11 avril 1980, 340.

<sup>217</sup> Pelletier, *Débats Parlementaires*, Assemblée Nationale, 2e Séance du 11 avril 1980, 340.

<sup>218</sup> Nicholas About, *Débats Parlementaires*, Assemblée Nationale, 2e Séance du 11 avril 1980, 341.

an 81-year-old man sleep with a nominally consenting fifteen-year-and-one-month-old girl and risk nothing, while a lesbian couple of twenty years and seventeen years-and-eleven months risk three months in prison?<sup>219</sup>

The response of the right to this question exposed rampant homophobia and a conception of consent that rendered all minors, even those over fifteen, objects—not subjects—of desire subject to state guidance toward proper “sexual behaviors that conform to nature.” At the second reading of the law in July 1980, Foyer says:

At any rate, the problem is different for majors and minors. Whether consenting majors adopt these customs—and how they are considered in the moral field—is their affair. But when the topic is minors it is a completely different problem. Indeed, [there is] risk of causing them irreversible physical and mental trauma.<sup>220</sup>

The mental habits of the moral order persisted for minors. The fidelity to the modern evolution of thought and mores that had motivated Foyer as Minister of Justice to sign off on the liberalization of new family and contraception laws in the 1960s did not apply here. Homosexuality was a practice “that did not conform to nature,” one that if “humanity had only ever practiced, would have long ago gone extinct.”<sup>221</sup> It was thus not tolerated in minors, on whom the sexuality was only ever “imposed,” not sought out. Senator Etienne Daily sharpened the stakes for this argument when he finally spoke on the entire law project at its third reading in October 1980 to say that, while “homosexuality was not a crime [in the adult population], it remained a failure.”<sup>222</sup> An equal age of majority for homosexual and heterosexual acts, the “end of seeking to protect minors from homosexuality,” would “declare [homosexuality] to be normal in the adult population.” The kind of protective regime articulated by the final law vested the age between sexual majority and civil majority as the site of hyper normative sexual legislation.

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<sup>219</sup> Phillipe Marchand, *Débats Parlementaires*, Assemblée Nationale, 2e Séance du 24 juin 1980, 2226.

<sup>220</sup> Jean Foyer, *Débats Parlementaires*, Assemblée Nationale, 2e Séance du 24 juin 1980, 2225.

<sup>221</sup> Jean Foyer, *Débats Parlementaires*, Assemblée Nationale, 2e Séance du 24 juin 1980, 2225.

<sup>222</sup> Etienne Daily, *Débats Parlementaires*, Sénat, Séance du 16 octobre 1980, 3919-20.

Adults would be permitted to flout the moral order, but only sex that “conformed to nature” would be granted as a liberty to minors between 15 and 18, for the stakes of exposure to homosexuality were both individual and social.

Socialist parliamentarians made one last effort in late November 1980 to remove *Attenat à la pudeur sans violence* for homosexual minors between 15 and 18 from the law when they appealed to the *Conseil constitutionnel*, arguing the proposed article 331-2 did not conform to the principle of equality before the law encoded in article 61 of the Constitution. But the council decided otherwise on December 19<sup>th</sup>, remarking that the equality principle “did not preclude differentiation by criminal law in between acts of different natures.”<sup>223</sup> That opened the door to the promulgation of the law by the Elysée on December 23<sup>rd</sup>, 1980, defining rape as the nonconsensual attack on the sexual or bodily liberty of others at the same time that it denied such bodily autonomy to homosexual youth between 15 and 18. It was, as *Le Monde* put it, a “politics of repression without coherence.”<sup>224</sup>

### *Sexual Majority in the Streets: Abrogation Fever and the Triumph of the Left*

As soon as the effort to abrogate article 331-2 stalled in the Senate in October 1980, the fury of the organs of homosexual press and activism was channeled into focused political protest. The CUARH called for immediate street protests against the “Foyer-Pétain law,” (referring to the Vichy origins that smeared article 331-2) in which three thousand protestors marched the following week.<sup>225</sup> A bevy of new petitions took specific aim now at article 331: *Homophonies* published a new petition signed by Aragon, de Beauvoir, Marianne Merleau-Ponty, François Truffaut, and Yves Montand.

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<sup>223</sup> Report by the National Assembly’s commission of laws on December 18, 1981.

<sup>224</sup> “Une politique répressive sans cohérence,” *Le Monde*, April 1980.

<sup>225</sup> *Homophonies*, November 1980.

Where the efforts of earlier reformists, like Baudry, had sought a cross-party, persuasive approach (Baudry had written in 1976 that the issue “traversed the old left-right political dialectic”),<sup>226</sup> the right’s one-sided defeat of the Caillavet Amendment in the rape reform law pushed gay activists to ally with the parties of the left and “exert our electoral forces in the presidential election.”<sup>227</sup> Activists pressed François Mitterrand, the socialist candidate for president and the close runner up to Giscard in the 1974 presidential election, for his position on the “délit d’homosexualité.” It was Gisèle Halimi, however, who finally pinned down the candidate’s response, when on April 4<sup>th</sup>, 1981, at a forum on “Which Candidate for Women” at the *Palais de Congress* asked Mitterrand point blank if he would repeal 331-2.<sup>228</sup> Mitterrand affirmed that if he was elected “Homosexuality will cease to be a délit,” for there is no reason to judge the [sexual] choice of each, which must be respected. No discrimination [can be made] under the justification of the nature of mores.”

When Mitterrand won the second round of the presidential election in May 1981, placing the left in power for the first time under the Fifth Republic, the gay movement continued to organize amidst elation. *Homophonies* rejoiced: “Giscard, c’est parti!”<sup>229</sup> The June cover of *Gai Pied*, by then France’s flagship gay journal, published Mitterrand’s pledge to scrap 331-2 over the title: “Seven Years of Happiness?”<sup>230</sup> A real question remained about the strength of the left’s victory however, and the legislative elections that followed in June 1981 were to clarify the breadth of agenda Mitterrand would pursue. In his debate with then-president Giscard in April, Mitterrand had been pressed by both Giscard and journalists about his ability to get the

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<sup>226</sup> Lettre d’André Baudry au Garde des Sceaux, August 9, 1976, Archives Nationales, SL 1320-17.

<sup>227</sup> Henri Liffra, “Les lois,” *Homophonies*, December 1980.

<sup>228</sup> François Mitterrand and Gisèle Halimi, *Quel président pour les femmes ?*, 90-93.

<sup>229</sup> “Après le 10 mai!,” *Homophonies*, June 1981.

<sup>230</sup> *Gai Pied*, June 1981. French Presidential Mandates before 2002 were for a duration of seven years, not five.

legislature to approve his government, which as it stood in May 1981 was held by the right. Mitterrand made clear that he would exert presidential power to call legislative elections to solve the question.<sup>231</sup>

The CUARH mobilized to keep that question off the table as soon as Mitterrand had won the second round—their June cover called upon readers to “vote against homophobes,” which they identified as the Rassemblement pour la république (RPR) and Union pour la démocratie française (UDF), whose coalition plan had mentioned the fight against the “degradation of mores.”<sup>232</sup> In the meantime, local homosexual organizations like the Comité Homosexuel d’Arrondissement XIII kept up the pressure on Mitterrand’s temporary government, writing letters to the Minister of Solidarity Madame Questiaux calling for the recognition of the “right to one’s sexual orientation” and the subsequent repeal of remaining discriminatory articles in the Work Code, Code of Public Functionaries, and Penal Code. When the Socialist Party won an outright majority in June, relegating those who had opposed the abrogation of 331-2 to the opposition, the window of political opportunity for the homosexual movement was flung open.

In the late summer of 1981, the government, led by the new Minister of Justice Robert Badinter, began a push to deliver on its promise to repeal article 331-2. Badinter, a lawyer and professor known for his anti-capital punishment advocacy and high-profile criminal defense cases in the Giscardian era, was more directly involved in the reform efforts than his predecessor, Alain Peyrefitte, who had never attended a reading of the Rape law of 1980. On August 27<sup>th</sup>, 1981, Badinter wrote a circular to local procureurs to halt prosecutions under 331-2 “except in the gravest of circumstances” because it was soon to be debated and repealed by the

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<sup>231</sup> Gérard Herzog and Serge Moati, “1981 : Débat Giscard - Mitterrand” (France Régions 3, May 5, 1982), Institut national de l’audiovisuel, <https://madelen.ina.fr/programme/1981-debat-giscard-mitterrand>.

<sup>232</sup> “Après le 10 mai!,” *Homophonies*, June 1981, 3.

Assembly.<sup>233</sup> When the Socialists, again led by Raymond Forni, introduced the proposal on December 20<sup>th</sup>, 1980, Badinter attended and spoke at length. Gisèle Halimi, a newly elected Assembly member, introduced the law under the principles of non-discrimination and the individual “right to sexual choice.”<sup>234</sup> Again, Foyer and Daily made moral interventionist stands, now alleging the “legalization of pedophilia” was at play, a charge Socialists dismissed by promising to anchor the age of sexual majority under *Attentat à la pudeur sans violence* at fifteen.

The bill passed the Assembly 327-155 along party lines, with the Socialists, Communists, and MGP mostly voting in favor and the entire RPR and UDF voting against. The process of 1980 now happened in reverse, with the Senate striking down the law and the Assembly reaffirming it three times each throughout 1982. The unconditional support of the government made all the difference, as the French Constitution allowed for the President to submit a law to the National Assembly on its fourth reading for a definitive vote. The law passed on July 27<sup>th</sup>, 1982. 331-2 was abrogated on August 4<sup>th</sup>, the symbolic day of the abolition of feudal privileges. The two ages of sexual majority, established by *Attentat à la pudeur sans violence*, were immediately equalized at fifteen for acts homosexual and heterosexual almost forty-years after their divergence.

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<sup>233</sup> Action Publique no 81.1943 a.12, August 27, 1981, Archives National, SL 1320-17

<sup>234</sup> Giselle Halimi, *Débats Parlementaires*, Assemblée Nationale, 2e Séance du Dimanche 20 décembre 1981, 5367, 5376.



Figures 3-7: *Homophonies* fomented street protests and directed readers to vote for the Socialist and Communist Parties after the failure of Giscard's government to abrogate article 331 line 2. After Mitterrand's victory in May 1981, *Gai Pied*'s cover advertised the possibility of "seven years of happiness."

### *The Death of Radical Strands*

It would be tempting to dismiss Foyer and Daily's claims of leftist and gay activists' tangible links with the "legalization of pedophilia" as homophobic bluster or an unfounded echo of Anita Bryant's *Save our Children* campaign in the United States (parallels which supporters of abrogation like Foucault saw at the time),<sup>235</sup> but in truth the focalization of the gay movement on the discriminatory age of consent corresponded in press and activist circles with a thorough debate of the merits of pedophilia. The same major organs of the gay press that called for the decriminalization of gay sex for minors between fifteen and eighteen called into question the existence of any age of sexual majority, not only in defense of children's rights, but on the grounds that it targeted "pedophilia: the last taboo?"<sup>236</sup> Between December 1981 and 1984, pedophilia experienced a new vogue in *Homophonies* and *Gai Pied*, where it was argued that pedophiles were a sister sexual minority to stand with in solidarity against the age of sexual majority.

<sup>235</sup> Foucault et al, "La loi de la pudeur."

<sup>236</sup> "Le dernier tabou de la sexualité de ce vingtième siècle finissant ?," *Homophonies*, November 1984, 20-23.



In the year between the failure of the Caillavet amendment and the passage of equalization before the Assembly, the political missions and identities of gay and pedophile activists became more and more assimilated. When the International Association of Gay Men and Women met for their second annual conference in Barcelona in April 1980, they adopted an affirmative “Resolution on Pedophilia and the age of sexual majority.”<sup>237</sup> This was no fringe group—it was the IGA that had lobbied the Parliamentary Assembly of the Council of Europe, who ultimately called for the equalization of ages of consent, the decriminalization of sodomy, and equality for gays in employment and custody rights in October 1981.

Like the Versailles Affair, parts of the press critically covered trials of men who had sex with minors. But now they were mainline gay journals. When a man was charged with *Attentat à la pudeur sans violence* in December 1980 in a banlieue north of Paris for sex with same sex minors as young as eleven with whom he had lived, both *Homophonies* and *Gai Pied* covered the affair in depth.<sup>238</sup> To *Homophonies*, it was evidence of the unfortunate “unthinkability of a relationship between an adult and child,” relationships that in their telling could be sexual without inherent violence. They went as far as to track down one of the minors—Jean-Michel, now 22—with whom the man had had sex and published his “fond memories” of the affair.<sup>239</sup> Two months later the journal was hosting a “debate on pedophilia” in its pages, which hosted proponents of the “assimilation of rape with pedophilia” and a “defensive alliance with pedophiles.”<sup>240</sup>

*Homophonies* hosted some opponents who took issue with the IGA’s recognition of pedophilia as a sexual minority but conceded that “the question of pedophilia is a larger question

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<sup>237</sup> “Résolution sur la pédophilie et l’âge de la majorité sexuelle,” *Homophonies*, November 1980.

<sup>238</sup> *Homophonies*, January 1981.

<sup>239</sup> *Homophonies*, December 1980.

<sup>240</sup> *Homophonies*, February 1981.

of the place of children in society.” The impartiality of *Homophonies* was undermined, however, by the fact that its lead editor, Gérard Bach, was also a member of the Group de recherche pour une enfance différente, a group that advocated between February 1980 and the last Homosexual Conference in Marseille in 1985 for the total abrogation of an age of consent under the grounds that it “denied children the right to choose.”<sup>241</sup> Bach wrote in July 1981 that “though the Parliament is about to repeal article 331-2 [...] we must also ask ourselves why the law, under article 331-1, bars homosexual and heterosexual relations with those under 15.” Finally, at its national meeting on September 26<sup>th</sup> and 27<sup>th</sup>, 1981 in Lyon, the CUARH pronounced itself in favor of the abolition of *all* laws that penalize consenting sexual rapports.<sup>242</sup> Several cover articles of *Gai Pied* and *Homophonies* featured sympathetic reports on pedophilia, and the writers Gabriel Matzneff and Tony Duvert reported on the subject well into the 1980s in *Gai Pied*, which was France’s largest homosexual magazine.

“Children’s rights” and pedophile activists did not succeed in lowering the age of sexual majority to thirteen or abrogating it entirely. The age of sexual majority’s equalization entailed its anchoring at fifteen in the eyes of legislators. Both Tailhades in 1980 and Badinter in 1982 had stressed the solidity of the age of sexual majority at fifteen as a condition for equalization and took great pains to show procurers could still “protect” minors even above fifteen (Badinter took copious preparatory notes on the legal apparatuses that would allow the state to still prosecute those who had sex with minors between fifteen and eighteen).<sup>243</sup> Were that not enough, Raymond Forni immediately gave an interview after equalization with the CUARH in *Homophonies*, where he warned the movement that the age of sexual majority beyond 331-2

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<sup>241</sup> *Homophonies*, July-August 1981.

<sup>242</sup> *Homophonies*, November 1980.

<sup>243</sup> Badinter notes in SL 1320-17; Tailhades mentions in *Débats Parlementaires*, séance du 16 octobre 1980, 3920.

“was not a homosexual question, but a societal question,” and that they “had more to lose than to gain if they took this route alone.”<sup>244</sup> As late as 1986, the CUARH asked national candidates for the legislature if they were in favor “of the lowering of the age of sexual majority for consensual sexual relations [and] of the expansion of minor’s liberties.” No candidates, including the Socialist candidate for Prime Minister, Lionel Jospin, responded in the affirmative.

At the same time that elected leaders declined to lower the age of sexual majority below 15, the intellectuals who had organized the basis for the first push to reform laws governing relations between majors and minors experienced an almost immediate counterrevolution in the form of the Coral Affair. On October 15<sup>th</sup>, 1982, Claude Sigala, an educator tied to anti-psychiatry movements who ran a small school outside of Montpellier for troubled and disabled youth, was questioned under allegations that he and two other psychiatrists had committed an *Attentat à la pudeur sans violence* on a minor at the school. The minor affair moved to national news when police received a written allegation that an entire network of French political leaders and intellectuals—who in truth had ties to Sigalla—had visited the facility and partook in a pedophile ring (including the minister of culture Jack Lang).<sup>245</sup> The police took the allegations seriously, arresting Schérer himself and investigating Matzneff. Ultimately, only Sigala was found guilty of *Attentat à la pudeur* and Krief retracted his statement to the police, but the damage was done to the momentum and standing of intellectuals’ still advocating for the abolition of sexual majority: Gabriel Matzneff lost his platform at *Le Monde*; Foucault disputed with Hocquenghem on how much to come to Schérer’s aid; and the object of their lobbying—Socialist Party ministers—would no longer touch sexual majority with a ten-foot pole.<sup>246</sup> The focus that the

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<sup>244</sup> “Les libertés aujourd’hui et demain,” *Homophonies*, May 1982.

<sup>245</sup> Pierre Verdrager, *L’enfant interdit*, 29-30, 100-101.

<sup>246</sup> Pierre Verdrager on “Affaire du Coral : scandale pédophile ou cabale politique ?,” *Affaires Sensibles* (Paris:

event drew to non-consensual sex with minors below fifteen also undermined the hold of the liberty of minors framework: in the mind of the public, anti-age of sexual majority activists may no longer have been interested in the rights of minors, but in the ability of pedophiles to act as they pleased. That was nowhere near as palatable of an argument.

Finally, the gay movement, so critical to the equalization and larger doubt of sexual majority, was distracted by more pressing issues after 1982. Scanning through the monthly issues of *Homophonies* between 1981 and 1986, one can witness the gradual shift in the frequency of articles on the evils of the moral order to the threat AIDS, which the French press first reported as a potential “Gay Cancer” spotted in the United States in 1983.<sup>247</sup> Nondiscrimination laws in more domestic realms like housing, healthcare, and labor like that passed in 1985 became the focus of gay rights activism, realms whose importance was only strengthened by the precarity that AIDS unleashed on their community. As this shift occurred, the most radical groups—like the CUARH and the GRED—either dissolved, or in some instances their leaders died of AIDS. In the intellectual realm, both Hocquenghem and Foucault died of the disease, the former in 1988 and the later in 1984. With this generation, and particularly, as Chapter Two showed, Hocquenghem, passed visions of radical homosexuality that staked its interventions on expansive resistance to categories of social difference like class, race, and age, and the antagonism of the justice system.

What did survive the 1980s was the recommendations of intellectuals, the CRCP, and lawmakers to deemphasize morality in the revision of the Penal Code. Badinter had inherited the mission to reform the Penal Code and composed his own commission in 1981 that immediately

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France Inter, October 6, 2020), <https://www.franceinter.fr/emissions/affaires-sensibles/affaires-sensibles-06-octobre-2020>.

<sup>247</sup> “Le Cancer n’était pas gai,” *Homophonies*, June 1983.

began producing, revising, and approving entirely new drafts of the Penal Code. These would come to be approved in 1992. The second book of the *Nouveau Code pénal* renamed the entire apparatus of sex crimes (save for rape) in departing with the concept of sexual violence under *Attentat aux bonnes mœurs* (Attacks on good mores) in favor of *Des atteintes à l'intégrité physique ou psychique de la personne* (Infringement on the physical or psychic integrity of the person). This had been Foucault's final proposal from 1977-1982, now completely reflected in law. *Attentat à la pudeur sans violence* became *Atteinte sur un mineur* (Violation of a minor);<sup>248</sup> *Attentat à la pudeur avec violence* was rewritten as *agression sexuelle* (Sexual aggression).<sup>249</sup> The new Penal Code also reaffirmed the lack of a separate age of majority for homosexuals (despite its attempted reintroduction by Senator Daily in 1989),<sup>250</sup> the eschewal of statutory rape, and the lesser prosecution before a correctional tribune of *Atteinte sur un mineur* under the logic of nuanced protection. In effect, French law continued to recognize the possibility of consensual, and thus lesser punished, sex between majors and minors.



Figures 8-11: CUARH's *Homophonies* made pedophilia its cover issue in February 1981 and November 1984. The fact that 5 months later, in April 1985 they would have a separate cover on Sexual Violence demonstrates the extent to which the two were separated in the CUARH's discourse. Figure 12: *Gai Pied*, the largest Gay magazine in France, posted coverage of the "First Pedophile Congress and the Sentencing of the Pedophile Dugue opposite the equalization of the Age of Consent."

<sup>248</sup> Article 227-25, Code Penal, (1994).

<sup>249</sup> Article 222-22 through 222-33-1, Code Penal, (1994).

<sup>250</sup> Senator Étienne Daily, Amendement no 147 de la commission des lois, 1991, SL 1320-17. Covered by "Les députés corrigent la copie des sénateurs sur l'homosexualité," *Le Monde*, 22 July 1991.

## **Epilogue: Rethinking Consent**

In April 2021, France's National Assembly and Senate unilaterally adopted statutory rape at fifteen, effectively charging all those over the age of fifteen who had sex (or "bucco-genital acts") with those under fifteen with the *crime* of rape. No longer necessary was proof of "violence, constraint, threats, or surprise," and the charge carried a sentence of up to twenty years in prison. In doing so, they repudiated the individualized system for determining consent that had been advanced by intellectuals forty years prior. Where intellectuals and legislators had once endeavored to create an elaborate system to determine the presence of consent, erring on the side of caution so as not to deny those below fifteen their so-called affective rights, contemporary commentators and legislators have reasserted the presence of populations so inequitable in power, and thus liable to abuse, that the state must entirely suspend the possibility of consent.

Might we recognize this reform as the recognition of the inadequacies of liberalism's dream of a rational subject who engages freely in contractual exchange when it comes to matters of sex? What is certain is that this rethinking of the bounds of consent did not respond to "ungrounded" intellectuals, as contemporary commentators interested in defending the populist purity of "la France profonde" have proposed. I have documented in this thesis how these sociological fields were deeply connected when it came to deliberating the age of sexual majority and the capacity of youth to consent. When the intellectuals who signed the May 1977 petition suggested the abrogation or reform of sexual majority, they were met with moderate public approval and serious government reception because the issue lie at the core of France's post-1968 concerns: the frustration or outright denial of youth's political and affective rights; the

overreach and abuses of the justice system; and the gulf between the mores of Napoleonic law and post-war society.

The intellectuals who entered this debate in 1977 were united only by their dissatisfaction with the status quo. The two camps sparred over whether consent was an adequate proxy for the development of the faculties that allowed one to enjoy sex without coercion. Those in favor included Michel Foucault, André Baudry, and Françoise Dolto, the former two of whom worked directly with the Ministry of Justice to advance an individualized and non-discriminatory method for determining rape, abuse, and consensual sex. Those opposed included Guy Hocquenghem and René Scherer, who instead hoped to remove the state from any role in the policing of desire, regardless of age. In their vision of sexual politics, desire and sex acts could bulldoze broader categories of social inequality. Much like the more materialist French Marxists, Hocquenghem and Shérér's visions failed to gain traction under the liberal governments of the 1970s and even under Mitterrand's leftist governments.

Feminists in the mid-1970s called for the revision of sexual violence law and the redefinition of rape to hinge on the absence of consent rather than the marital status and gender of the victim. As legislators responded to these calls, they adopted many of Foucault's proposals that had been passed on through the Ministry of Justice, as well as his emphasis on the primacy of individualized consent. Determinations of consent would be made in a lesser and private court, safe from the prying eyes of the public and the monstrous judicial system that could traumatize young victims more than the original acts. In their legislative debates, some legislators spoke of a second motivation, dignity, which enabled moral intervention to persist in denying homosexuals between fifteen and eighteen the right to consent. This discriminatory contradiction brought sexual majority to mass politics, first to pressure, and then to support the

left in its endeavor to equalize the age of sexual majority. After equalization passed in 1982, Foucault, Baudry, and Dolto's vision was accomplished—though Hocquenghem and Scherer's ideas appeared in the gay press at stumbling intervals until the AIDS crisis shifted gay organizing to new matters. Though it did not credit him by name, the 1992 revision of the Penal Code found a way to finally incorporate Foucault's last suggestion: the total erasure of mores and dignity from the language of sexual violence law. Consent now governed.

This is the history I have tried to lay out in this paper, which attempts a study of the intellectual grounding in culture and law through 1982. What remains unwritten, however, is the in-depth history of how this valorization of consent unraveled in the forty years after 1982. Though I have identified the moment of legal rupture in 2021, we might better understand the trend in public attitudes toward the age of sexual majority, the age of consent, and the viability of consent by looking at the scandals in the year between. In the 1990s, 2000s and 2010s, women's groups (soon accompanied by gay activists) began to analyze the conditions of consent, unearth the potential of trauma even with the expression of mutual desire, and, in all, reassert that the category of persons incapable of consensual sex was a border best guarded by a wall. Whether this *tout court* exclusion of youth from the consenting population has simply fine-tuned and reinvigorated consent for the general population or reveals a turn to an alternative, protectionist vision of subjects and sex that repudiates a key liberal concept, remains to be seen.



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Arcadie (1954-82)	Gai Pied (1978-92)	Le Monde
Débats Parlementaires (1978-92)	Homophonies (1980-87)	Minuit
Dossiers de l'écran (1971-78)	Juriscasseur Périodique (1974)	Tout !
Franceculture (1978)	Journal Officiel (1980, 82)	

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