

22.

Raising the Age of Sexual Consent: Renewing Legal Moralism?

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In contrast to the 1992 sexual assault reforms analyzed by Elizabeth A Sheehy earlier in this section, the law reform discussed in this chapter was neither initiated nor shaped by feminist intervention. Instead, Julie Desrosiers argues that the 2008 reform that raised the age of consent is based in deeply conservative moralism. Although she acknowledges that feminists worry about the ability of young women to freely “consent” to sexual contact with adult men, particularly in the context of a society that teaches young females that their value lies in their attractiveness to males, she suggests that feminist process requires that we engage with young women to ascertain their experiences and their input on the issue. Like Alison Symington, who writes in Chapter Twenty-Five about the risks of criminalizing failure to disclose one’s HIV status, Julie cautions that using the repressive force of the criminal law will further disempower young women’s claims to autonomy and will discourage them from seeking services and information when they need it most.

Toward the end of the eighteenth century, Blackstone stated that any use of force, however minimal, could constitute an assault.¹ This principle acquires its full meaning within the context of sexual aggression where either a caress or a beating can sustain charges of sexual assault.² Charges of sexual assault do not depend on the extent of violence employed, but rather on the absence of consent in so far as a person — female or male — does not consent to being touched and is entitled to the protection of their physical integrity.³ Obviously, women have had to fight to challenge sexist prejudice that undermines the legal protection

1 William Blackstone, *Commentaries on the Law of England: Book the Third: Of Wrongs and Their Remedies, Respecting the Rights of Persons* (London: Clarendon Press, 1765–69), online: <<http://avalon.law.yale.edu>>.

2 *R v Cuerrier*, [1998] 2 SCR 371 at para 11, per L’Heureux-Dubé J.

3 *R v Park*, [1995] 2 SCR 836 at paras 41–42.

of their physical integrity,⁴ yet the fact remains that on formal grounds, the criminal law has always prohibited sexual touching in violation of the person's will to be touched.

Canadian criminal law has also prohibited sexual contact with children, be they consensual or not. This prohibition is based upon two serious concerns. First, a child's body is in no way prepared for coitus, and penetration of any kind may result in injury or laceration. And second, children do not have the capacity to give free and enlightened consent because their self-autonomy still requires time to evolve. They are vulnerable to all forms of depredation and duress. They have no means of defending themselves when facing threats or physical constraints. In a word, they are simply not equal sexual partners. The criminal sanctioning of sexual contacts between children and adults carries the day with universal agreement and approval.⁵

How are these two rules —sexual contact without consent is prohibited and sexual contact with children is prohibited— applied to adolescents? While an adolescent cannot be forced into sexual contact, may the adolescent consent to such contact? If such be the case, then at what age can they consent in law? Moreover, must any prohibition be total, or only apply under certain circumstances?

Western democracies have all ruled on an age of sexual consent that varies between twelve and eighteen years of age.⁶ Yet the age of consent says very little about how adolescents are to be governed because this is but one factor amongst a rather complex set of rules intended to protect children while ensuring the sexual freedom of adolescents.⁷ To

4 Up until its repeal in 1984, proof of rape required evidence of vaginal penetration by a man of a woman not his wife. Violent oral or anal assaults were not classified as rape. The law was thus mainly concerned with protecting men's property rights in their wives and daughters, and particularly women's reproductive capacity: Lorene MG Clark & Debra J Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977). The rules of evidence under the *common law* constituted further obstacles: namely the need for corroboration, evidence of recent complaint, and admissibility of evidence of the sexual reputation of the woman. See, in particular, Josée Néron, *L'agression sexuelle et le droit criminel canadien: l'influence de la tradition* (Cowansville: Yvon Blais, 1997).

5 See *R v L (JJ)*, [1998] RJQ 971 (CA).

6 Helmut Graupner, "Sexual Consent: The Criminal Law in Europe and Outside of Europe" in Helmut Graupner & Vern L Bullough, eds, *Adolescence, Sexuality and the Criminal Law: Multidisciplinary Perspectives* (Binghamton, NY: Harworth Press, 2004) 111.

7 *Ibid.* It would be normal to set a high level of age of consent in a country where this would be the sole means of protecting minors, since such an age of consent would allow the continuance of relations between adolescents and persons in a position of

clearly understand the Canadian regime, the spectrum of analysis must be enlarged. As such, the age of consent has for many years been set at fourteen years of age, but it coexisted with various “other” threshold ages: age eighteen for consenting to anal penetration as well as for consenting to sexual contacts within a framework of authority, trust, or exploitation.

In 2008, the age of consent was raised to age sixteen for purposes of better protecting adolescents from sexual abuse and exploitation.⁸ A cross analysis of relevant criminal provisions indicates, however, that increasing the age of consent produces legal effects in only one scenario: namely that of sexual contacts consented between an adolescent (age fourteen to sixteen) and an adult (with an age difference of five years) in a social setting of relative equality. Bearing in mind that the average moment of adolescents’ first sexual relationship takes place at about age fourteen, and that data on the impact of sexual relations between adolescents and adults are piecemeal and non-conclusive, what will the raising of the age of consent accomplish? The application of liberal, conservative, and feminist analytical grids shed light on the values underlying this new prohibition. All in all, a measure of skepticism is in order. For underlying the crusade against sexual predators, there is clearly a renewal of legalistic moralism.

1. The Ups and Downs of the Age of Sexual Consent

In Canada, the age of consent was set at age fourteen in 1890.⁹ It was strictly prohibited to engage in sexual relations with a young woman of less than age fourteen, save where she was the legitimate spouse of the accused. The consent of an adolescent over age fourteen was deemed to be valid except in instances of seduction of a person under age eighteen who was of *previously chaste character*.¹⁰

authority (Belgium and Luxembourg, where the age limit is set at sixteen). Likewise, a higher age of consent presents fewer risks of criminalization if implemented with a process for filtering complaints (Finland and Norway, where the age of consent is set at age sixteen, but where two-thirds of cases do not go to trial). Lastly, a relatively low age of consent is appropriate if other measures of protection are in place (setting the age of consent at fourteen, but at eighteen for those in positions of trust or authority).

8 *Tackling Violent Crime Act*, SC 2008, c 6.

9 *An Act to Amend the New Criminal Act*, SC 1890, c 37 ss 3, 7, quoted in Committee on Sexual Offences against Children and Youth, *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youth [Badgley Report]*, vol 1 (Ottawa: Department of Supply and Services Canada, 1984) at 337.

10 *Ibid* at 342–49.

In 1984, the Badgley Report concluded that offences by seduction did not sufficiently protect young women age fourteen to eighteen, especially because proof of such offences depended on the victim's sexual reputation and on evidence of vaginal penetration.¹¹ Then, in 1988, new offences pertaining to sexual contact with adolescents and exploitation were drafted in order to remedy these deficiencies, yet the age of consent would remain the same. At the time of their adoption, sections 151 and 152 of the *Criminal Code* prohibited any form of sexual contact with a person under age fourteen, whether or not there had been consent, while s 153 prohibited any form of sexual contact between an adolescent age fourteen to eighteen and an adult in a position of trust or authority, regardless of consent. As such, an adolescent over age fourteen could consent to sexual contact with a person of any age insofar as the person was not in a position of trust or authority. However, s 159, consent to anal intercourse, required that the adolescent had attained eighteen years of age.

Section 150 was also added at this time to permit a lower age of consent, between twelve and fourteen years, if the age difference between the two persons was not more than two years. This section was added to recognize important realities. Pursuant to the reforms in 1984¹² and 1988,¹³ sexual assault covers a vast array of behaviours — from an unwanted kiss to intercourse. By setting the age of consent at fourteen, the legislator would have criminalized kisses and caresses freely consented to between, for instance, thirteen-year-old adolescents. Hence the adoption of a two-year proximity of age clause that opened a small escape-provision in the otherwise impenetrable prohibition whereby an adolescent between twelve and fourteen years may consent to sexual activities with another adolescent insofar as an age difference of less

11 *Ibid* at 437–41.

12 *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other acts in relation thereto or in consequence thereof*, SC 1980-81-82-83, c 125, in force on 4 January 1983. This statute repeals the crimes of rape and indecent assault and replaces them with the crimes of sexual assault (*Criminal Code*, RSC 1985, c C-46 ss 271ff).

13 *An Act to Amend the Criminal Code and the Canada Evidence Act*, SC 1987, c 24, in force on 1 January 1988. This statute specifically puts into effect the crimes of sexual abuse and exploitation of minors (ss 151–53).

than two years separates one from the other.¹⁴

In 2008, the conservative government raised the age of consent to sixteen,¹⁵ without modifying the structure of the regime set in place in 1988. Consensual sexual activity between adolescents and adults in a position of trust, authority, or exploitation remains prohibited until the legal age of majority. The same applies to consensual anal intercourse. But the reform has important consequences for consensual sexual contacts between young adults and adolescents by criminalizing otherwise formally lawful sexual relations. A fourteen- to sixteen-year-old adolescent no longer has the option of freely choosing a partner; she or he may consent to sexual contacts (kisses, caresses, or other sexual acts), but only with a partner who is not much older than he or she is. The new provisions prohibit consensual sexual relations between adolescents age fourteen to sixteen and persons more than five years older than they are. As for adolescents age twelve to fourteen years, their liberty to engage in sexual relations remains subject to a proximity age clause of two years. The sexual autonomy of adolescents is therefore quite relative: they may indulge in sexual relations, but only amongst themselves. The ensuing synthesis — presented in Table 1 — should facilitate the understanding of the law and the 2008 amendments.

Thus, in practical terms, the raising of the age of consent goes further in restricting the sexual autonomy of fourteen- to sixteen-year-old adolescents who may no longer consent to having sexual contacts with persons who are “too old.” It is noteworthy that prior to the reform, their autonomy was already quite relative since they could not consent to sexual contacts with adults in position of authority, trust, or exploitation. It is also noteworthy that the legislator had already stipulated in an amendment in 2005 that the age difference had to be taken into account at the time of deciding if the relation constituted exploitation.¹⁶ Adolescents were, however, already protected from unscrupulous sexual predators many years their senior. The nature of the relationship has become irrelevant; sexual assault is now only a function of age difference.

Nonetheless, a small legislative work-around makes it possible to avoid the criminal law proscription. Redemption comes from marriage. Any person age fourteen to sixteen years of age may consent to sexual contacts with any adult — no matter how many years his or her

¹⁴ *Ibid* at s 150.1 (2).

¹⁵ *Supra* note 8.

¹⁶ Section 153(1.2).

Table 1: Age of Consent Law, 1988 versus 2008

	1988	2008
Sexual contacts adult/ child	Prohibited (s 150.1(1))	Idem
Sexual Contacts adolescent/adult or adolescent/adolescent in a position of trust, authority or exploitation	Prohibited until majority (s 153)	Idem
Other sexual contacts among adolescents	Permitted between a youth of age twelve to fourteen and another youth who is less than two years older than he or she (s 150.1(2)) 12 ↔ less than age 14 13 ↔ less than age 15 14 -1 day ↔ less than age 16 Unrestricted permission as of age fourteen, with the exception of anal intercourse.	Idem Idem (the reform has no impact upon adolescent couples)
Other sexual contacts adolescent/adult	Unrestricted permission as of age fourteen (s 150.1(1)), with the exception of anal intercourse (s 159(2))	Permitted between a youth of age fourteen to sixteen and a person who is less than five years older than the youth (s 150.1(2.1)) 14 ↔ less than age 19 15 ↔ less than age 20 16 -1 day ↔ less than age 21 Unrestricted permission as of age sixteen (s 150.1(1)), with the exception of anal intercourse (s 159)

senior — provided the adult is his or her legally wedded spouse.¹⁷ To ensure total legality, the betrothed couple must abstain from kissing, touching one another, or having sexual relations prior to consecrating their union legally. Lastly, it is noteworthy that matrimony also makes legal consensual anal intercourse — little does the age of the participants matter.¹⁸

2. Youth and Their Sexuality

In Canada, *The Canadian Youth, Sexual Health and HIV/AIDS Study*, published in 2003, remains the last landmark study investigating adolescent sexuality. The vast canvassing of samples upon which it is based ensured result reliability: 11,082 students in seventh, ninth, and eleventh grades, or in first, third, and fifth years of secondary school, participated in the study — namely adolescents generally twelve, fourteen, and sixteen years old.¹⁹ Upon analysis of their answers, it was noted that the adolescent sexual experimentation proceeded progressively and that they indulged in a variety of sexual acts (kisses, caresses, oral sex) prior to having fully completed sexual intercourse.²⁰ The study established that a large number of adolescents had already had sexual contact at age twelve (prolonged kissing and caresses), which is the case for a decisive majority of adolescents at age sixteen. Oral sex is practiced by 30 percent of fourteen-year-old adolescents and by 52.5 percent of sixteen-year-old adolescents. Sexual intercourse with penetration, has been experienced by at least 2 percent of twelve-year-old students, by 21 percent of fourteen-year-old students, and by 43 percent of sixteen-year-old students.²¹ Finally, the average age of the first fully-completed sexual intercourse within the age-sixteen group claim-

17 Section 150.1(2.1)(b).

18 Section 159(2).

19 Council of Ministers of Education, *The Canadian Youth, Sexual Health and HIV/AIDS Study: Factors Influencing Knowledge, Attitudes and Behaviours* (Ottawa: Council of Ministers of Education, 2003) at 9–11.

20 Studies on adolescent sexuality are generally undertaken from the perspective of focusing on sexual health; they hence evidence a specific interest in preventing pregnancies and sexually transmitted diseases. As such, the focus tends to enquire into sexual intercourse with penetration. Yet, in order to grasp adolescent sexuality as a whole, the analysis spectrum must be enlarged. Thus, the drop in the rate of sexual intercourse with penetration, for example, cannot be considered in isolation, but must also take into account the correlative increase in oral sexual relations. See David Weiss & Vern L Bullough, “Adolescent American Sex” in Graupner & Bullough, *supra* note 6 at 43 at 44–45.

21 All these figures were culled from *The Canadian Youth, Sexual Health and HIV/AIDS Study*, *supra* note 19 at 83–92.

ing to be sexually active was 14.3 years of age.²²

Table 2: Results from The Canadian Youth, Sexual Health and HIV/AIDS Study

	Seventh grade & secondary 1 (generally age 12)	Ninth grade & secondary 3 (generally age 14)	Eleventh grade & secondary 5 (generally age 16)
Prolonged kissing and caresses	42%	66%	81%
Oral sex	At least 1% ¹	30%	52.5%
Sexual intercourse (penetration)	At least 2%	21%	43% (average age: 14.3)

- ¹ The authors of the report explain that there were no questions specifically addressing oral sex or sexual intercourse with penetration for the twelve-year-old group; nonetheless, some students made mention of this under the heading “other.” See The Canadian Youth, Sexual Health and HIV/AIDS Study at 84.

Data compiled in Quebec in 2002 within the framework of promoting “sexual health” are comparable with the Canadian profile: about one-half of thirteen-year-olds had already had an intimate relationship (which implies kissing and caresses) and 4.2 percent of them had experienced sexual intercourse with penetration. Among sixteen-year-old students, these figures rise to 80 percent (intimate relationship) and 40 percent (sexual intercourse with penetration).²³ The average age for the first sexual relationship amongst sixteen-year-olds claiming to be sexually active was 14.5 years old.²⁴

The first observation that must be made is that adolescents twelve to sixteen years old often do have sex lives. This information should come as no surprise since adolescence is a period of intense physical trans-

²² *Ibid* at 93.

²³ Institut de la statistique du Québec, *Enquête sociale et de santé auprès des enfants et des adolescents québécois* (Québec: Publications du Québec, 2002) at 277–78. This survey was performed on 3,700 girls and boys aged nine, thirteen, and sixteen. The survey claims to be representative of all Quebecers in these age groups.

²⁴ *Ibid* at 285.

formation that results in the sexual maturity of the body, ie, the prerequisite necessary for ensuring the reproduction of the human species. Each individual is biologically programmed to have sexual contacts as puberty runs its course.²⁵ The second observation regarding sexuality is that normality is an elastic concept. Adolescents do not conform to one standard behavioural profile. Some have already had sexual relations at age thirteen (roughly 4 percent), others have never kissed anyone at age sixteen (19 percent). Sexual maturing is an ongoing process amongst all adolescents. Young people reach various stages of readiness for sexual experimentation at widely different ages, all within the range of “normal.” When the legislators set a minimum age of consent without taking those realities into account, they risk criminalizing the normal sexual behaviour of a significant proportion of adolescents.

Turning now to the issue of sexual contacts between adults and adolescents, what can be said? First of all, there is a dearth of data concerning this phenomenon.²⁶ Canadian researchers observe that female adolescents undergo precocious physiological maturing when compared to young males, and they usually choose partners somewhat older than themselves.²⁷ Extrapolating the extent of this phenomenon is difficult. A few studies in the United States have sought to document the prevalence of adolescent female/male adult relations — the most frequently observed sexual combination — where age difference is an issue.²⁸ While data findings are insufficient for drawing well-founded conclusions, and many methodological problems hamper their interpretation, it appears that this type of relationship is relatively frequent: depending on the studies, 3.5 percent to 13 percent of female adolescents reported these sexual experiences.²⁹ If such relations may have negative effects upon female adolescents, they may also have positive

25 Traditionally, the age of consent was simply the age of puberty. See Vern L Bullough, “Age of Consent: An Historical Overview” in Graupner & Bullough, *supra* note 6 at 23 at 25.

26 But see the recent study of Bonnie B Miller, David N Cox & Elizabeth M Saweyc, “Age of Sexual Consent Law in Canada: Population-Based Evidence for Law and Policy” (2010) 19 Can J Human Sexuality 105.

27 *Enquête sociale et de santé auprès des enfants et des adolescents québécois*, *supra* note 253 at 278; *The Canadian Youth, Sexual Health and HIV/AIDS Study*, *supra* note 19 at 115.

28 Denise A Hines & David Finkelhor, “Statutory Sex Crime Relationships Between Juveniles and Adults: A Review of Social Scientific Research” (May 2007) 12 Aggression and Violent Behaviour 300 at 302.

29 *Ibid* at 302–04.

effects. As such, generalizations are far too speculative to be made.³⁰ It is also noteworthy that we do not have any information on the prevalence and potential effects of female adolescents/adult women couples.

With respect to male adolescents/adult women couples, they seem to comprise about 5 percent of male adolescents and, on the whole, seem to be overall beneficial for both parties to the relationship.³¹ The same may be applied to young gays, who tend to react positively to sexual interactions with more mature adult men.³² In the preceding case, adolescent males state that their relationship with an adult male has assisted them in coming to terms with their sexual orientation and having a more positive outlook on life. Therefore, available data strongly refutes a presumption of trauma caused by sexual relations with adult men, at least for gay youths. Nonetheless, with knowledge in this area at its current state, additional research is needed, especially with regard to relationships between adults and female adolescents.

3. The Conceptual Foundations for Raising the Age of Sexual Consent

Adolescents are sexual beings who, on occasion, share sexual intimacy with adults. Should this be prohibited? Criminalizing behaviour is a serious undertaking: it transforms a citizen into a criminal.³³ The assertion that the criminal law should be a last resort has become a commonplace statement. Contemporary Canadian authors generally restate the moderation principle set forth by the Law Reform Commission in past times:³⁴ the implementation of criminal law must only be directed towards the repression of conduct that infringes upon some fundamental social value and that is in addition deemed harmful.³⁵ Are

30 *Ibid.*

31 *Ibid* at 305. See also Bruce Rind, "An Empirical Examination of Sexual Relations Between Adolescents and Adults: They Differ from Those Between Children and Adults and Should be Treated Separately" in Graupner & Bullough, *supra* note 6 at 55.

32 Hines & Finklehor, *supra* note 28 at 304; Rind, *ibid.*

33 Herein the author draws inspiration from Elizabeth Comack & Gillian Balfour, *The Power to Criminalize: Violence, Inequality and the Law* (Halifax: Fernwood Publishing, 2004) at 9: "To criminalize, according to the standard dictionary definition, means to turn a person into a criminal."

34 Law Reform Commission, *Our Penal Law* (Ottawa: Law Reform Commission of Canada, 1976).

35 Gisèle Côté-Harper, Pierre Rainville & Jean Turgeon, *Traité de droit pénal canadien* (Cowansville: Yvon Blais, 1998) at 61; See also Don Stuart, *Canadian Criminal Law*, 4d ed (Toronto: Carswell, 2001) at 62.

consensual sexual contacts between adolescents and adults in circumstances of relative equality to be considered criminal conduct? The answer depends on the theoretical perspective that informs it.

3.1 Liberal Perspectives

The emblematic figure of liberalism, John Stuart Mill, advocated the broadest liberty of individual action possible with the conviction that the sum of individual liberties benefits all humanity by ushering in new fields of knowledge and new ways of doing, knowing, living.³⁶ Government must therefore restrain its resort to repressive actions in order not to impose an oppressive norm. The principle is clear: the only prohibitions ought to be those of behaviours that cause harm to another. Since the concept of harm is notoriously difficult to determine, liberals have outlined various criteria to determine if a specific behaviour should be singled out for criminal sanction.³⁷ For that matter, the criminalization of consensual relations between adults and sixteen- to eighteen-year-old adolescents is quite problematic in light of several of these criteria: the criminalization of a consensual relationship, the random application of the prohibition depending on arbitrary age cut-offs, and an inappropriate legal response to an issue more social than criminal in nature. Some illustrations are in order.

Liberals have a marked hesitancy to brand a purely consensual relationship as a criminal offence. A fifteen-year-old adolescent who voluntarily, enthusiastically, and even with love and passion pursues a relationship with a young adult certainly does not consider him or herself to be a victim. From a liberal perspective, there can be no crime without a victim and it is highly problematical for the state to force its citizens to respect its views in matters of morality.

Furthermore, the criminalization of consensual relations between adults and adolescents between ages fourteen and sixteen raises genu-

36 John Stuart Mill, *On Liberty*, 2d ed (London: John W Parker and Son, 1859). See also its first French language translation: John Stuart Mill, *La liberté*, translated by Charles Brook Dupont-White (Paris: Guillaumin, 1860), online: <<http://books.google.fr>>.

37 See Herbert Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), who raises six issues: (1) Generally speaking, does the prohibited conduct constitute an important social threat? (2) Does criminalization of the conduct produce deterrent effects? (3) Does criminalization of the conduct hamper the pursuit of lawful and socially beneficial activities? (4) Is it possible to repress the prohibited conduct in a non-discriminatory manner (which is not the case when such conduct is widespread and measures taken against it are selective and sporadic?) (5) Is the prohibited conduct a consensual activity in which no one is a victim? (6) And last of all, besides criminalization, are there other efficient ways to solve the problem?

ine problems regarding consistent and fair application of the prohibition. The number of these relationships is unknown, but sexual relationships between adults and adolescents are likely to be relatively widespread. Although there are no Canadian data on this subject, it is a known fact in the United States that the majority of investigations are instigated by complaints to authorities from worried or disapproving parents.³⁸ Yet, while some parents deem such a relationship to be criminal, others disapprove but refrain from alerting authorities, while still others simply decide to have confidence in their adolescents and their sexual choices. Hence, the law is enforced sporadically, and potentially unfairly, for purposes of controlling adolescent sexuality.

Finally, and just supposing — which has not yet been documented — that the consensual relations between adults and fourteen- to sixteen-year-old adolescents are prejudicial for the latter, criminalization does not appear to be the best of solutions. Sexual education programs would likely be far more appropriate in order to equip adolescents with the knowledge and skills needed for developing and exercising their capacity to exercise good judgment about their sexual relationships.

Objections expressed before the parliamentary committee entrusted with reviewing the legislative bill spoke to the risks inherent in criminalizing adolescent sexuality, namely youth abandonment of sexual education services and programs intended for adolescents. It is feared that adolescents would be disinclined to exhibit their intimacy if it meant risking criminal repression.

At a time of constitutionalizing human rights and freedoms in Canada, liberal perspectives occupy a preponderant place in legal analyses. Of course, our Supreme Court refused to recognize the “*harm principle*,” *the idea that the government can only criminalize those acts that cause demonstrable harm to others*, as a constitutional principle of fundamental justice, such that the state may criminalize conduct without having to demonstrate that the conduct causes serious harm.³⁹

Nonetheless, the *harm principle* vigorously reappeared in the *Labaye* case when the Supreme Court ruled that “conduct” only acquired the character of criminal indecency when it caused or risked causing some serious harm, such as physical or psychological injury

38 Todd Melby, “When Teens Get Arrested for Voluntary Sex” (2006) 40 Contemporary Sexuality 1 at 5; “A 1997 American Bar Association study, written by Sharon G Elstein and Noy Davis, observes that nearly two-thirds of reports to prosecutors about underage sex came from parents.”

39 *R v Malmø-Levine*; *R v Caine*, [2003] 3 SCR 571.

to anyone participating in the activities.⁴⁰ There can be no doubt that in a *Charter* challenge to the new prohibitions based on the violation occasioned to fundamental rights, the liberal assumption would be centre stage since the state would be required to demonstrate that the infringement caused to sexual freedom is justified under s 1 of the *Canadian Charter of Rights and Freedoms*.

Does the debate lend itself to being framed in terms of constitutional rights? Sexual freedom is not overtly recognized in the *Charter* as a right and its legal status remains ambiguous, somewhat akin to “the political history of sex in the Western World.”⁴¹ Taboos associated with Christianity have meant that human sexuality has only recently entered public and legal debates, painfully and slowly. In principle, sexual freedom involves two aspects, both of equal importance: the right to indulge in sexual relations and the corresponding right to refuse such contact. Without evoking all the legal subtleties that an exhaustive legal analysis would require,⁴² it may be asserted that in its positive version, sexual freedom is an aspect of the right to privacy. As such, individuals claim the right to live their sexuality as they see fit, to say “yes” to whomever they please and in whatever manner pleases them, insofar as no harm is done to third parties. In its negative form, sexual freedom is also an aspect of the right to physical integrity,⁴³ whereby consent must be to specific sexual acts and can be withdrawn at any time. The two facets of sexual autonomy are expressed in two distinct and opposing expressions: the right to say “yes” (privacy) and the right to say “no” (protection of physical integrity). As such, if the state has the duty to act to protect the physical integrity of its citizens, it must also respect their privacy:

Sexuality and sexual life is at the core of private life (privacy) and its protection. State regulation of sexual behaviour interferes with this right, and such interference can only be justified, if demonstrably necessary for the prevention of harm to others. Whereby “necessity” in this context is linked to a democratic society, whose hallmarks are “tolerance, pluralism, broad-mindedness,” those hallmarks require that there is a pressing social need

40 *R v Labaye*, [2005] 3 SCR 728 at para 62.

41 Daniel Borrillo, “Liberté érotique et exception sexuelle” in Daniel Borrillo & Danièle Lochak, eds, *La liberté sexuelle* (Paris: Presses universitaires de France, 2005) 38 at 41.

42 For a European starting point, see Danièle Lochak, “La liberté sexuelle, une liberté (pas) comme les autres?” in Borrillo & Lochak, eds, *ibid* at 7.

43 *Supra* note 3 at para 41.

for the measure and that the measure is proportionate to the aim sought to achieve. Attitudes of the majority can not serve as valid ground for justification. It is the core task of human rights to protect the individual and minorities against unjustified interference by the majority... Interferences solely based on the views of the majority Mill called a "betrayal of the most fundamental values of the political theory of democracy."⁴⁴

Thus, the raising of the age of consent would not be a means of protecting young people, but rather a means of controlling them. To borrow the expression of another author, we are witnessing the creation of offences against sexual autonomy.⁴⁵

3.2 Conservative Perspectives

From a conservative perspective, it is legitimate to use penal law to protect majority values. Traces of the concepts of "good" and "evil" are found throughout the *Criminal Code*, solidifying the very foundations of society. It is both impossible and inadvisable to ignore them because law that is not grounded in morality would lead purely and simply to social disintegration.⁴⁶ Thus, insofar as most of the population considers sexual relations between adolescents and adults to be unacceptable, they may be criminalized. Liberals and conservatives may very well agree on the immorality of a given sexual behaviour, yet the former would refuse to criminalize such behaviour without there being tangible evidence of harm occasioned by the behaviour.

Conservatives and liberals have torn one another apart over different understandings of "morality." For example, the legal status of homosexuality served as the departure point for fundamental doctrinal debates. On the one hand, conservatives called for the criminalization of a sexual practice contrary to family values. On the other, liberals opposed the prohibition of an inoffensive sexual practice.⁴⁷ Conservatives are deeply attached to traditional family values and value the sacred institution of marriage, while remaining wary of "social progress" that undermines the institution. In following this line of thinking, le-

44 Helmut Graupner & Vern L Bullough, "Introduction" in Graupner & Bullough, *supra* note 6 at 1 at 2–3.

45 Michael C Baurmann, "Sexuality, Adolescence and the Criminal Law: The Perspective of Criminology" in Graupner & Bullough, *supra* note 6 at 84: "offences against sexual self-determination."

46 Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965).

47 Patrick Devlin, *ibid*, and Herbert LA Hart, *Law, Liberty and Morality* (Stanford: Stanford University Press, 1963).

gitimate sexual fulfilment resides in procreation within the institution of marriage.

In the debate on the raising of the age of consent, several conservative arguments were presented. Those most favourable to the bill issued from police and religious organizations. The Director of Public Policy of the Evangelical Fellowship of Canada spoke out strongly against the precocious sexualization of children and adolescents, stating that he was firmly convinced “that the best and most enriching expression of sexuality is to be found within a lifelong conjugal relationship.”⁴⁸ From his standpoint, parents and spiritual communities must promote “the teaching of values that educate young people, and include an understanding of their sexual identity from a Christian point of view.”⁴⁹ Sexual relationships between adults and adolescents were presented as deviant relationships. For example, many of the presentations used a sexual exploitation schema, referring to the adults involved as “sexual predators” and the adolescents as “children” and “victims.” They issued a plea for enhanced penal severity so as to dissuade “pedophiles” here and elsewhere.

Protection of children and protection of the institution of marriage are two settings that come together in the new legislation. Because, if it is necessary to dissuade sexual predators, one must also permit marriage, independent of age differences. From which issues a new form of marital immunity, independent of age differences. Hence, this new form of marital immunity, codified under s 150.1(2.1)(b) states that the consent of a person age fourteen to sixteen is valid if it is given to his or her spouse. A young woman age fifteen may therefore have lawful sexual relations with her forty-year-old husband, but she may not have a twenty-one-year-old lover.

Yet it is perhaps the silence in the law that best reveals its conservative influences. The change in the age of consent would have been the natural opportunity for correcting the discriminatory treatment afforded to gay youth, who cannot consent to anal intercourse prior to eighteen years of age. It would have been simple to state that the age of consent would be sixteen years of age without reference to anybody's sexual orientation, all the more so since certain appellate courts have

48 Before the Standing Committee on Justice and Human Rights: Canada, *Témoignages de comités*, 39th Parl, 1st Sess, No 56, (22 March 2007), Doug Cryer, Director of Public Policy of the Evangelical Fellowship of Canada, online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2791741&Language=E&Mode=1&Parl=39&Ses=1#Int-1969620>>.

49 *Ibid.*

ruled that the different age limit in s 159 discriminates on the basis of sexual orientation, contrary to s 15 of the *Charter*.⁵⁰ Partisans for this course of action made representations before the Committee; however, the legislator ignored their efforts. The age of sexual consent is therefore fourteen years for heterosexual adolescents who have partners of about the same age, sixteen years for heterosexual adolescents who have adult partners,⁵¹ and eighteen years for gay adolescents, regardless of the age of their partners.

Conservatism, it would seem, currently expresses itself in a more convoluted manner than during the twentieth century. In a society as pluralistic as ours, it is a difficult undertaking to identify moral values that are supported by the majority. Furthermore, conservative claims are difficult to reconcile with fundamental rights because they carry the potential for oppressing minorities. Conservative rhetoric reappears forcefully in legislative initiatives purported to respond to “populist” demands by vocal lobby groups who claim to represent the views of “ordinary” citizens.

Raising the age of consent is a long-standing legislative project that made unsuccessful appearances in the House of Commons in 1997,⁵² 2001,⁵³ and 2005⁵⁴ before making a forceful comeback in 2008 bearing a new name: the age of “protection.” In the end, it was the fear of sexual predators that made it possible to restrict adolescents’ zone of sexual liberty. Yet the reality of sexual exploitation runs little risk of being affected by this measure since most sexual crimes perpetrated against adolescents are committed on a non-consensual basis by those in their immediate circle of family and friends. Thus raising the age of consent permitted the Canadian government to claim that it took action taken against “crime,” while soothing the more conservative fringe of their

50 *R v M(C)* (1995), 41 CR (4th) 134, 98 CCC (3d) 481 (Ont CA); *R v Roy*, [1998] RJQ 1043, 125 CCC (3d) 442 (CA); *R v Talbot* (2002), 161 CCC (3d) 256 (Ont CA).

51 It remains understood that in accordance with s 153, adolescents age sixteen to eighteen are legally incapable of consenting to sexual contacts with adults when that consent is vitiated by a position of authority, trust, or exploitation.

52 Bill C-255, *An Act to Amend the Criminal Code (prohibited sexual acts)*, 1st Sess, 36th Parl, 1997, was introduced by Art Hanger (Calgary North-East, Canadian Alliance).

53 Bill C-278, *An Act to Amend the Criminal Code (prohibited sexual acts)*, 1st Sess, 37th Parl, 2001, was also introduced by Art Hanger (Calgary North-East, Canadian Alliance).

54 The raising of the age of consent was once more debated within the framework of Bill C-2, but unsuccessfully: Bill C-2, *An Act to Amend the Criminal Code (protection of children and other vulnerable persons and the Canada Evidence Act)*, 1st Sess, 38th Parl, 2005 (1st reading).

electorate by reasserting the paramountcy of marriage and maintaining the degraded status of gay sexual relationships.

3.3 Feminist Perspectives

The feminist vision of the law is neither that of the liberals nor the conservatives. The feminist concept is that the law must be used as a tool permitting access to greater social justice. While legislative action makes possible the destabilizing of power relations between males and females, it may also act in favour of other historically discriminated groups, such as persons with disabilities, racial or cultural minorities, and gays or lesbians.

Feminist perspectives are not necessarily opposed to the raising of the age of consent. To begin with, women were the first to publicly focus attention on the phenomenon of men's sexual aggression against women and then to transform it into an important political issue. During the 1970s and 1980s, they exposed and critiqued sexism in the criminal law of rape by drawing attention to the discriminatory and unfounded beliefs on which these laws were premised. Feminists also branded rape as an act of violence and a form of domination perpetrated against the bodies of women.⁵⁵ They lobbied for and achieved substantive law reform both with respect to the definition of the crime—now sexual assault—and the rules of evidence that govern its proof.

With the momentum thus generated, feminists also drew the attention of the media and politicians to the hidden crime of incest. In Canada, the Badgley Committee, entrusted with shedding light on sexual assaults perpetrated on infants and children, assumed its mandate with a near military outlook: it recommended enhanced protection of children against sexual abuse and of adolescents against sexual exploitation. The model that guided their investigation was that of a young child, suffering from repeated sexual abuse and hence in desperate need of protection.

The Badgley Committee was not charged with considering the case of the enthusiastic adolescent seeking sexual contacts with some young adult within an egalitarian relationship. While the committee clearly recognized that its recommendations would affect the equilib-

55 There exists substantial critical literature in this respect. See, among others: Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1985); Susan Estrich, *Real Rape* (Cambridge: Harvard University Press, 1987); and Catharine MacKinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1987) at Chapters 6 & 7.

rium between the protection of children from sexual aggression and exploitation on the one hand, and, on the other, the possibility for adolescents to express themselves sexually in their evolution from early adolescence into adulthood,⁵⁶ it did not address the balance it should strike. Instead, it instantly dove straight to an assertion of the need to protect young victims. Thus, it was that a body of argumentative reasoning was formed, extracted directly from the feminist grid, in order to better protect an extremely vulnerable group.

Throughout history, and in all cultures, female sexuality has been dominated by male control. Rape, forced marriages, wives' marital duties, and on-the-job sexual harassment are practiced on a widespread scale. The feminist movement has insisted on women's autonomy rights—their right to control their own bodies and their sexuality. Feminists have advocated for women's right to say “no” to sexual contact and for “no” to have legal effect, principles that our criminal law now reflects. They have also established that consent cannot be inferred from the fact that a woman is submissive or passive;⁵⁷ consent must be active in order to be understood as “voluntary agreement” according to the *Criminal Code*.⁵⁸ Women's sexual autonomy has both a negative and a positive aspect, however. Women's sexual freedom — the right to choose when, how and with whom they engage in sexual relations — is supported by these same criminal law principles and is also of undeniable importance to the feminist agenda.

Nor should one ignore feminist distrust of liberal discourse, especially when dealing with the issue of consent. For the liberal, consent is a glorified act that symbolizes individual self-determination. Not so among feminists for whom the expression of true consent depends upon an egalitarian relationship. In our culture — one that excessively extolls feminine beauty and youth to such an extent that young women are commonly represented in television, film, and music as only existing through the desire of a man — should one not question the sexual consent of an adolescent? Is an egalitarian relationship possible between an adolescent female and a considerably older man? Is the risk of domination too important to be neglected? The fact of the matter is that feminists conceive the notion of harm from a standpoint far wider than the liberals' perception thereof. Should one not fear the instru-

56 *Badgley Report*, *supra* note 9 at 294.

57 *R v M(L)*, [1994] 2 SCR 3.

58 Section 273.1(1).

mentation of young bodies in the service of adult sexual pleasure? Is there not a risk of degradation or, even worse, dehumanization of adolescent women's sexuality?

Feminists also maintain a high level of distrust — perhaps even greater — with regard to conservative ideology. It was in the name of majoritarian values that women were for ages confined to their homes, without any source of income, far from the seats of religious and political power. Ironically, in the current discourse on policy, where raising the age of consent is claimed to further protect victims of sexual predators, there is some confusion, even a blending of feminist and conservative claims. We see emerging a more popular “nouveau genre” in which criminal law is raised to the level of an “answer to social problems,” without undertaking any more fundamental changes.

From my standpoint — namely a feminist perspective — the “urge” to further protect young people through raising the age of consent must be resisted for two reasons. My first point is that the raising of the age of consent does not afford better protection from adult sexual predators: non-consensual sexual relations have always been criminalized. As for consensual sexual contacts with adults, they are already prohibited in the case of relationships with adults in positions of authority, trust, or exploitation. If the current legislation is intended to protect youth, it just does not do the job.

My second point is that raising the age of consent was pursued in a closed circuit, without any fieldwork for collecting data about the lives and experiences of adolescent women, in violation of feminist methodology. Feminist demands are grounded in real-life experiences. The approach seeks to shed light on the dim, hidden side of reality, namely that of one-half the population. Before prohibiting sexual contact between adolescents age fourteen to sixteen years old, it is necessary to consult with the subjects of such proposed laws, to ask for their opinions. Adolescents' right to participate is not only recognized internationally;⁵⁹ it is also the starting point for anyone seeking to protect them. It is one thing to seek to protect victims of sexual assault who have made public demands for improved legal treatment; it is yet another to proceed to law reform in the absence of the victims. When this step is taken in the name of feminism, feminism shifts to moralism. In the current state of affairs, the raising of the age of consent is illegit-

59 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 at 12 (entered into force 2 September 1990).

imate because nothing has been done to explore or document the consequences of sexual relations between adolescents and adults, nor has anything been done to record what these adolescents have to say about the potential benefits and harms that they experience through criminalization of their chosen sexual partners.

CONCLUSION

For many reasons, the raising of the age of consent is open to criticism. In fact, the recent increase in the age of consent, rebaptized the “age of protection,” constitutes a hijacking of the initial objective (the protection of adolescents from sexual abuse and exploitation) in order to refurbish legalistic moralism. The actual effect of the new law is to prohibit sexual contact between the age fourteen-to-sixteen group of adolescents and adults, even if such sexual contact takes place in an egalitarian context. Henceforth, little does the nature of the relationship matter.

We have limited knowledge regarding the extent of intimate relationships between adolescents and adults, and limited knowledge of their consequences. The law was enacted in a vacuum, in response to the fear of sexual predators, without being solidly positioned in the social environment. Adolescents age fourteen and older often are sexually active. What do they think of this amendment to the law? Can they find their way through the muddle of rules that just add to the complexity of laws in force? Here then is a genuine risk of alienating young people further from the law. When we purport to govern young people’s sexuality through laws that bear no relation to their realities, law loses its legitimacy and its relevance.

Obviously, one may question the ethics or morality of intimate relations between adolescents and adults. But to prohibit such relationships under pain of criminal sanction is one step that should never have been taken, all the more so when a prison sentence awaits “offenders.”⁶⁰ The implementation of repressive measures always entails negative consequences — first for the accused, who must then serve a prison sentence and thereafter must live with the stigma of being a sexual of-

60 Crimes of sexual interference (section 151), invitation to sexual touching (section 152), and sexual exploitation (section 153) are all sanctioned by a minimum term of 45 days (indictable offence) or 14 days (summary conviction) of imprisonment. Bill C-10, *Safe Streets and Communities Act*, 1st Sess, 41st Parl, 2011. (Royal Assent 13 March 2012), c/s 11, 12, and 13, augments this term to a minimum of one year (indictable offence) or 90 days (summary conviction) of imprisonment. The same applies to sexual assault if the complainant is under the age of 16 years (cl 25).

fender. And the consequences for the adolescent? Will they avail themselves of services and information specially prepared for them if they run the risk of criminal intervention? Moreover, control over adolescent sexuality by means of criminal law runs the risk of pitting parents and adolescents against with one another, thereby entailing a sporadic and unpredictable application of the law. All in all, except in cases where an adult pursues sexual relations with an adolescent from a position of authority, trust, or exploitation, criminal law is just not the forum for debating issues of consensual sexual relations between adolescents and adults.