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The Age of Innocence: A Cautious Defence of Raising the Age of Consent in Canadian Sexual Assault Law

Janine Benedet¹

In 2008, Canada raised the age of consent to sexual activity with an adult from 14 years of age to 16. This change was motivated, in part, by several high profile cases of internet “luring” of younger teenagers. This article considers whether raising the age of consent has had any benefits. It begins by discussing the history and development of age of consent laws in Canada. The justification for a statutory age of consent has shifted from one based on the age at which a girl is deemed to be sexually available to one based on her capacity to give a valid consent to sexual activity. The article examines the arguments made by groups who opposed raising the age of consent, but finds those arguments unconvincing. It concludes by cautiously supporting a higher age of consent. The higher age limit captures exploitation of young people that was not subject to criminalization in the past.

However, a formal age of consent may also normalize exploitative sexual relationships which contain a significant age disparity where the younger party is only marginally over the age of consent. It is argued that age should be a factor considered in determining whether a relationship is exploitative even where both parties are over the age of consent. The fact that both parties in a relationship are over the formal age of consent should not relieve the courts from the responsibility to consider whether there was coercion or an abuse of power or trust.

KEY TERMS:

Sexual assault, Age of consent, Statutory rape, Sexual Exploitation, Sexual violence against girls

In 2008, Canada raised the age of consent to sexual activity with an adult from 14 to 16 years of age for the purpose of the criminal law of sexual offences. These changes responded to several high profile cases of individuals engaged in sexual behaviour with younger adolescents, particularly after “luring” by means of the internet. This change received considerable support, but also extensive opposition by sexual health, civil liberties and gay and lesbian organizations who argued that the changes denied the realities of youth sexual activity and had negative health

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implications. There is also a lengthy history of scholarly criticism of age of consent laws and the misapplication of statutory rape laws, particularly in the United States.²

In this article I consider whether a higher age of consent to sexual activity for the purposes of the criminal law has any real benefits. I conclude that the amendments offer useful protection to younger teenagers who are vulnerable to the exploitative sexual behaviour of adults. Unfortunately, existing criminal laws, as applied, have proven inadequate to capture this abuse. These shortcomings can be traced to a variety of sources: a failure to recognize the coercive nature of significant differences in age; the application of the mistake of age defence; and a prioritizing of adult sexual autonomy over other interests. I argue, however, that raising the age of consent is useful but insufficient. One can find cases where the complainant has passed the age of consent but age should nonetheless operate as a relevant factor in assessing non-consent. Courts must be attuned to the potential for exploitation in all cases, regardless of age.

I. Age of Consent Laws in Canada

Laws governing sexual offences in Canada are found in the *Criminal Code*, which applies across all Canadian provinces and territories.³ Canada has had a codified criminal law since 1892, with the original version derived from a collection of statutes based heavily on English law.

² These criticisms include the lack of close in age exceptions, or their limitation to heterosexual activity; the treatment of statutory rape as a crime of violence justifying deportation; the misuse of prosecutorial discretion and the disproportionate application of statutory rape laws to racialized youth. See, for example, Kay Levine, *Intimacy Discount: Prosecutorial Discretion, Privacy and Equality in the Statutory Rape Caseload*, 55 *Emory L.J.* 691 (2006); Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 *Wm. & Mary J. Women & L.* 313 (2002-03); Michael Kent Curtis and Shannon Gilreath, *Transforming Teenagers Into Oral Sex Felons: The Persistence of the Crime Against Nature after Lawrence v. Texas*, 43 *Wake Forest L. Rev.* 155 (2008); Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination behind Heterosexist Statutory Rape Laws*, 42 *U.C. Davis L. Rev.* 195 (2008-09).

The criminal laws applicable to sexual intercourse with girls remained largely unchanged from the first *Code* of 1892 to until the early 1980s. These laws made it an offence to have sexual contact with a girl under the age of 14, so long as she was not the wife of the accused.⁴ Although the basic age of consent for girls was set at 14, the seduction offences provided additional protection for girls up to the age of 21 who were seduced into sexual intercourse. Some of these offences required proof of a false promise of marriage (with subsequent marriage to the complainant a good defence) and/or proof that the girl was “of previously chaste character.”⁵

Sexual assault laws at this time were gendered, in that they were mostly drafted in terms of a male accused and female victim. Since homosexuality was criminalized *per se* until 1968 through the offences of buggery and gross indecency, there was no age of consent for boys with respect to a male partner.⁶ When homosexuality was decriminalized, the age of consent for anal intercourse was set at eighteen, higher than for other forms of sexual behaviour.⁷

In the early 1980s, two forces came together to prompt a major review of criminal sexual assault laws in Canada. The women’s movement was growing in strength and calls for the reform of sexual assault laws, in particular the abolition of the marital rape exemption, were intensifying. Reforms had already been enacted in some U.S. states (e.g. Michigan) that provided a model for

³ R.S.C. 1985, c. C-46.

⁴ Until 1890, the age was 12 years. Criminal Code, 1892, 55-56 Vic. c. 29, § 269

⁵ Id. §§ 181-182, 184(2).

⁶ Consistent with the common law, it was presumed that boys under 14 were incapable of committing the offence of rape: Code 1892, § 266(2).

⁷ This distinction remains in the Code today in § 159(2) (b), although it has been declared unconstitutional age discrimination by courts of appeal in both Ontario and Quebec: *R v. M (C.)* 41 C.R. (4th) 134 (Ont.C.A.) (1995); *R. v. Roy* 125 C.C.C. (3d) 442 (Que. C.A.) (1998). This article does not focus on the anal intercourse offence since it is seldom prosecuted today, and does not consider whether any justifiable case can be made for a higher age of consent for that offence.

Canadian activists. These reformers were aided significantly in achieving political action on this topic by the enactment in 1982 of the *Canadian Charter of Rights and Freedoms*, which provided a constitutional guarantee of equality under the law, a right to be free from discrimination based on sex.⁸ The Charter delayed the coming into force of the equality rights provisions for three years to give Parliament and the provincial legislatures an opportunity to amend or repeal discriminatory laws. It was generally accepted by the legal community and by politicians that aspects of the existing rape laws were open to constitutional challenge and that some reform was necessary.⁹

In 1983, the offences of rape, indecent assault and gross indecency were abolished and replaced by the gender neutral offence of sexual assault. This offence increased in seriousness according to the degree of additional violence or bodily harm accompanying the assault rather than the nature of the sexual act at issue. The marital rape exemption was abolished, as were the doctrines of corroboration and recent complaint. Stricter rules were enacted to limit the use of evidence of past sexual history in sexual assault trials.¹⁰

The question of sexual offences involving children was referred to a parliamentary committee, which produced a series of recommendations for a new scheme of sexual offences against children. The 1984 *Badgley Report* led to the repeal in 1988 of the offence of intercourse with a

⁸ Canadian Charter of Rights and Freedoms, s§ 15(1). The equality provisions of the Charter did not come into effect until 1985, to give legislatures an opportunity to amend or repeal discriminatory laws.

⁹ An excellent history of sexual assault laws prior to the reforms is found in: Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900-1975*,(2008). For a discussion of and reflections on the major reforms of 1983, see the essays in Julian Roberts and Renate Mohr, ed. *Confronting Sexual Assault: A Decade of Legal and Social Change* (1994).

¹⁰ Criminal Code, R.S.C. 1985, c. C-46, §§ 265 – 268, 271-277.

girl under 14¹¹ (commonly referred to as “statutory rape”) and the seduction offences, and their replacement with the gender-neutral offences of sexual interference, invitation to sexual touching and sexual exploitation of a young person.¹² The *Code* revisions also included a provision confirming that non-consent was not an element of the general sexual assault offence where the complainant (male or female) was under 14 years of age.¹³

A range of ages was retained for some offences, but the focus was on the degree of power and control between the parties rather than the prior chastity of the female complainant, as was the case with the crime of seduction. While the new scheme made it an offence to have any form of sexual contact with a boy or girl under the age of 14, the Code also recognized a “close in age exception” for 12 and 13 year olds. An accused could raise consent as an affirmative defence in a case where the complainant was 12 or 13 if he was less than 2 years older than the complainant and not in a position of trust or authority towards her.¹⁴ Since the minimum age of criminal responsibility in Canada is 12, this provided an added potential defence to younger accused persons.¹⁵

Parliament also enacted a separate offence against young persons aged 14 to 17 inclusive, called “sexual exploitation of a young person.” This offence criminalized sexual conduct with a young person between the specified ages where the accused is in a position of trust or authority or a

¹¹ Criminal Code, R.S.C. 1970, c. C-46, § 146(1).

¹² Criminal Code, R.S.C. 1985, C. C-46, §§ 151-153.

¹³ Committee on Sexual Offences against Children and Youths, Report of the Committee on Sexual Offences against Children and Youths Vol. I-II and Summary (Badgley Report) 1984.

¹⁴ Code, § 150.1(2). The exception is gender neutral; I am referring to the accused as “he” and the complainant as “she” for clarity.

¹⁵ The revisions abolished the absolute presumption of incapacity for 12 and 13 year old perpetrators, thus leaving them open to prosecution for sexual assault. This means that a 13 year old is presumed incapable of consenting to sexual activity with a person more than 2 years older, but capable of criminal responsibility for sexually assaulting that person where non-consent is proven.

relationship of dependency with the young person.¹⁶ This scheme made it possible for a man of, say, 45 years of age, where there was no relationship of authority or dependency, to argue that a girl (or boy) as young as 14 consented to sexual activity, except in the context of prostitution, where the age of consent was set at 18. The *Code* also provided the accused with a mistake of age defence where the accused honestly believed that the complainant was 14 years or older (or 18 years or older in the case of the sexual exploitation or child prostitution offences.)¹⁷

In the twenty years following the major reforms, there were two further developments that provoked calls for change – one societal and one jurisprudential. The first obvious change was the rise of electronic means of communication and the potential those tools posed for the sexual exploitation of children. Parliament responded to this by passing new laws dealing with child pornography (with an age of consent of 18 years); creating an offence of video voyeurism to cover surreptitious recording of both children and adults, and also creating an offence of luring a child by means of a computer system (with an age of consent of 14 years).¹⁸

The second development was a series of cases that gave a fairly narrow interpretation to the relationships of “trust, authority or dependency” that could be said to vitiate the consent of adolescents 14 to 17 years old. For example in *R. v. J.H.S.*, the complainant testified that she was sexually abused by her mother’s common law spouse from the time she was 12 or 13 until she was 18 years of age. She alleged that the 3 abortions she had during this time period were all attributable to pregnancies caused by this abuse. The accused denied that any sexual activity occurred until the complainant was 17 and argued that it was all consensual. In allowing the

¹⁶ Code, § 153

¹⁷ Code, § 150.1(4), (5).

¹⁸ Code, § 162(1) (voyeurism); § 172.1(1) (luring); § 163.1 (child pornography)

appeal from conviction on the counts relating to the admitted sexual activity that took place when the complainant was 17, Justice Lambert, for the British Columbia Court of Appeal, held that:

. . . [the provisions of the *Criminal Code*] are inconsistent with the conclusion that as a matter of law consent must be deemed to have been impossible in 1984 and 1985 on the part of a 17-year old woman to sexual acts with the common law husband of her mother who lived in the family home.

[. . .]

I do not think that where the relationship is between a 17-year old young woman and the common law spouse of her mother, who shares the family home, a relationship of trust or authority on the part of the man or dependency on the part of the young woman should be conclusively presumed to exist as a matter of law.¹⁹

The language used by the Court is significant: note that the complainant is always referred to as a young woman rather than a girl, and the accused is never referred to her as her stepfather, but only in terms of his relationship to the complainant's mother. In this way, the sexual activity is made to sound less like father-daughter incest or child sexual abuse in the home, and more like a "relationship" between adults who could have met anywhere.

Another decision with similar reasoning was *R. v. Galbraith*, in which the complainant was a 14 year old girl who had run away from home numerous times since the age of 13.²⁰ She had lived with friends and supported herself through prostitution. She met the accused, who was 27 years old and employed at a gas station while attending school, through mutual friends and she ended up staying at his apartment for a few months. During this time they had sexual intercourse on a

¹⁹ 1993 CanLII 6885 (B.C.C.A.) at paras. 14 and 25, leave to appeal to S.C.C. denied, S.C.C.A. 45 [1994].

²⁰ *R. v. Galbraith*, 18 O.R. (3d) 247 (C.A.). (1994)

daily basis and he provided her with living expenses. She testified that she thought they were “boyfriend and girlfriend” but that she assumed that if she ceased having intercourse with the accused she would no longer have been able to stay at the apartment. The police complaint was initiated by the complainant’s mother, who wanted her to return home.

There were other factors present in this case that ought to have caused the court some concern. The accused was on probation for the sexual assault of two young cousins at the time the complainant moved in with him. In addition to being sexually exploited in prostitution, the complainant had also been sexually abused by her father. Yet the Ontario Court of Appeal unanimously overturned the accused’s conviction and substituted an acquittal on the ground that the relationship was consensual and there was no relationship of dependency.

Justice Finlayson, for the Court, noted that “prima facie, a 27 year old man is entitled to have sexual relations with a 14-year old girl unless one of three conditions prevails. They are a position of trust, a position of authority, or a relationship of dependency.”²¹ He found that the complainant was not dependent on the accused because she could have returned to her mother’s home.

The language used by the court is troubling. One would hope that the law would reject the notion that a 27 year old man was *entitled* to have sexual relations with anyone, much less a teenaged girl. The Court of Appeal showed no recognition of the connection between the accused’s past sexual aggression and his choice of the complainant, already a victim of sexual abuse by other men, as an appropriate sexual partner. Criticism of cases such as this one led

²¹ Id. at p. 250.

Parliament to expand the offence in 2005 to include a prohibition of sexual contact in the context of relationships “that are exploitative of the complainant” and to list a series of factors to be taken into account in determining whether exploitation exists, including the difference in age between the parties.²²

Even with these amendments designed to broaden the scope of the concept of exploitation, the basic age of consent of 14 years remained. Its application to the internet luring offence also attracted criticism. Since the age of consent in most U.S. states ranges from 16 to 18 years, Canada became a favourable jurisdiction to prey on young adolescents for sexual purposes. Religious groups, child protection groups and others began to pressure Parliament to raise the age of consent to 16. The amendments, which came into effect in 2008, had the effect of raising the age of consent to sexual activity to 16 years for all offences in which the age of consent was previously 14.²³ Offences that already had an age limit of 18 (prostitution and pornography) remained unchanged.

The “close in age exception” was extended to cases where the complainant is aged 14 or 15 years old and the accused is less than 5 years older; in such cases consent is an affirmative defence. This permits, at the outside limit, sexual contact between a 14 year old and a person under the age of 19. Or, put another way, the hypothetical 45 year old man mentioned above is now limited to a consenting partner 16 years of age or older, rather than one who is 14 years or older.

²² S.C. 2005, c. 32, § 4; Code, § 153(1), (1.2). The effect of this addition is discussed below.

²³ Bill C-2, Tackling Violent Crime Act, S.C. 2008, c.6

These are not radical changes, yet the proposed law was subject to criticism by sexual health organizations, gay and lesbian groups, civil liberties associations and other similar organizations. It was argued that the new rules ignored the reality of teenage sexual behaviour, would deter adolescents from accessing sexual health information, and would have a discriminatory impact on gay and lesbian youth in particular. To fairly evaluate these concerns and the amendments themselves, it is useful to step back from the recitation of the legislative provisions and consider what the age of consent is measuring. This requires attention not only to the changes in age, but also to the shifting understanding of consent and non-consent to sexual activity in Canadian criminal law.

II. Measuring Consent

Until the reforms of the 1980s, consent to sexual activity in Canadian criminal law was measured, as in most other common law jurisdictions, in terms of victim resistance. Women were expected to offer physical resistance to unwanted sexual advances. Since it was assumed that token resistance might often accompany sex that was in fact desired by the woman, women needed to show corroborative evidence of real resistance in the form of torn clothing, physical injuries or a “hue and cry” immediately following the assault. Judges and juries were influenced by the popular stereotype that any woman who truly did not want sexual contact could resist it if she just “kept her legs together”.

In one sense, then, the age of consent in this time period could be understood as a measurement of the age at which girls could be expected to physically resist unwanted sexual advances. If that was the only explanation, however, one would not expect to see the age vary so widely in the

seduction offences. In reality, the age of consent was not strictly, or even predominantly, a measure of the capacity for resistance. Rather, it measured the age at which girls were considered fair game for male sexual attention. Girls considered chaste by virtue of their race and social position were officially “off limits” for longer than those who were not. In this sense, the age of consent was related to marriageability. Girls whose virginity was not considered a valuable asset were not given much protection by the criminal law.

One might assume that the legal ages of consent to sexual activity and capacity to marry would have to be coterminous. Otherwise, if the age of consent to sex is lower than the age of consent to marry, it suggests that a young person can be emotionally and intellectually ready for casual sex with a bare acquaintance but not sex in the context of a committed relationship. The alternative is equally problematic, since it suggests that early marriage enhances the sexual availability of teenage girls who are otherwise inappropriate sexual partners.

In fact, the criminal law has been willing to accommodate both possibilities, and to make exceptions to the general rules about capacity to consent where the parties are married. This continues to the present day, with the 2008 amendments, where the close in age exception for 14 and 15 year old complainants is extended to any age difference where the parties are married or cohabiting and the parents of a child.²⁴ This is unlikely to be of much practical importance since in all Canadian provinces the marriage of a person under 16 is not permitted without the consent of the court. Marriages of 16 and 17 year olds require parental or judicial consent. Thus the age of consent to sexual activity now tracks the minimum age to marry fairly closely, although a 17

²⁴ Criminal Code, §§ 150.1 (2.1) (b), (2.2.).

year old in Canada who still requires parental consent to marry her 19 year old boyfriend is presumed to be competent to decide to have sex with her boyfriend's 49 year old neighbour.

The legal understanding of consent, however, has changed significantly in the past 20 years. Prior to the 1983 reforms, Canadian courts tended to follow the common law approach of requiring proof of physical resistance in order to prove non-consent. While this requirement was relaxed over time, courts throughout the 1980s and 1990s continued to require firm and unequivocal verbal objection by the woman as a sign of her non-consent.²⁵ In 1992, Canada enacted a statutory definition of consent for the purposes of sexual assault law which defines consent as the "voluntary agreement of the complainant to engage in the sexual activity in question."²⁶ In a series of decisions culminating in 1999 in *R. v. Ewanchuk*, the Supreme Court of Canada has held that non-consent is to be measured by the state of mind of the complainant, and is proven whenever the complainant, in her own mind, did not want the sexual touching to take place.²⁷ The complainant's statements and behaviour are evidence that may be relevant to the credibility of her asserted state of mind, but passivity is not to be equated with consent in law and is in fact of evidence of a lack of consent.

As the understanding of non-consent shifts away from demonstrated resistance to one focused on the state of mind of the complainant, the age of consent necessarily becomes a measure of the *capacity* of a young person to make a voluntary decision to engage in sexual activity. In one sense, then, the existence of varying ages of consent depending on the age of the other person

²⁵ *R. v. Letendre* 5 C.R. (4th) 159(B.C.S.C.) (1991) ; *R. v. M. (M.L.)* 18 C.R. (4th) 186 (N.S.C.A.) (1992), rev'd 2 S.C.R. 3 [1994].

²⁶ Criminal Code, § 273.1

²⁷ *R. v. Ewanchuk* 1 S.C.R. 330 at para. 29 [1999].

engaging in the sexual activity is not immediately defensible. One might argue that it does not take any more capacity for a 15 year old to decide to have heterosexual sexual intercourse without a condom, for example, with a partner who is 35 years old, as opposed to one who is 16.

A distinction between these two scenarios can be justified, however, if one adopts a more situational view of capacity. Isabel Grant and I have argued elsewhere, in relation to the capacity of women with mental disabilities to consent to sexual activity, that it is necessary to understand capacity in this manner.²⁸ Rather than simply assessing whether an adult woman who is considered mentally disabled is “qualified” to engage in all sexual activity, or alternatively disqualified from any lawful sexual contact, a nuanced assessment of capacity needs to take into account the relationship between the parties, the sexual acts engaged in, the presence of sexual health education and support, and other factors. The House of Lords seems recently to have endorsed such an approach in the context of mental disability.²⁹

The fact that the law in many jurisdictions treats two identical sexual acts differently depending on the age of the young person’s sexual partner may be trying to capture in some way the fact that capacity may be affected by the age and sophistication of one’s partner. This is similar to the discomfort and concern that arises when a person with mental disabilities has a sexual relationship with a non-disabled partner. Such a distinction is perhaps more accurately described as recognition of the fact that consent is a reflection of both the capacity of the 15 year old (or the person with a mental disability) and the relative power wielded by her sexual partner, of which his age is one component. On this view, capacity has a relational element. Another way

²⁸ Janine Benedet and Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief*, 52 McGill L.J. 243 (2007).

²⁹ R. v. C. (G.) Crim. L.R. 75 (H.L.) [2010].

to understand this distinction is that the two young people close in age are equally diminished in capacity, such that neither should be criminally responsible.

Prior to the recent amendments, Canada chose to distinguish between the 35 year old accused and the 16 year old accused, each of whom has had sexual contact with a 15 year old, by requiring proof in both cases of an imbalance of power or breach of trust, on the assumption that it would be much easier to prove in the first case than the second. Today, by raising the age of consent to 16, Canada has chosen to assume the power imbalance in the first case and prohibit such contact outright, while continuing to require either proof of non-consent or proof of a relationship of authority where the parties are close in age, as in the second example. What is gained and what is lost, if anything, by raising the line at which this irrebutable presumption is made?

III. Opposition to Raising the Age of Consent

The proposal to raise the basic age of consent to sexual activity in Canada to 16 years of age was met with opposition by a number of groups concerned with the sexual autonomy and sexual health of adolescents. These groups were not convinced that the close in age exception permitting consensual sexual activity of 14 and 15 year olds with partners up to 18 or 19 years of age was sufficient to address these concerns.

For example, the Canadian Foundation for Children, Youth and the Law supported raising the age of consent for the internet luring offence, but opposed raising it for other offences, noting

that exploitative sexual activity against 15 and 16 year olds was already criminalized by the sexual exploitation of a young person offence in s. 153. This group argued that if the age was to be raised, it ought to be left open to an accused person who did not fall within the close in age exception to show that the relationship was truly consensual. In other words, they argued that the presumption of incapacity for 15 and 16 year olds with older partners ought to be rebuttable.

This group also expressed two related concerns that were echoed by many other groups opposing the legislation. First, they argued that raising the age of consent would have a discriminatory impact on gay teenagers, who may be more likely to have sexual relationships with older partners:

. . . the “close in age” exemption in Bill C-22 may have a discriminatory impact on the LGBT youth community. Many of our clients report experiencing homophobia, homophobic language, slurs and bullying by adolescents, particularly in school. This may restrict their choice of sexual partners to partners who are not in the same schools, athletic clubs or ordinary social groups. To criminalize non-exploitative sexual relationships in the LGBT youth community may perpetuate the disproportionate policing of the LGBT youth community.³⁰

Second, these groups argued that the effect of the legislation would be to have a chilling effect on youth seeking sexual education and services because the possible criminalization of their sexual activity would tend to drive their activities underground. This might be as a result of concerns that their partner will be investigated or alternatively out of a mistaken belief by the young person that they might also be charged. Organizations raising these concerns noted that the average age of first sexual activity in Canada is just over 14 years of age and that youth aged 15 to 19 have the highest rates of sexually transmitted infections.³¹

³⁰ Submission of Justice for Children and Youth to the Standing Committee on Justice and Human Rights, March 29, 2007, 5 (March 29, 2007).

³¹ Id. at 7

Both of these arguments are premised on the assumptions that a 14 or 15 year old can have a healthy, non-exploitative sexual relationship with a person who is aged 19 or 20, and that either such a relationship ought to be encouraged or that it will not be deterred by the existence of criminal sanctions. I remain unconvinced that the needs of gay and lesbian youth are especially distinct in this respect. The potential for sexual exploitation by older men of gay male youth is at least as pressing a concern as it is for men who exploit teenage girls. Gay youth, both male and female, may need particular support to find spaces in which to meet up with their peers in a positive environment free from harassment; having sex with older partners is not a good substitute for this.

If in fact there are healthy relationships between 15 year olds and 20 year olds that ought to be encouraged rather than criminalized, that may speak to the need to widen the ambit of the close in age exception from 5 years to some greater number. I am skeptical that this need exists. Instead, there is a discernible pattern of 14 and 15 year old girls having sex with men in their 20s in the context of relationships that are deeply destructive and harmful to those girls, even though there may be no obvious indicators of exploitation beyond the difference in age, played out in the context of gendered power.

In the United States, where teenage pregnancy rates are much higher than in Canada, there has been considerable public criticism of teenaged mothers receiving welfare payments, who are seen as burdening the system with their poor choices. The American Bar Association Center on Children and the Law has pointed out, however, that adult men are most often the fathers of

these babies, and has argued that the girls in question ought to be seen as victims of sexual exploitation and child sexual abuse rather than irresponsible parasites placing a burden on taxpayers. Promoting the idea that sexual relationships between younger teenagers and adults can be non-exploitative runs counter to reality. It poses the very real risk of consigning these girls to bearing responsibility for the emotional and financial costs of their supposed choices. The Center recommended that all girls 15 years of age and younger be legally protected from sexual intercourse with men aged 20 and older, a position consistent with Canada's new law.³²

The focus on the first age of sexual activity is also misguided because it assumes that the first sexual experiences of young people are always voluntary. Evidence suggests that the earlier the age of first sexual activity, the less likely it is to be voluntary. In one large U.S. survey, 22% of women whose first experience of sexual intercourse occurred before age 16 described that intercourse as not voluntary, compared with 6.5% of women whose first sexual experience occurred at age 16 or older.³³ Protection from sexual abuse and forced sex is the most important component of sexual health and education for youth.

The disinclination of youth to seek sexual health advice and counseling is not a reason, on its own, for changing (or declining to change) the law regarding the age of consent. Presumably those young people engaged in exploitative sexual relationships, or who commence sexual activity at 13 or younger, or who are being prostituted, also need sexual health information and counseling. No one is suggesting however, that sexual activity in these circumstances be

³² Sharon G. Elstein and Noy Davis, *Sexual Relationships Between Adult Males and Young Teen Girls: Exploring the Legal and Social Responses*, American Bar Association Center on Children and the Law, iii. (October 1997)

³³ *Id.* at 2.

decriminalized (for the adult) to prevent it from being pushed underground, because the overriding harm to the young person is evident.

Sexual assault in Canada is disproportionately a crime by and against young people. Rates of victimization reported to police were highest among teenage girls and young women (with the highest rate at age 13) and rates of sexual offending were highest among male teenagers aged 13-15.³⁴ Thus a considerable amount of sexual assault occurs in situations where the close in age exception might be applicable and where a mistake of age defence may be plausible.

There are better and deeper criticisms to be made of the age of consent laws than those raised by groups opposing its recent elevation to 16 years of age. Those relate to the way in which the age of consent (and the corresponding mistake of age defence) has the potential to obscure acts of gender-based violence by keeping the focus on what is presumably a technical or “statutory” rape.

Age of consent laws can work to obscure male violence because proof of age serves as a proxy for proof of non-consent. The sexual assault is treated as “technical” or “statutory” rather than as a real rape. The concern is that the public may assume that if there was good evidence that the sexual activity was really non-consensual, prosecutors would treat it as a true sexual assault and prosecute it as such. The recent controversy over the decision to extradite film director Roman Polanski reflects this, with supporters and many media outlets insisting that he pled guilty only to “underage sex” with a 13 year old girl, despite the factual underpinnings of the case, which

³⁴ Rebecca Kong, Holly Johnson, Sara Beattie and Andrea Cardillo, *Sexual Offences in Canada*, Canadian Centre for Justice Statistics, 23 Statistics Canada, 7 (2003)

showed a drug-facilitated rape.³⁵ In fact, prosecutors tend overwhelmingly to take the simplest path to conviction, even where there is evidence of non-consent. Age is easy to prove; non-consent is often more difficult, and opens the complainant to personal and traumatic cross-examination about the details of the assault.

The path to conviction may not matter in a strict legal sense, although it may well affect the severity of the sentence. This is a concession that most prosecutors in Canada are usually willing to make in exchange for ease of proof. But focusing on age instead of coercion or non-consent opens the door to an argument by the accused that he mistakenly believed that the complainant had reached the age of consent. In Canada, the mistake of age defence has been recognized as a constitutional requirement by the Supreme Court of Canada because s. 7 of the *Charter of Rights and Freedoms* forbids conviction for an offence with a possible penalty of imprisonment without some minimum level of *mens rea*.³⁶

In Canada, the mistake of age defence is limited by the requirement that the accused have taken “all reasonable steps to ascertain the age of the complainant.” Nonetheless, some courts have still interpreted the defence generously in favour of the accused. In *R. v. L.T.P.*, the accused successfully raised such a defence despite doing nothing to ascertain the age of the 13 year old complainant.³⁷ The court reasoned that doing nothing amounted to reasonable steps because the complainant was physically mature, hanging around with students who were a few years older

³⁵ The Associated Foreign Press reported that over 100 film directors and industry executives had signed a petition demanding his immediate release: Top directors rally around Polanski, 28 September 2009, available online at <http://www.google.com/hostednews/afp/article/ALeqM5haldbIEeUFj-LzeDtopMqrFFHrQ> (accessed 16 January 2010)

³⁶ *R. v. Hess*; *R. v. Nguyen*, 59 C.C.C. (3d) 161 (S.C.C.) (1990).

³⁷ *R. v. P. (L.T.)* 113 C.C.C. (3d) 42 (B.C.C.A.) (1997).

than her and drinking beer.³⁸ This has the effect of making those teenaged girls who are arguably the most vulnerable to sexual assault more likely to lose that legal protection because they “looked older.” Even more troubling, acceptance of the mistake of age defence resulted in the accused’s acquittal even though the complainant testified that he pushed her to the ground and forced her to have sexual intercourse.³⁹ The core of the girl’s complaint was not that the accused, who was also a teenager, had exploited her youth; it was that he raped her. But with non-consent no longer an element of the offence, this evidence was irrelevant and the accused was acquitted based on a reasonable doubt as to his mistake of age.

To avoid this result, prosecutors may need to charge and prove the offence in the alternative, to reflect the fact that the complainant was both not legally capable of consent due to her age and that she did not consent in fact due to violence, force or coercion. These are not contradictory conclusions. Rather, this recognizes that the capacity to consent (to voluntarily say yes) is more complex than the capacity to not consent (to know that the sexual contact is unwanted). A 13 year old who lacks the ability to give a voluntary “yes” to sexual activity with an older partner may nonetheless have the full capacity to know that the sexual contact is not wanted. Her non-consent ought to be recognized and affirmed by the court whenever it is proven, rather than just relying on proof of age and hoping that the mistake of age defence will fail. This approach also makes it more likely that the court will focus on the coercive actions of the accused.

Perhaps the most difficult cases are those in which both the accused and the victim are teenagers, both claim that the act was consensual, and they fall outside the close in age exception. In

³⁸ Id. at paras. 22-24

³⁹ Id. at para. 25.

Canada, we saw this set of facts in the case of 18 year-old Cass Rhynes, whose 2003 case garnered public attention because he was an elite high school baseball player who had been selected as a major league prospect. Rhynes was charged with inciting a child under 14 to sexual touching when it was learned that two girls aged 12 and 13 had performed acts of oral sex on him on a number of occasions. The girls testified that they knew that they were meeting up with Rhynes for oral sex and that this activity was common among their peers. The trial judge convicted Rhynes and sentenced him to 45 days in jail plus probation and community service, finding that he had no mistake of age defence. This conviction was overturned on appeal because the court found that Rhynes had not “incited” the girls to touch him – they had been willing participants who sought him out for that purpose and his passive acquiescence was not incitement.⁴⁰

The appeal decision turns on the Crown’s decision to charge Rhynes with the invitation to sexual touching offence and the use of the word “incite” in the indictment. The court’s strict interpretation of that term permitted an acquittal. But there were other offences, most notably sexual assault, which should have been able to sustain a conviction once the mistake of age claim was rejected. The court’s approach is based on the assumption that there was consent in fact, rather than an acknowledgement that the girls were presumed to have no capacity to consent. The fact that they sought out the sexual activity is not relevant to that capacity. On the court’s reasoning, a much older accused would also be acquitted of this offence on these facts.

One can certainly have some sympathy for Rhynes, who was himself a teenager and who did not appear to do anything demonstrably coercive. The relatively light sentence at trial reflected that

⁴⁰ R. v. Rhynes PESCTD 30 (P.E.I.S.C.) at paras. 21-24 (2004).

fact. Yet the fact remains that the “hooking up” was decidedly unequal; the girls were always younger than the boys and there was no expectation of sexual pleasure in return. The facts reflect not only age disparity (twelve is, after all, very young) but also gendered sexual norms that objectify women.⁴¹ The Rhynes case is an example of the fact that falling below the line is not always enough to trigger the law’s protection.

V. (Cautious) Support for raising the age of consent

The age of consent also poses problems for those who are above that line. Regardless of where the age of consent is set, it can have the effect of making age seem irrelevant to cases in which the line has been passed. Thus in a case where the complainant is 18 and the accused 50 years old, age is assumed not to matter because the complainant is an “adult” for sexual purposes. Even though a difference in age may be relevant to the voluntariness of consent, age typically falls away entirely once the age of consent is met. Catharine Mackinnon has noted:

The age line under which girls are presumed disabled from consenting to sex, whatever they say, rationalizes a condition of sexual coercion which women never outgrow. One day they cannot say yes, and the next day they cannot say no. The law takes the most aggravated case for female powerlessness based on gender and age combined and, by formally prohibiting all sex as rape, makes consent irrelevant on the basis of an assumption of powerlessness. This defines those above the age line as powerful, whether they actually have power to consent or not. [. . .] As with protective labor laws for women only, dividing and protecting the most vulnerable becomes a device for not protecting everyone who needs it, and also may function to target those singled out for special protection for special abuse. Such protection has not prevented high rates of sexual abuse of children and may contribute to eroticizing young girls as forbidden.⁴²

⁴¹ Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 *J. Crim L. & Criminology* 15 (1994).

⁴² Catharine MacKinnon, *Toward a Feminist Theory of the State*, 175-176 (1989).

MacKinnon's conclusion that the age of consent represents a failure of the general non-consent standard in sexual assault law is certainly correct as applied to the history of such laws in Canada. Age of consent laws are only really necessary where the judicial understanding of non-consent is so thin and impoverished that the power imbalances between a girl and an older man cannot be recognized for what they are, proof that no consent was in fact present. Reliance on presumptions based on age or other factors may make us lazy about developing a definition of coercion or non-consent that reflects the reality of male sexual violence as practiced.

Yet the act of abolishing a rule once it exists creates social meanings of its own. If Canada were to announce that it was abolishing the age of consent, that would almost certainly be interpreted as an implicit endorsement of the idea that children can consent to sex in some circumstances. It would not likely be understood as an affirmation of the feminist ideal that one sexual assault law should protect all women.

One of the most important arguments in favour of bright-line ages of consent is that, unlike disability, age is always a temporary condition. While we clearly need to be wary of restricting the sexual self-determination of adult women with disabilities, we may be less concerned about the temporary restrictions placed on young people to have sex with much older partners. Of course, for young people, saying wait a few years may feel like the equivalent of saying wait forever. The same is not true for adults, who should be expected to have the ability to, at a minimum, defer sexual activity which carries with it such a clear risk of harm.

Certainly raising the age of consent in the internet luring offence to at least 16 years seems sensible. In such cases, young people are often coaxed into making child pornography of themselves and sending or streaming it via webcam to the perpetrator. Thus the sexual exploitation may go beyond words very quickly, even if the youth and the adult never meet. The adult may threaten the child with exposure of pictures or video as a way of blackmailing the young person to provide more explicit sexual activity.⁴³ There have also been cases of perpetrators or victims travelling thousands of kilometres to meet in person, placing the young person in further jeopardy. In 2008 a Belgian man was charged with internet luring after he allegedly flew to Montreal to meet a 13 year old girl he befriended over the internet.⁴⁴ Going further and raising the age for this offence to 18 would make it consistent with the other offences dealing with prostitution, pornography and other inherently exploitative sexual activity.

It is hard to know how many cases of internet luring of 14 and 15 year olds have taken place in Canada, since this was not a crime until 2008. However, there have been about 50 charges per year laid under the offence with the previous age limit of 14⁴⁵. There are also some stark examples of the inadequacy of the lower age limit. For example, in 2005 Dale Beckham travelled from Texas to Canada to meet a 14 year old boy he had contacted through the internet. The boy was under medical care for a variety of physical and psychological conditions. The boy met Beckham in a hotel room where they had intercourse. The boy insisted that the intercourse

⁴³ R. v. Innes, ABPC 237 (2007); appeal from sentence of 7 years' imprisonment dismissed, ABCA 129 (2008).

⁴⁴ Man charged with luring 13-year old to Montreal hotel, The Canadian Press, June 14, 2008, available online at www.cbc.ca/canada/story/2008/06/14/luring-montreal.html; A Pedophile in Love is Still a Pedophile, Beyond Borders Newsletter, no. 13, Fall 2008, 3 (reporting court decision to decline leave to appeal sentence of 20 months' imprisonment).

⁴⁵ About 75% of charges result in a conviction. Jennifer Loughlin and Andrea Taylor-Butts, Child luring through the Internet, Juristat, Statistics Canada (March 2009) available online at <http://www.statcan.gc.ca/pub/85-002-x/2009001/article/10783-eng.htm>.

was consensual, and Beckham was therefore not convicted of any offence other than possession of child pornography in relation to files found on his laptop computer. He was deported to Texas where a search of his home discovered large quantities of child pornography, and he was sentenced to 17 years in a U.S. prison for the offence of transporting child pornography across the border.⁴⁶ Today, Beckham would be caught in Canada by the higher age of consent, and would have been guilty of internet luring.

There is good reason to extend the age increase to 16 beyond the internet luring offence to other sexual offences. The gross imbalance of power that existed in this case was a function of age as well as grooming by a skilled sexual predator. That power imbalance would be equally present if the two had met at a shopping centre or a sports field and no computer chats were involved.⁴⁷ There have been several acquittals of accused persons charged with offence of sexual exploitation of a young person that provide some examples of the kinds of sexual activity outside the internet luring context that was previously not criminalized but is now caught by the higher age of consent.

One of those is the fact scenario in *Galbraith*, discussed above, involving the 14 year old runaway and her 27 year old “boyfriend.” Another can be found on the facts of *R. v. Poncelet*, where the British Columbia Supreme Court acquitted a 40 year old “cowboy” of the offence of

⁴⁶ Web luring case raises age-of-consent issue, CBC News, (February 11, 2005) available online at <http://www.cbc.ca/canada/story/2005/03/08/internet-luring-050308.html>

⁴⁷ Sometimes the exploitation can combine online and personal meetings. A Royal Canadian Mounted Police officer pleaded guilty in 2008 to sexual offences relating to sexual activity with a 17 year old girl whom he had been mentoring and counseling on her addictions since the age of 15. Their relationship included both extensive online and personal meetings: Former RCMP officer going to prison for sexual assault, CTV Calgary, September 8, 2008, available online at <http://calgary.ctv.ca>; Tarina White, Mountie up on sex charges; Two year tryst with teen alleged Edmonton Sun, July 17, 2007, 5.

sexual exploitation of a young person for a lengthy sexual relationship with a 15 year old girl.⁴⁸ The girl was taking horseback riding lessons from the accused's girlfriend, but switched to intensive instruction from the accused when she decided to learn a western rodeo form of riding. The two spend several hours together each day; the lessons were provided in exchange for ranch labour by the complainant. The sexual relationship was initiated by the accused and on the first three occasions the complainant rejected his advances, describing herself as scared, uncomfortable and crying. The complainant said that she developed feelings for the accused and that she allowed the relationship to progress to sexual intercourse because she was curious and it was "fun."⁴⁹

The trial judge rejected the Crown's claim that the accused was in a position of trust. He found that the complainant was mature and independent and that there was no formal teaching relationship. He quoted from the decision of the Newfoundland Supreme Court in *R. v. W.J.M.*, where the judge noted, "We live in an age where, fortunately, the stigma of older people having relationships (sexual or otherwise) with younger people has to a large degree disappeared."⁵⁰

We ought to be concerned by reasoning that suggests that there is no difference between the sexual and the "otherwise" when it comes to interactions between young people and adults. The accused himself acknowledged that he had been a mentor to the complainant, who had few friends her own age and was homeschooled. While the court relied on these facts as proof of her independence and maturity, they could as easily be understood as conditions making her more vulnerable to sexual exploitation.

⁴⁸ R. v. Poncelet B.C.J. No. 289 (S.C.)(QL) [2008].

⁴⁹ Id. at paras. 21-25.

⁵⁰ Id. at para. 44, quoting *R. v. W.J.M.* 194 Nfld. & P.E.I.R. 38 (S.C.) at para. 60 (2000).

Today, both of these cases would be caught by the new age of consent and would result in conviction, regardless of the conclusion that there was no trust or dependency or that the complainants had consented. In my view, this is a good thing. But it might also be a good thing to convict in similar factual circumstances where the complainant is 16 or 17, as in *J.H.S.* The real problem here is the failure of the courts to recognize predatory and exploitative behaviour. Such behaviour does not always require the use of child pornography or other classic grooming tools, and it may take advantage of a victim's existing positive feelings toward the adult in a way that makes the exploitation relatively easy. That ease could fairly be interpreted as a sign of vulnerability rather than of truly voluntary consent. A victimizer may spend many years grooming a young person for sexual contact and then progressively sexualize the relationship, avoiding sexual activity until the formal age of consent is crossed. This is still grossly exploitative and the courts ought to recognize it as such.

The existence of an age of consent, however, can act as an informal barrier to questioning assertions of consent by young people over that age, even where the facts suggest exploitation. For example, police recently apprehended a 42 year old woman, Lauri Price, in the company of a 16 year old Ontario boy. Price, a schoolteacher and mother of four, had an online sexual relationship with the boy for over a year and eventually traveled to Ontario and convinced him to leave his home. They later had sexual intercourse in a motel. Canadian police stated that she would not face charges in Canada because the age of sexual consent is 16. Sergeant Robert Allan of the Ontario police was quoted as saying "although morally we took issue with the

instance, criminally, she did nothing wrong.”⁵¹ Price was charged with luring offences on her return to Texas, where the age of consent is 17.

Given that the grooming of the boy began when he was only 14, it would certainly have been open to the Canadian police to lay sexual exploitation charges under s. 153, which does not require proof of non-consent and would consider the breach of trust and the exploitation inherent in the context leading up to the sexual intercourse. Or, the Crown could have pursued internet luring charges for the conduct that happened before the boy turned 16, arguing that since the victim was in Canada there was a sufficient connection to prosecute in Canada.

I remain unconvinced, in the face of cases such as these, that the current age of consent scheme really has the potential to diminish in some way the sexual agency and autonomy of young people. It is true that an older partner may sometimes be more responsible and respectful than one close in age. It also true that sexual hierarchies may be more affected by gender than age, such that there could be a greater power imbalance in sexual activity between a 16 year old girl and an 18 year old boy, than between two females twenty years apart in age, depending on the circumstances. I would argue, however, that young people under the age of 16, who are not old enough to drive, vote, leave school or live on their own, have enough scope for sexual autonomy under the current state of the law.

My support for raising the age of consent is cautious precisely because I worry that the age of consent invites a sort of analytical laziness, and that, as would appear to be the case in the report described above, exploitation and power imbalances can be rendered invisible once the

⁵¹ Ciara Byrne, Boy ‘devastated’ as woman faces charges, Guelph Mercury, January 7, 2010, A6.

threshold is crossed. The age of consent is often no more than a rough substitute for the kind of contextual analysis that is needed in sexual assault cases, one that pays attention to the imbalances of power based on age, gender, disability and other factors.⁵²

⁵² This equally demands caution in the use of the criminal sanction where the power imbalances are less pronounced. There are at least two Canadian cases of internet luring charges being laid against teenaged accused: Fort McMurray youth abducted through Internet back home, *The Daily Herald-Tribune* (Grande Prairie, Alberta), February 28, 2007, 7 (17 year old male accused; 13 year old male victim); Dianne Wood, Teen gets nine months for child luring, *Waterloo Region Record*, October 7, 2009, B2 (18 year old accused; 14 year old victim). In both cases the conduct can be seen as aggravated in that the accused brought one or more friends with him when he picked up the victim.