



## We bid you be of Hope (Again) – A Case of Sexual Consent

Luci V. Hyett\*

### *Abstract*

*The age of consent is a polarised concept which has caused a dissonance between the law and society for the past one hundred fifty years. s9 Sexual Offences Act 2003 epitomises the discord when it creates an offence of Sexual Activity with a Child which envisages that a girl under the age of 16 (and even those under 13) can consent to penetrative sexual acts with an adult. This article contends that whilst it is meritorious of Parliament to create an offence of strict liability which renders liable, any person having sexual intercourse with a girl under 16, the symbolic value of the broad offence label does little to communicate the full extent of the guilty conduct of the perpetrator (where penetration is involved). It argues that the label in fact perpetuates attitudes toward girls under 16: that they are self-determinate, sexually autonomous miscreants sent to inveigle ordinary men with their youthful and phlegmatic erotism. It contends that girls between 13 and 16 are learning to become autonomous adults and the fragility of their vulnerability throughout this process is something which Parliament has a duty to protect. It suggests that the law should thus, deem those under the age of 16 as lacking the legal capacity to consent to sexual intercourse which would give rise to a rebuttable presumption of non-consent under the auspices of the Rape offence.*

### **Keywords**

Age of Consent, s9 Sexual Offences Act 2003, Capacity, Rotherham & Rochdale Child Exploitation Matters, Consent Myths.

### **I. INTRODUCTION**

The age of consent has always been somewhat of a Utopian concept, engendered by an optimism for 'lifting the stone lid' on child sexual exploitation and telling the stories of girls as young as 12 being regaled with gifts by adult men, as an interchange for sexual intercourse.<sup>1</sup>

---

\* L/SL in Law, University of Wolverhampton. ORCID ID: 0000-0002-7253-9422.

<sup>1</sup> Stead, W.T in 'We Bid You Be of Hope', *The Pall Mall Gazette* (July 6, 1885) 1. 'Lifting the stone lid' was an analogous reference comparing the incidence of child prostitution in London during the 1900's where children were 'snared, trapped and outraged

Whilst this chronicle may depict a scene from Dickensian England where country girls are courted by men in different guises, proposing to bring them to London to 'see the sights' and, plying them with alcohol and affection in return for a euphemistic 'night in lodgings'; one hundred and fifty years later, the modern-day narrative is not too dissimilar. For girls continue to endure the beguilement of men which is made manifest by the augmentation of the eroticism for youthfulness and the social dissimulation with which it is received. No more so was this epitomised than by the Rotherham and Rochdale child sexual exploitation cases where girls were groomed with alcohol, drugs and gifts before being forced to have sex, sometimes with multiple men. What became apparent was that these men were not the Minotaurs that had become synonymous with the term 'sex offender' but, were ordinary men targeting young vulnerable girls. Moreover, the vulnerability of those girls would condone rather than condemn their experiences and justify inaction by statutory agencies who deemed them 'undesirable and not worthy of protection'.<sup>2</sup> However, whilst the number of girls subject to this form of abuse in both cases was extensive, it delineates a systemic problem in society where girls are seen as being both at the mercy and control of men and boys, with consent to sexual intercourse being representative of their commodification.<sup>3</sup>

However, reforming the law on sexual offences has done little to challenge these attitudes and has failed to improve the paucity of prosecutions for such crimes committed against the 13-16 age group rendering them a distinctly neglected category of person in contemporary sexual offences legislation. In particular, the lack of inclusion of a specified offence in the Sexual Offences Act 2003 categorising sexual intercourse with a child under 16, as rape of a child under 16 undermines public notions of the age of consent because the Act then dilutes the seriousness of the offence based upon whether the victim factually consented – 'rape' under s1 Sexual Offences Act 2003 where there was no factual consent to sexual intercourse by the victim and 'sexual activity with a child' under s9 Sexual Offences Act 2003 where the victim gave their consent. The implications of this are that the legislation provides no real challenge to the myths which propagate views that girls under 16 who use drugs or alcohol freely,<sup>4</sup> those who dress provocatively or initiate intimacy are deemed to have sent out signals of sexual desire which cannot or should not be easily revoked.<sup>5</sup>

This article will set the analysis of the suitability for the offence of sexual activity with a child as failing to capture the seriousness with which adults having sex with children should be treated by contextualising the historical development of the age of consent, as well as that of sexual offences relating to children. It will then go on to explore whether the conduct should (notwithstanding the factual consent of the victim) be more appropriately criminalised as rape and in doing so, the discussion will be framed around three themes. Firstly, it will consider that the politicisation of sexual offences means that the State and those organisations acting on behalf of the State whose elitist status is conferred upon them through the granting of power to seek and administer justice,<sup>6</sup> are perpetuating these myths about young girls when they fail

---

either when under the influence of drugs' to the Campo Santo Cemetery in Naples where Human Corpses were disposed of in sewer systems and lay festering beneath the streets, hidden from unsuspecting citizens walking above.

<sup>2</sup> Jay, A. *The Independent Inquiry into Child Sexual Exploitation in Rotherham* (August 21 2014) para 8.2.

<sup>3</sup> Coy, M. 'Joining the Dots on Sexual Exploitation of Children and Women: A Way Forward for UK Policy Responses' (2016) 36(4), *Critical.Social.Policy*, 583.

<sup>4</sup> Ashworth A and Temkin J, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent'[2004] 328 *Criminal Law Review*, 342.

<sup>5</sup> Munro, V. 'Constructing Consent: Legislating Freedom and Legitimizing Constraint, 41 *Akron LR*, 936

<sup>6</sup> Khan, SR, 'The Sociology of Elites' (2012) *Annual Review of Sociology* 38, 370.

to adequately protect them from incidences of exploitation, whether through a lack of suitable legislation, investigation or prosecution. It will assert that Parliament as the collectivist Super-Elite,<sup>7</sup> avoided criticism in both the Jay Report<sup>8</sup> and the Coffey Report,<sup>9</sup> whose parameters were set so as to inquire into the wrongdoings of public sector agencies rather than to consider the suitability of the legislative provisions designed to protect young girls from predatory adults.<sup>10</sup>

Secondly, that the symbolic effect of labelling the offence as sexual activity with a child instead of rape means that victims are more likely to be blamed for consenting to the sexual intercourse rather than to be perceived as a victim of exploitation or abuse,<sup>11</sup> which in turn results in a lack of reporting in either failing to recognise an offence has taken place or being scared that they will not be believed.<sup>12</sup> It further propounds that the symbolic function of law is such that the taxonomy of sexual offences committed against those under 16 has undergone a paradigmatic shift from explicitly professing the extent of blameworthy conduct of the perpetrator in the offence label, to a negative refashioning of language which places the emphasis upon the acts of the child victim. This is largely responsible for perpetuating attitudes which posit that girls who consent to sexual intercourse with adults over 18 are empowered young women and not vulnerable young girls deserving of protection.

Finally, it will consider whether the focus upon consent for sexual offences committed against female children has simply become an extension of that applied to women, with the nexus being that they both possess female bodies.<sup>13</sup> However, it will assert that children must be removed from the discourse that seeks to legitimise adults having sexual intercourse with them because there are inherent vulnerabilities and inequalities at play. By recognising that whilst children may have choices,<sup>14</sup> the state should intervene in children being able to exercise that choice to have sexual intercourse with an adult by deeming that they lack the legal capacity to consent.<sup>15</sup>

## II. THE HISTORY OF THE AGE OF CONSENT

The genesis for setting the legal age of consent at 16 was thus predicated upon the need to safeguard children from being deemed as possessing 'the absolute right to dispose of their person' because despite those between the ages of 13 and 16 'professing themselves as perfectly willing to be seduced' the consequences and physical nature of the act were considered as being unknown to them and thus, consent was given through ignorance as opposed to understanding.<sup>16</sup> Yet, over time this resolute stance has become somewhat

---

<sup>7</sup> The reference to 'Elite' and 'Super-Elite' is attributed to Donald Draper, who considers elitism as implicit in Rape Myth Discourse. Draper, D. 'After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?' (2008) 41 Akron L Rev 957, 958. Helen Reece also adopts this terminology in Reece, H. 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33(3) Oxford J Legal Studies 472.

<sup>8</sup> n.2 above.

<sup>9</sup> Coffey, A. *Real Voices: Child Exploitation in Greater Manchester* (October 2014).

<sup>10</sup> Although, it is accepted that they both took issue with the wording of the SOA that made reference to child prostitution.

<sup>11</sup> Raphael, J. 'Rape is Rape: How Denial, Distortion and Victim Blaming Are Fuelling a Hidden Acquaintance, Rape Crisis (2013) 53-54.

<sup>12</sup> Munro, V. 'Constructing Consent: Legislating Freedom and Legitimizing Constraint' (2008) 41 Akron LR, 937.

<sup>13</sup> Coy, M. 'Joining the Dots on Sexual Exploitation of Children and Women: A Way Forward for UK Policy Responses' (2016) 36(4), Critical.Social.Policy, 585

<sup>14</sup> Nussbaum, M, 'Women's Capabilities and Social Justice' (2000) 1(2) Journal of Human Development, 234.

<sup>15</sup> Craig, E. 'Capacity to Consent to Sexual Risk' (2014) 17(1) New Criminal Law Review, 126.

<sup>16</sup> Stead, W.T in The Maiden Tribute of Modern Babylon II: The Report of Our Secret Commission, *The Pall Mall Gazette*, July 7 1885.

atrophied by the bisection of consent as a concept which means that the law still renders unlawful, any sexual intercourse with a child (consent in law) but, uses any consent given (consent in fact) as a means to determine the extent of the perpetrator's blameworthy conduct. This has also resulted in the dichotomisation of sexual activities committed against children as being non-consensual and consensual.

### III. SEXUAL OFFENCES: THE NEED FOR AN UNDIFFERENTIATED OFFENCE.<sup>17</sup>

Rape, as the apex non-consensual offence (and the only one available to the 13-16 age group) requires that the victim does not consent to the intentional penetration of their vagina, anus or mouth,<sup>18</sup> which requires the prosecution to prove both an absence of consent of the victim and that the defendant does not reasonably believe that the victim is consenting in addition to the intentional penetration in order to make out the offence. The problem exists in that the age of consent being set at 16 communicates to the public that under 16 year olds cannot consent at all and thus, where an under 16 year old does consent to sex with an over 18 year old, then there may be an expectation from the public that this should be rape. However, because there lacks a specified offence of rape of a child under 16 then the initial focus for the Crown Prosecution Service when selecting a charge largely depends upon whether the child has factually consented to the sexual intercourse; reserving the offence of rape for the more obvious cases of non-consent and rendering 'sexual activity with a child' as the catch-all offence for cases where proving the non-consent of the victim is evidentially more difficult.

The offence of Rape then envisages that only where the defendant deceives the victim as to the nature or purpose of the act, will it be conclusively presumed that the victim did not consent.<sup>19</sup> In *R v Jheeta* [2007] the court said that the strongest case of deception would be to deceive the victim as to the medical need for such penetration however, deception is narrowly construed so that it could not accommodate the situation where the victim was simply coerced into consenting.<sup>20</sup> Thus, it renders rather fanciful that Parliament should legislatively support the notion that girls under 16 do not understand the nature of the act of sexual intercourse as was originally predicated by William Stead so as to deem the victim conclusively non-consenting and, means that unless the defendant has fraudulently misled the victim she will otherwise be deemed to have consented. However, whilst it is accepted that the occurrence of sex education in schools, the accessibility of information on the internet and the increased sexualisation of society mean that girls between this age range *should* know the essence of the act of sexual intercourse (and the Sexual Offences Act 2003 assumes that they do by the lack of consideration as to the age of the victim as giving rise to circumstances constituting such an irrebuttable presumption in the wording of s76(2)) the reality is that the physical and emotional consequences are seldom understood.<sup>21</sup> This

<sup>17</sup> Tadros asserts that differentiating the definition of Rape would specify different ways in which the offence could be completed thus, communicating the extent of the perpetrators blameworthy conduct under the auspices of one offence of Rape. However, this is outside the remit for consideration here. Tadros, V. 'Rape Without Consent' (2006) 26(3) Oxford J of Legal Studies, 518.

<sup>18</sup> s1(1) Sexual Offences Act 2003.

<sup>19</sup> s76(2)(a) Sexual Offences Act 2003

<sup>20</sup> *R v Jheeta* [2007] EWCA Crim 1699. However, this could be an ulterior purpose, according to Andrew Ashworth under the conclusive presumption ie where the defendant makes the victim believe that he will be her boyfriend if she has sex with him, in Ashworth, A. *Principles of Criminal Law*. (8<sup>th</sup> edn, OUP 2016) 361. This may be too wide for those over 16's but, not to the under 16's but over 13's in taking account of their perceived vulnerability.

<sup>21</sup> In the Rotherham case, inquiry into the Children who were victims of sexual exploitation identified that the impact of sexual exploitation upon them had been devastating and had led to family situations breaking down, homelessness, serious emotional

renders the offence of Sexual Activity with a child as the offence that subsumes all of the consensual acts, including the penetrative ones,<sup>22</sup> where the victim gave their ostensible consent.

s9 Sexual Offences Act 2003 states that a person over the age of 18 commits an offence if he intentionally touches another person, the touching is sexual and either the victim is under 16 (and he does not reasonably believe that she is over 16) or the victim is under 13.<sup>23</sup> Provided therefore that the sexual touching can be established, where the victim is under 16 but over 13 the offence is one which does not require consideration of whether the victim consented or not because a child cannot legally consent to sexual activity. However it is an offence of strict liability where the victim is under 13 because reasonable belief that the victim was over 16 is irrelevant and,<sup>24</sup> liability will still ensue even where the defendant was simply negligent (i.e. did not check) as to the age of the victim.

The first contentious issue with regard to s9 is the sexual touching that is required to satisfy the offence. It also (like the Rape offence) provides that the offence may be committed where the defendant penetrates the victim's anus, vagina or mouth with any part of their body,<sup>25</sup> and thus amounts to acts constituting sexual intercourse.<sup>26</sup> However, the characterisation of the crime that is labelled as 'sexual activity with a child' is not aligned with this exegesis because whilst 'activity' is an all-encompassing term to define 'things happening or being done',<sup>27</sup> the nebulousness of 'sexual' and 'activity' combined are not necessarily analogous with sexual intercourse. And, whilst the Crown Prosecution Service contemplate that the nature of the term 'sexual' might include sexual intercourse as a sexual act, it is spurious to deduce that this is a delineation that society is likely to equate to the offence in its current format.<sup>28</sup>

Thus, in terms of taxonomy, the offence is broadly defined which then leaves the majority of the work to be done by a judge at the sentencing stage where a reflection of the seriousness of the wrongdoing, that is having sexual intercourse with a child, can be exemplified.<sup>29</sup> However, it is fundamental to the rule of law that a progressive legal system provides clear and reasonably certain offence definitions so that they offer standards of guidance which enable citizens to 'understand [those] rules and how they apply to them and to conform to them'.<sup>30</sup> It therefore requires precision in the naming of the offence so as to represent sexual intercourse as a type of criminal conduct caught by the provision or, in its narrowing, the uncoupling of the penetrative acts in creating a standalone offence. Offence titles also enable society to determine the seriousness of the conduct without requiring knowledge of the circumstances. So in the United States a recent proposal to reform Rape laws was criticised for using the term 'sexual assault' instead of 'Rape' in a draft statute

---

harm, psychotic episodes, suicide attempts, self harm, PTSD and lasting psychological damage. Jay, A. *The Independent Inquiry into Child Sexual Exploitation in Rotherham* (August 21 2014) 5.37.

<sup>22</sup> s9(1) Sexual Offences Act 2003.

<sup>23</sup> s9(1) Sexual Offences Act 2003.

<sup>24</sup> In *R v K* [2001] 3 WLR 471, Lord Bingham said of Rape of a child under 13 that there is no defence as to the mistake of age in relation to sexual offences concerning under 13-year-old because they are offences of strict liability. This means that if the child is under 13 then you are deemed to know that she is.

<sup>25</sup> s9(2) Sexual Offences Act 2003.

<sup>26</sup> 'Sexual Intercourse' is defined as 'sexual contact between individuals involving penetration' by Oxford English Dictionary (12<sup>th</sup> edn, OUP 2011).

<sup>27</sup> Defines 'activity'. *Oxford English Dictionary*, (12<sup>th</sup> edn, OUP 2011).

<sup>28</sup> [www.cps.gov.uk/legal/p\\_tor/rape\\_and\\_sexual\\_offences\\_soa\\_2003\\_and\\_soa\\_1956/#sexual](http://www.cps.gov.uk/legal/p_tor/rape_and_sexual_offences_soa_2003_and_soa_1956/#sexual)

<sup>29</sup> Chalmers, J. and Leverick, F. 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 223.

<sup>30</sup> Hart, H. *The Concept of Law*. (Oxford, Clarendon Press, 1961) 38.

because this downplayed the offence from the actual crime, as well as having the potential to belittle the experience of the victim.<sup>31</sup>

A standalone offence was provided for under previous law where the offence of unlawful sexual intercourse with a girl under 16 accurately defined the conduct that it forbade.<sup>32</sup> Yet, the Sexual Offences Act 2003 seemingly jettisoned this offence and replaced it with a broad s9 offence for the under 16's in pursuit of a desire to rebut suggestions of over-regularisation.<sup>33</sup> Rather anomalously however it built upon the old offence of unlawful sexual intercourse with a girl under 13 to reformulate a new offence of Rape of a child under 13, under s5.<sup>34</sup> To add to the enigmatic effect that the SOA 2003 has had upon child sex offences, the s9 offence also envisages that the sexual touching amounting to penetrative acts can be committed against a child under 13; the contradistinction between s5 and s9 being that under s5 it acknowledges that a child under 13 cannot consent to sexual intercourse which it labels 'rape' but, under s9 envisages that they can consent which it labels 'sexual activity with a child'.

Notwithstanding the issue relating to consent, it must be considered that if unlawful sexual intercourse with a girl under 13 was reformulated as rape then why the unlawful act of sexual intercourse with a girl under 16 was not enshrined and thus reconceptualised as rape (because the essence of s5 is concerned with the penetrative act commensurate with sexual intercourse involving the defendant's penis, which is the prohibited act caught by s9) This is particularly so given that the House of Lord's interpretation of a child's inability to consent under the 1956 Act was designed to 'provide protection to children whose inherent immaturity was understandably regarded as impairing any consent they might give'.<sup>35</sup>

This is important because the symbolic function of offence labels are such that they not only communicate the extent of vilification that should be attributed to the defendant but, also symbolises to the victim the meaning that society attaches to their actions and further, how they interpret or define her role in the act.<sup>36</sup> This also applies to the elements that make up the offence which the prosecution must prove so, for the rape offence the prosecution must prove that the defendant did not reasonably believe that the victim was consenting and in determining whether the defendant had such a reasonable belief, they are to have regard to all of the circumstances which include the acts of the victim.<sup>37</sup> So, the symbolic value attached to the reasonableness standard here then shifts the focus from the defendant to the victim in considering what she did or did not do including whether there was sexual history with the perpetrator.<sup>38</sup> This has the potential to instil bias in the prosecutor or jury in favour of the defendant which then is likely to impact upon the way in which society is likely to respond to the victim,<sup>39</sup> particularly in the formulation of Rape Myths.<sup>40</sup> Payne asserts that this can

<sup>31</sup> Pedersen, E, 'The New Rape Law' (2016) UMKC Law Review 84, 1127.

<sup>32</sup> s6 Sexual Offences Act 1956.

<sup>33</sup> Spencer, J.R 'The Sexual Offences Act 2003: (2) Child and Family Offences' (2003) Crim L.R. 354 deems this as having the potential for 'Legislative Overkill'.

<sup>34</sup> *ibid* 348.

<sup>35</sup> *R v K* [2001] 3 WLR 471 HL *per* Lord Bingham at [6].

<sup>36</sup> Blummer, H. 1962 'Society as Symbolic Interaction' in *Human Behaviour and Social Processes: An Interactionist Approach*, eds by A.M. Rose. (Boston: Houghton-Mifflin 1962) 180.

<sup>37</sup> s1(2) Sexual Offences Act 2003.

<sup>38</sup> Krahe, B & Temkin, J, *Sexual Assault and the Justice Gap: A Question of Attitude* (1<sup>st</sup> edn, Hart Publishing 2008) 45-46.

<sup>39</sup> Charon, J.M. 2010. *Symbolic Interactionism: An Introduction, An Interpretation, An Integration*. (10<sup>th</sup> edn. NY: Prentice Hall 2010) 50.

<sup>40</sup> Rape myths have been defined as "descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay, or justify sexual violence that men commit against

manifest itself in stereotypes which blame the victim so “If a woman is raped while she is drunk, she is at least somewhat responsible for letting things get out of control; when women go around wearing low-cut tops or short skirts, they’re just asking for trouble”; woman who ‘tease’ men deserve anything that might happen or, women are raped often because the way they said ‘no’ was ambiguous”.<sup>41</sup> If one assumes that a person is a reflection of the surroundings in which they live,<sup>42</sup> then those men in communities having sexual intercourse with children who are charged with the offence of engaging in sexual activity with a child’ and not ‘rape’, communicates that the said sexual violation was a result of the victim’s impropriety<sup>43</sup> - blaming the victim which in turn is likely to result in internalised self-blame.<sup>44</sup> What usually follows is a lack of reporting of these offences because victims fail to recognise that a crime has been committed,<sup>45</sup> or through a fear of not being believed. The normalising effect on social attitudes is then three-fold<sup>46</sup> – that the law’s seeming renunciation of the age of consent by virtue of the dichotomisation of offences into consensual and non-consensual has promoted scepticism by those administering the law towards girls who do report unwanted sexual intercourse with adult men; Men are led to believe that girls who possess the attributes of women’s bodies are legitimate objects for their sexual gratification as long as they consent; that society determines that only those girls who experience ‘real rape’ are the true victims of an offence.<sup>47</sup>

(a) *The perpetuation of exploitation*

This was exemplified by the Rochdale and Rotherham Child Exploitation matters which arose as a result of between 40 and 1400 children aged 12-16 having been sexually exploited by individual and multiple male perpetrators between 1997 and 2014. Prosecutions ensued for those perpetrators but who were largely convicted of offences relating to the conspiracy to engage in sexual activity with a child (through penetrative sex) by virtue of them selling the sexual services of apparently consenting children, to other men. However, what can be gleaned from the Rochdale Child Sexual Exploitation Case is that the continuing treatment of child victims by those responsible for safeguarding, as well as investigating and prosecuting the perpetrators of grave sexual crimes committed against children is symptomatic of the wider perception that girls who ostensibly consent to sexual intercourse and other sexual acts with adult men are themselves culpable by ‘placing [themselves] at risk of sexual exploitation

---

women” as stated in G. Bohner, F. Eyssel, A. Pina, F. Siebler, G. Tendayi Viki ‘Rape myth acceptance: Cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator’ in

M. Horvath, J. Brown (Eds.), *Rape: Challenging contemporary thinking* (Willan Publishing 2009) 19.

<sup>41</sup> Payne, D. L., Lonsway, K. A., & Fitzgerald, L. F, ‘Rape myth acceptance: Exploration of its structure and its measurement using the Illinois Rape Myth Acceptance Scale’ (1999) 33(2) *Journal of Research in Personality*, 49-50.

<sup>42</sup> Foucault, M, *Power/Knowledge – Selected Interviews and Other Writings 1972-77* (1<sup>st</sup> edn, Random House 1988) 73-74.

<sup>43</sup> Munro, V. ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint (2008) 41 *Akron LR*, 937. Also see Payne et al at n.41

<sup>44</sup> Munro, V. ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint (2008) 41 *Akron LR*, 937

<sup>45</sup> Because ‘women least likely to regard their experience as rape [are] those with high rape myth acceptance’. Peterson, Z and Muehlenhard, C, ‘Was it rape? The function of women’s rape myth acceptance and definitions of sex in labeling their own experience’ (2004) 51 *Sex Roles* 129,140.

<sup>46</sup> Adopting Foucault’s position that normalisation is a mechanism by which society controls a person’s conduct through the construction of idealised socio-cultural norms. Foucault, M in Hurley, R (eds) *The History of Sexuality, Volume 1: An Introduction* (1<sup>st</sup> edn, Vintage 1980) 146.

<sup>47</sup> Real Rape scripts are considered to involve strangers, be violent and take place outdoors. Ryan, K, ‘Rape and Seduction Scripts’ (1988) 12(2) *Psychology of Women Quarterly* 237, 242.

and danger’;<sup>48</sup> that they somehow consent to their own abuse and this justifies the prolonged maleficent wrongs committed against them. In most cases, the victims knew the perpetrators which accords with national statistics on sexual offending which estimates that 90% of victims of the most serious of sexual offences do but,<sup>49</sup> evidence suggests that where victim and perpetrator are acquainted then it is more likely that the victim will be disbelieved on account of myths which render the sexual intercourse as a case of ‘bad sex’ or ‘regrettable sex’ rather than Rape.<sup>50</sup> The Crown Prosecution Service and Social Services perpetuated myths when noting that the victim in one particular case was known to ‘[tend] to wear sexualised clothes when she was out of school such as cropped tops’ and ‘because of her record and her unsettled background, she is far from an ideal victim’.<sup>51</sup> Likewise, in the Rotherham case myths were perpetuated about the victims of sexual abuse when a child as young as 12 was deemed to be ‘100% consensual in every incident’ or,<sup>52</sup> a mother, concerned about her sexually active 14-year-old daughter, deemed to be incapable of accepting that her daughter was growing up<sup>53</sup> rather than condemning the parlousness of a 14-year-old girl having sexual intercourse with a 27-year-old man.

Once entered into, the criminal justice process is as equally fraught an environment for the child because of its adversarial nature. Inside the courtroom, victims on the one hand are treated as being at the disposal and convenience of the CPS prosecutor<sup>54</sup> and on the other are having their character discredited by the defence who assert that the victim consented to the abuse<sup>55</sup> which seeks to exonerate or minimise the extent of the defendant’s blameworthy conduct in pursuit of leniency when sentencing.<sup>56</sup>

The perpetuation of myths does not end here. Even if a conviction does ensue, children who are deemed to have given their consent to sexual intercourse with an adult are often refused payments through the Criminal Injuries Compensation Authority (CICA) for the criminal injury that they have suffered<sup>57</sup> and are thereby deemed wholly culpable for the acts committed against them.<sup>58</sup> This is on account of the fact that they are deemed to have consented and thus,<sup>59</sup> are not considered as being a victim of a crime of violence.<sup>60</sup> The

<sup>48</sup> n.2 at 5.24 where a Social Services initial assessment deemed this to be the case with regard to Child D, a 13-year-old girl.

<sup>49</sup> Ministry of Justice, Home Office & The Office of National Statistics, *An Overview of Sexual Offending in England and Wales* (10 Jan 2013) available at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/214970/sexual-offending-overview-jan-2013.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/214970/sexual-offending-overview-jan-2013.pdf)>

<sup>50</sup> Raphael, J. *Rape is Rape: How Denial, Distortion and Victim Blaming Are Fuelling Hidden Acquaintance*, (Rape Crisis 2013), 53-54.

<sup>51</sup> n.11 at 47.

<sup>52</sup> n.2 at 5.21.

<sup>53</sup> *ibid* at 5.23.

<sup>54</sup> Herman, J. ‘Justice from the victim’s perspective’ (2005) 11(5) *Violence Against women*, 581.

<sup>55</sup> Larcombe, W. ‘Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law (2011) 19 *Fem. Leg. Stud.* 37.

<sup>56</sup> The starting point for Rape where the victim is considered vulnerable by her personal circumstances is 10 years imprisonment but, the sentence can range between 9-13 years dependent upon aggravating factors such as whether the defendant actually targeted the victim due to her age. Mitigating factors such as showing remorse or no previous convictions will reduce the sentence within the range. *Cf* Sexual Activity with a Child where the starting point is 5 years where the activity was penetrative in nature. The sentencing range is between 4-10 years with the same aggravating and mitigating factors taken into account. Sentencing Guidance Council, available at <[https://www.sentencingcouncil.org.uk/wp-content/uploads/Final\\_Sexual\\_Offences\\_Definitive\\_Guideline\\_content\\_web1.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Sexual_Offences_Definitive_Guideline_content_web1.pdf)>

<sup>57</sup> Bowcott, O and Rawlinson, K. Government ‘Denying Sexually Abused Children Compensation’. *The Guardian* (18<sup>th</sup> July 2017) Available at <[www.theguardian.com/society/2017/Jul/18/government-denying-sexually-abused-children-compensation](http://www.theguardian.com/society/2017/Jul/18/government-denying-sexually-abused-children-compensation)>.

<sup>58</sup> A refusal to award compensation is in complete contrast with the approach taken to an award of compensation in negligence cases where the victim’s culpability for the act is represented by a reduction in award that they receive (contributory negligence). However, this is not suggested as being an acceptable means by which to address the inadequacies of this policy but, simply proffers this as a comparator.

<sup>59</sup> Annex B(2)(a) Criminal Injuries Compensation Scheme 2012 where a victim is deemed to be a victim of a crime of violence only where ‘the sexual assault was one to which they did not in fact consent’.



reference to the need for violence within these guidelines is clearly outdated in terms of it being contrary to any legal definition relating to sexual offences contained within the SOA 2003, even the apex offence of Rape but, the approach to Criminal Injuries Compensation is a view not wholly antithetical to that of Parliament because it is a manifestation of the ability for the legislation to envisage that children can consent to sexual intercourse with adults.

Moreover, the unjust nature of the treatment of child victims, particularly those aged between 13 and 16 both in the court arena and through the denial of compensation is part of the same continuum; that is that they are connected thematically by stereotypes which perceive consenting girls as self-determinate miscreants and not as vulnerable children which, even if sexual offences legislation were deemed as progressive (which this author asserts that they are not) such attitudes and assumptions will continue to undermine any attempt to properly consider the need to reform the substantive law.<sup>61</sup>

However, whilst claims that police procedure, social work practice, CPS guidelines, Criminal Law Procedure,<sup>62</sup> and CICA rules are in need of urgent review, it is contended that they simply represent a manifestation of the effect that a lack of congruity between Parliament and society about the age and legal capacity to consent causes. This leads to misunderstandings about the definition of consent and to seeking to apportion blame when things go wrong. Furthermore, in addressing criticism targeted at the CICA in particular<sup>63</sup> their exposition of consent is not inimical to that of Parliament (as is clear by the inclusion of penetrative acts under s9) when determining that those under 16 can consent to sexual intercourse, yet parliament seems to evade any opprobrium. However, according to Donald Draper's assessment of social class inequality, Parliament whose supreme law making function renders them an elitist power in the state articulation of social and cultural beliefs (as well as norms and stereotypes) means that through legislation, they are able to challenge these stereotypes.<sup>64</sup>

As Super-Elites, Parliament had the ideal opportunity to do this when they enacted the SOA 2003 and in some way they did. In particular, they removed the limitation period of 12 months for bringing a charge against a perpetrator suspected of having sexual intercourse with a child under 16, 'which only actually existed because the intercourse may have resulted in pregnancy and the evidence could not be completed until after she has recovered sufficiently to make a statement'.<sup>65</sup> Nevertheless, the removal of the 12 month limitation period by the SOA 2003 has meant that historic cases (post 2003) can now be brought against perpetrators which means that levels of impunity for unabsolved crimes is reduced. However, this did little to assist the victims of the Rochdale and Rotherham matters because most of the offences pre-dated the SOA 2003 and therefore, only the most obvious cases of

---

<sup>60</sup> Para 4 Criminal Injuries Compensation Scheme 2012 denotes that 'A person may be eligible for an award if they sustain a criminal injury which is directly attributable to their being a direct victim of a crime of violence'.

<sup>61</sup> McGlynn, C, 'Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?' in McGlynn, C and Munro, V, (eds) *Rethinking rape law: international and comparative perspectives*. (Routledge 2010) 146.

<sup>62</sup> Coffey, A. *Real Voices: Child Exploitation in Greater Manchester* (October 2014) 36 and, Jay, A. *The Independent Inquiry into Child Sexual Exploitation in Rotherham* (August 21 2014) Ch 8.

<sup>63</sup> above n.32 where the criticism exposed that 'it is inappropriate and harmful that CICA applies a different definition of consent from the law' by the Co-Chair of Rape Crisis, Dawn Thomas.

<sup>64</sup> Draper, D. 'After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?' (2008) 41 *Akron L Rev* 957, 958.

<sup>65</sup> Report of the Departmental Committee on 'Sexual Offences Against Young Persons' under the chairmanship of Sir Ryland Adkins KC (1925) [41.8].

non-consent were prosecuted (the others were impugned because of the 12-month rule).<sup>66</sup> Yet, current statistics seemingly suggest that consensual sexual intercourse with a child under the age of 16 accounts for 75% of all recorded offences under s9 with just over 10,000 cases in 2016/17.<sup>67</sup> Therefore, the abolition of the 12 month rule can only have a positive effect in ensuring that legislative time limits are non-prohibitive in pursuit of prosecution. What is, however worrying is that a contemporary statistical analysis reveals that the incidence of consensual sexual intercourse between adults and children are not isolated ones but, have been increasing year on year and thus, the lack of differentiation in the offence label becomes more problematic when seeking to identify the extent of the problem.<sup>68</sup>

Parliament, through the enactment of s9 also sought to dispel myths which propagated views that girls under 16 who use drugs or alcohol freely must have encouraged the sexual dialogue which resulted in intercourse; those in a relationship with the alleged perpetrator must have been willing partners; those who did not scream or put up a fight must have been ergo agreeable.<sup>69</sup> Thus, s9 'provides a means of prosecuting a person who secures the consent of a child through pressure but, stops short of coercion so that a non-consensual offence cannot be proved'.<sup>70</sup> The s9 offence may then find favour with prosecutors who are motivated by mantric notions of the 'realistic prospect of conviction' standard.<sup>71</sup> This renders it likely that a determination of this lesser charge (than that of rape) is preferable in achieving a conviction rather than presenting a victim who is inconsistent, at times irrational and, who lacks any form of self-discipline, to the jury.<sup>72</sup>

Some elites however, (Alex Jay the retired social worker who conducted the Rotherham Inquiry) have been somewhat loquacious in their retrospective denunciation of such fictions,<sup>73</sup> but these views have done little to improve the paucity of prosecutions.<sup>74</sup> Yet,

<sup>66</sup> In *R v Forde* [1923] 2KB 400 the act of carnal knowledge (sexual intercourse) was charged as indecent assault where 12 months had elapsed before charge as a means by which to mitigate the harshness of the 12 month rule created by s5 Criminal Law Amendment Act 1861. However, in *R v J* [2005] AC 562 the court stated that this would be a misconstruction of Parliament's intention if the charge could be substituted and in this case the CPS charge was intended to circumvent the intent of Parliament. Thus, the inference to be made is that the indecent assaults charged in the Rotherham and Rochdale matters could not have been concerned with sexual intercourse.

<sup>67</sup> The Office for National Statistics, Crime Survey September 2016, Appendix A4 available at <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/crimeinenglandandwalesappendixables>>. Accordingly, there were 1911 recorded cases of unlawful sexual intercourse with a girl under 16 between April 2003 and March 2004 i.e. Pre Sexual offences act 2003. That jumps to 2546 between April 2004 and March 2005 when the SOA 2003 comes into force. Consensual sex accounts then for 75% of recorded crimes if we assume that there is no decrease in those crimes year on year. s9 offences have increased year on year. In 2016-17 there were 13642 recorded crimes under s9. This means that there is the potential that there are over 10000 recorded crimes of children having consensual sex with men.

<sup>68</sup> n.42. The ONS report an increase of 12% between April 2012 and September 2017.

<sup>69</sup> Crown Prosecution Service, Guidelines on Prosecuting Cases of Child Sexual Abuse, Issued 17 October 2013, revised 26 July 2017, paras 48-56. Available at <[http://www.cps.gov.uk/legal/a\\_to\\_c/child\\_sexual\\_abuse/](http://www.cps.gov.uk/legal/a_to_c/child_sexual_abuse/)>.

<sup>70</sup> Home Office circular 021/2004. Guidance on Part 1 of the Sexual Offences Act 2003, pg 11, para 44. Available at <<http://webarchive.nationalarchives.gov.uk/20130126151149/http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2004/021-2004/>>

<sup>71</sup> Crown Prosecution Service, The Code for Crown Prosecutors, para 4.4. Available at <[http://www.cps.gov.uk/publications/docs/code\\_2013\\_accessible\\_english.pdf](http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf)>.

<sup>72</sup> Lacombe, W. 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 Fem.Leg.Stud 37.

<sup>73</sup> Jay, A. *The Independent Inquiry into Child Sexual Exploitation in Rotherham* (August 21 2014) 8.36.

<sup>74</sup> In 2013-14 out of 20751 incidents of Rape recorded by Police, 3891 were charged which represents an 18% charge rate with 2348 of those being convicted (an 11% conviction rate). CPS Rape Prosecutions 2013-14 available at <<https://www.cps.gov.uk/underlying-data/cps-rape-prosecutions-group-and-area-2013-2014>>. When applied to the 13-16 age group (431 recorded) this equates to 78 charged (1 in 5) and 48 convicted (1 in 9) during the period. Cf with 2018-19 where there were 55195 incidents of Rape recorded by Police in England and Wales and out of those, 1946 concerned 13-16 age group. ONS Crime Statistics available at <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingseptember2019>>. Between 2018-19 there were 2343 prosecutions for Rape which represents a 4.24% charge rate. Out of those charged, 1.45% of 2343 were convicted. CPS Prosecution Data 2018-19 available at <<https://www.cps.gov.uk/publication/cps-data-summary-quarter-2-2019-2020>> When applied to the number of recorded offences against 13-16 age group (1946) this

despite a welcome improvement having been made to CPS guidance which openly sets out and seeks to challenge the myths that may be impeding the prosecution of sexual crimes committed against the 13 to 16 age group, individual prosecutors who themselves are drawn from society are deemed as gatekeepers to justice by being afforded the discretion to select charges that are at risk of being driven by attrition rates and the need to evidence the rhetoric that improvements are being made in 'the way we respond to those victim's brave enough to come forward and report such a crime'.<sup>75</sup> Furthermore, when selecting the s9 charge, it depicts prosecutors as central to communicating narratives to juries, the media and the public which present girls under 16 as willing and consenting participants whilst adult men are simply inveigled by their youthful and phlegmatic eroticism.<sup>76</sup> So, whilst a conviction may ensue for the defendant, the victim is again presented as the party deserving of blameworthy conduct and thus, socially castigated.

(b) *The relevance and irrelevance of consent.*

Paradigmatically, if rape is a non-consensual offence, then sexual activity with a child must proscribe consensual offences. However, consent of the victim is not an element of the offence that needs to be proved under s9 which impliedly enshrines that girls under 16 cannot consent in law to 'sexual activity'. This renders consent as being immaterial to the offence and thus, the jury will not be asked to consider whether the girl consented in fact or to explore the circumstances within which that consent was obtained. So, unlike the offence of rape, the consent of the victim in the s9 offence is non-exculpatory for the defendant and thus, the only defence available to him is if he is able to adduce sufficient evidence which undermines the prosecution case that he reasonably believed her to be over 16 (for those over 13).

But, where the acts constituting the s9 offence are penetrative acts, consent *is* wholly relevant to the nuanced actions of the victim because if she had not consented in fact, then the charge would be one of rape and not of sexual activity (because rape is a non-consensual offence). This is again unsatisfactory because the offence charged promulgates that girls can consent to their own exploitation when in reality, those between 13 and 16 are the most consistently recorded group of vulnerable young people at risk.<sup>77</sup> Moreover, the notion that consent is dichotomous, is likely to be largely unknown to society and so, girls giving consent in fact somewhat abrades the unlawful nature of sexual intercourse between adults and children and, the deprecation with which this should be viewed.

Historically, attitudes towards consent were such that a 'man who has a connection with a child, relying on her consent, does so at his peril if she is below statutable age'.<sup>78</sup> That statutable age has been increased over time from 12,<sup>79</sup> to 13,<sup>80</sup> to 16<sup>81</sup> which manifests a

---

equates to an estimate of 83 people being charged (1 in 23) with 28 people being convicted (1 in 70). This suggests that when comparing Rape prosecutions rates for 13-16 age group between 2013 – 2019, charge rates have decreased by 13.8% and conviction rates 9.5%.

<sup>75</sup> Coffey, A. *Real Voices: Child Exploitation in Greater Manchester* (October 2014) per Tony Lloyd Police and Crime Commissioner at 5.

<sup>76</sup> Coy states that in the UK sex market, men are buying female bodies from girls because being young is considered to be a premium commodity. Coy, M. 'Joining the Dots on Sexual Exploitation of Children and Women: A Way Forward for UK Policy Responses' (2016) 34(4) *Critical Social Policy*, 585.

<sup>77</sup> Jay, A. *The Independent Inquiry into Child Sexual Exploitation in Rotherham* (August 21 2014) 75, [8.36].

<sup>78</sup> *R v Prince* (1875) LR 2CCR 154 at [171], per Blackburn J.

<sup>79</sup> Chapter 13 Statute of Westminster 1275 creates an offence of Rape for 'him that doth ravish a woman under 12'. Available at <[www.legislation.gov.uk](http://www.legislation.gov.uk)>.

supposedly progressive yardstick that enables society to distinguish between an agreeable actor and a passive participant using the benchmark of age; thus, legitimising or censuring the resulting act of sexual intercourse. Yet the nomenclature of the age of consent seems to have become synonymous with reaching puberty. Thus, girls under 13 are considered by the law as those 'that do not, under any circumstances, have the legal capacity to consent to any form of sexual activity' because to do so,<sup>82</sup> would be to condone paedophilia. However, those under 16 (but, over 13) are considered to have the legal capacity to consent which is why their consent in fact, negates an inability to consent in law and thus, renders consent a polarised concept. Moreover, the age of consent becomes obfuscated when envisaging the circumstances where sexual activity with a girl under 13 involves a penetrative act because, if a girl under 13 lacks legal capacity to consent (which according to Home Office guidance, they do) then every case of sexual intercourse with a girl under 13, should be an offence under s5 (rape of a child under 13) and not s9 (sexual activity with a child). But, to have on the statute book, an offence of sexual activity with a child, which supposes that the victim could be under 13, undermines the age of consent entirely, inhibits any attempt at social enlightenment through the existing legal order and,<sup>83</sup> encourages the over-sexualisation of children.

It is this juxtaposition between the view that those under 13 do not have the capacity to consent by any means (notwithstanding the incongruity of s9 on this point) and, the inveteracy of consent obtained by a 13-16 year old girl to engage in sexual intercourse, which is characterised as unlawful sexual activity and not rape, that engenders a discussion about whether the law should continue to permit a girl under 16 the ability to consent to sexual intercourse with adults over 18; promulgating the need to protect victims from hebephilic abuse since 'if the daughters of the people must be served up as dainty morsels to minister to passions of the rich [or empowered], let them at least attain an age when they can understand the nature of the sacrifice which they are asked to make.'<sup>84</sup>

Consent is thus defined by s74 as being where a person agrees by choice, and has the freedom and capacity to make that choice.<sup>85</sup> Choice is thus crucial to the issue of consent,<sup>86</sup> and whether it has so been given, requires an omnifarious assessment rather than simply enquiring as to whether the victim said 'yes' or 'no'. The circumstances leading up to the sexual intercourse are therefore very important in determining whether the victim was able to give their consent freely, and whilst the word 'freedom' in the provision clearly requires consideration as to whether the victim was coerced into consenting (where a victim's choice is most obviously eliminated by threats of violence)<sup>87</sup> other sexually exploitative situations can be used to procure the assent to 'yes'. This is most often encountered where the girl accepts gifts of food, accommodation, drugs, alcohol, cigarettes, money, personalty or affection,<sup>88</sup> without cognisance of the bargain that has already been struck, with sex being the requisite.

---

<sup>80</sup> s5 Offences Against the Person Act 1875.

<sup>81</sup> s5 Criminal Law Amendment Act 1885.

<sup>82</sup> Home Office circular 021/2004. Guidance on Part 1 of the Sexual Offences Act 2003, pg 8, para 23. Available at <<http://webarchive.nationalarchives.gov.uk/20130126151149/http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2004/021-2004/>>

<sup>83</sup> Cotterrell, R. 'Law and Sociology: Notes on the Constitution and Confrontations of Disciplines' (1986) 13 J. of Law and Society 9, 27.

<sup>84</sup> Above, n.1.

<sup>85</sup> s74(1) Sexual Offences Act 2003.

<sup>86</sup> *R(F) v DPP* [2013] EWHC 945 at para 26, *per Judge, LJ*.

<sup>87</sup> Temkin, J. 'Towards a modern law of rape'(1982) 45 *Modern Law Review*, 406.

<sup>88</sup> Department for Children, Schools and Families. *Safeguarding Children and Young People from Sexual Exploitation: Supplementary Guidance to Working Together to safeguard Children* (2009 London) 9.

This offers limited availability of choice for the girl where the man exploiting her has power over her by virtue of his age, gender and resources and,<sup>89</sup> even if the means by which to procure consent is the seemingly inappreciable act of placing pressure on the girl to 'show that they are grown up', amounts to coercion.<sup>90</sup> Similarly, 'boys giving me drink and drugs for free' and statements which infer that love is the object of the sexual bargain represents the ingenious nature of the victim and the ruse that is perpetrated against them by predatory males.<sup>91</sup> However, it must be acknowledged that not every case of sexual intercourse involving a child under 16 is coercive but, where it involves intergenerational sex then there are inequalities which create conditions of vulnerability that are too risky to firstly, leave a child to determine the extent to which they fully consent and secondly, to rely upon legal and social systems to provide a system of surveillance to ensure that exploitative circumstances are minimised.<sup>92</sup> Indeed, the discourse which perpetuates that girls (and then women) can be convinced to consent to sex by fair or foul means,<sup>93</sup> renders consent as a meaningless concept by women who precariously negotiate the sexual playing field.<sup>94</sup> Consent then becomes an acquiescence; a submission;<sup>95</sup> an emblematic perfunctoriness rather than a positive and liberating experience for women. For society, the narrative perpetuated is that male interest in the female body is proprietary in nature so that women can be bought and owned but,<sup>96</sup> even more depreciable, is the notion that sexual intercourse becomes concerned with the 'sheer use of a person',<sup>97</sup> rather than promoting respect and mutuality as rudimentary to the exercise of sexual autonomy.<sup>98</sup> Thus, where consent is obtained by pressure then this violates a girl's integrity which impacts upon her psychic and emotional perceptions of self in the context of society.<sup>99</sup>

(c) *The capacity, sexual autonomy and agency of children to give a valid consent.*

If choice is then indicative of autonomy, it must be questioned whether children under 16 possess the agency and the sexual autonomy to be deemed capable of giving a valid consent. Intrinsic elements such as age do have a bearing on the freedom to exercise choice and the Act envisages that a person may lack insufficient capacity to consent due to their age.<sup>100</sup> However, the Act does not define capacity and so, prosecutors are dependent upon consideration of 'the emotional maturity of the girl and whether she entered into the

<sup>89</sup> Childs, in her analysis states that when objectively assessing whether choice is freely exercised 'what feels coercive to the less powerful person may seem very different to the more powerful party'. Therefore, it is suggested here that consent is too subjective a concept to be left to gate-keeping prosecutors and jurors alike. Childs, M. 'Sexual Autonomy and Law' (2001) 64:2 MLR 318.

<sup>90</sup> Coffey, A. *Real Voices: Child Exploitation in Greater Manchester* (October 2014) 11.

<sup>91</sup> Jay, A. *The Independent Inquiry into Child Sexual Exploitation in Rotherham* (August 21 2014) 37, [5.17].

<sup>92</sup> Craig, E. Capacity to Consent to Sexual Risk, (2014) 17(1) *New Criminal Law Review*, 128.

<sup>93</sup> Herring, J. 'Mistaken Sex' (2005) *Criminal Law Review*, 8.

<sup>94</sup> Mackinnon, C. *Toward a Feminist Theory of the State* (Harvard University Press 1989) 178.

<sup>95</sup> In *R v Olugboja* [1982] QB 320 at 332, Dunn LJ stated that whilst 'every consent involves a submission, it by no means follows that a mere submission involves consent'.

<sup>96</sup> Lacey, N. 'Unspeakable Subjects, impossible rights: Sexuality, Integrity and Criminal Law' (1998) 11 *Canadian Journal of Law and Jurisprudence*, 47.

<sup>97</sup> Gardner, J and Shute, S, 'The Wrongness of Rape' in J.Horder (eds), *Oxford Essays in Jurisprudence* (4<sup>th</sup> edn, OUP 2000) 205.

<sup>98</sup> Home Office, *Setting the Boundaries* (Home Office, 2000), 5.

<sup>99</sup> Childs, M. 'Sexual Autonomy and Law' (2001) 64:2 MLR 311.

<sup>100</sup> Explanatory Notes to the Sexual Offences Act 2003 (London, Office of Public Sector Information, 2003) 139. This states that 'a person might not have sufficient capacity because of [their] age'.

relationship willingly', when considering if there is a realistic prospect of conviction.<sup>101</sup> Yet, if as an agent a girl must have 'adopted a seriously self-engaged and evaluative approach to the sexual act in question' so as to have the capacity to give a fully informed consent then this appears a rather onerous assessment to make.<sup>102</sup> However, by determining that 'agency' can be measured by emotional maturity it then makes the task of proving that the child did consent an easier one because some girls may possess what is ostensibly considered as emotional maturity. However, a child under 16 'may appear to be mature, yet some of her actions and the risks to which she constantly puts herself are those of a very immature and naïve person'.<sup>103</sup> So, if emotional maturity is the yardstick for the exercise of agency in the under 16 age group then on a micro level the girl must only feel intrinsically mature enough to possess the freedom to execute the decision to engage in sexual intercourse for her to have the capacity to consent.<sup>104</sup>

Yet, if sexual autonomy is considered to be the right to choose but also, the right to refuse to have sexual intercourse then, whilst a girl may feel empowered by her ability to say 'yes', she may not feel unencumbered to say 'no'.<sup>105</sup> Therefore, if law is a social object which allows society to 'share understanding, tell others what they think, what they should know, what they are, what they intend and what they should feel',<sup>106</sup> as well as to enable individuals to interpret the meanings of social responses to actions then it is incumbent upon Parliament to emphasise that children under 16 neither have the agency nor the autonomy to consent to sexual intercourse with adults. In favouring a paternalistic approach, parliament does this by recognising the need to uphold the dignity and worth of the child by acknowledging that they do have the internal capability (through the exercise of choice) to factually consent to sexual intercourse but, that the state then limits their capability to exercise that choice by deeming under 16 year olds as lacking the capacity to consent due to their age.<sup>107</sup> This may then be viewed by libertarians as an exercise in seeking to exert control over and to unduly criminalise the explorative consensual sexual acts between young people such as that of the '18-year-old boyfriend with the 15-year-old girlfriend' exemplar that is commonly expounded in defence of over-regularisation.<sup>108</sup> However, prosecutorial 'public interest' tests are likely to determine that it is not in the public interest to prosecute the adult male in these circumstances.<sup>109</sup> However, what is in the public interest, is that the law seeks to protect young girls from the incidence of sexual exploitation when they have sexual intercourse with adult men.<sup>110</sup> It is thus necessary for Parliament to 'refashion the use of language...so that society is able to distinguish young

---

<sup>101</sup> Crown Prosecution Service, Rape and Sexual Offences Guidance. Available at <[http://www.cps.gov.uk/legal/p\\_to\\_r/rape\\_and\\_sexual\\_offences/soa\\_2003\\_and\\_soa\\_1956/index.html](http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/soa_2003_and_soa_1956/index.html)>

<sup>102</sup> Munro, V. 'Constructing Consent: Legislating Freedom and Legitimizing Constraint, (2008) 41 Akron LR, 9, 949.

<sup>103</sup> Jay, A. *The Independent Inquiry into Child Sexual Exploitation in Rotherham* (August 21 2014) 36, [5.11].

<sup>104</sup> In the Rotherham case, 1/3 of victims had mental health problems and almost 2/3's had emotional health difficulties. *HMIC independent assessment of South Yorkshire polices response to child exploitation* (2013) 31.

<sup>105</sup> Munro states that social stereotypes concerning gendered behaviour restricts the scope for refusal because men are pressured into the role of sexual hunter and women into the role of prey. Munro, V. 'Constructing Consent: Legislating Freedom and Legitimizing Constraint, (2008) 41 Akron LR, 9, 938.

<sup>106</sup> Charon, J. *Symbolic Interactionism: An Introduction, An Interpretation, An Integration*. (10<sup>th</sup> edn, New York: Prentice Hall 2009) 50.

<sup>107</sup> Nussbaum, M 'Women's Capabilities and Social Justice' (2000) 1(2) *Journal of Human Development* 219, 234.

<sup>108</sup> Spencer, J.R 'The Sexual Offences Act 2003: (2) Child and Family Offences' (2004) *Crim L.R.* 354 deems this as having the potential for 'Legislative Overkill'.

<sup>109</sup> Where there are only a few years difference in age between the defendant and the complainant then CPS public interest tests are likely to deem a prosecution unlikely where the activity is 'truly consensual for both parties'. Above, n.69.

<sup>110</sup> Coy, M. 'Joining the Dots on Sexual Exploitation of Children and Women: A Way Forward for UK Policy Responses' (2016) 34(4) *Critical Social Policy*, 575.

people's involvement with that of adults'<sup>111</sup> which can have an extraordinary impact upon the attitudes and treatment of marginalised young people.<sup>112</sup>By doing so, the UK has the ability to influence cross-cultural norms both domestically and internationally in pursuit of upholding and standardising the age of consent.<sup>113</sup>

(d) *No capacity to consent equals rape.*

In determining therefore that girls under 16 should not be deemed as having the legal capacity to consent to sexual intercourse with an adult, and as consent is central to the offence of Rape, it raises the question as to how an age bar might be incorporated into the offence so as to render it a non-consensual act. s76(2) provides two circumstances where the absence of consent will be conclusive and thus, irrefutably presumed. However, it is not contended that the lack of capacity to consent be conclusive here (to conclusively presume that all under 16 years olds do not understand the nature of the act, in a sexually advanced age would be too regressive) because that would fail to take into account circumstances where the complainant lied about her age for example. However, it is contended that it might be included as a set of circumstances giving rise to a rebuttable presumption of non- consent under s 75(2); that the complainant, because of her age, does not have the legal capacity to consent to sexual intercourse with a person over the age of 18. This means that the prosecution would have to establish the girl as being under 16 and that the defendant knew this to be the case. The presumption would then operate until the defence adduced sufficient evidence to cast doubt on the fact that he knew that she was under 16 and thus, 'satisfy the judge that there is a real issue about consent that is worth putting to the jury'.<sup>114</sup>It would then be for the prosecution to prove that the defendant did not reasonably believe that the victim consented. s1(2) provides that in determining whether the belief was reasonable, regard must be had to all the circumstances including any steps that the defendant had taken to ascertain whether the complainant consented. This is an objective assessment which entitles the court to consider that if the defendant had enquired as to the complainant's age and she had replied 'fourteen' (and he went on to have sexual intercourse with her) then a reasonable person is likely to hold that she has not consented (because she is under 16). If the defendant enquired and the girl had lied about her age, then the blameworthy conduct shifts from the defendant to the complainant and he is likely to be deemed as not having known that the victim was under 16 and thus his belief that the victim was consenting is reasonable. Furthermore, by including age as a circumstance which could result in the finding of non-consensual sexual penetration, it sends the message that there is a duty placed upon adults to enquire about the age of their sexual partners so as to avoid prosecution for the gravest of sexual crimes.<sup>115</sup>

---

<sup>111</sup> Melrose, M. 'Twenty First Century Party People: Young People and Sexual Exploitation in the New Millenium' (2013) 22(3) Child Abuse Review 155.

<sup>112</sup> Altering language which 'disassociated children and young people from the terminology of Prostitution' by categorising this form of sexual exploitation as abuse and not that of choice was transformative in changing attitudes towards the sexualisation of girls bodies. Coy, M. 'Joining the Dots on Sexual Exploitation of Children and Women: A Way Forward for UK Policy Responses' (2016) 36(4) Critical Social Policy, 575.

<sup>113</sup> Nussbaum, M, 'Women's Capabilities and Social Justice' (2000) 1(2) Journal of Human Development 219, 227.

<sup>114</sup> Sexual Offences Bill, Hansard HL vol 649 cc669-751 (17 June 2003) [670] per Baroness Scotland. Available at < <http://hansard.millbanksystems.com/lords/2003/jun/17/sexual-offences-bill-hl>>.

<sup>115</sup> n.43. The conviction rate of those prosecuted would likely increase if the Sexual Offences Act 2003 deemed a girl under 16 as lacking the capacity to consent because a finding of a reasonable belief of consent of the victim is the most likely reason for the defendant being found not guilty at trial.

(e) *Can the offence of rape be justified?*

Is then the inclusion of sexual intercourse with a girl under 16 within the offence of rape, justified? A person has the right to the exercise of his sexual autonomy without adverse interference from the state under Article 8 Human Rights Act 1998 however, this right can be derogated where the rights and freedoms of others are impacted.<sup>116</sup> Therefore, to re-categorize the act as rape would not unduly alter the prima facie infringement of the defendant's right to private and family life that already exists because the consent obtained from the child to engage in sexual intercourse is negated by their lack of legal capacity to consent and thus, any infringement upon the rights of the defendant is a lawful one. The criticism likely to ensue is thus, not an autonomy based one but, is firstly based upon the prevarication that to categorise the conduct as rape is to increase the severity with which the act of sexual intercourse with an ostensibly consenting child, is viewed. However, to reconceptualise as rape is to underscore the unlawful nature of the act and represents a commitment to recognising that sex with a girl under 16 is something more than just the theft of another man's property ie her father's; <sup>117</sup>it is the theft of *her* integrity. In addition, it proscribes sex with children as immoral because it recognises that children have an inherent inability to self-govern; they are heteronomous beings who, between the ages of 13 and 16 are learning to become autonomous people.<sup>118</sup> Through the creation of a presumption that all under 16-year olds cannot consent to sexual intercourse, the law is articulating the vulnerability of a group that are 'unable to rationalise through power of reason, deliberation and calculation', <sup>119</sup>the consequences of such an act with an adult and is further, regulating conduct so as to protect the healthy development of the child by promoting an 'unbroken continuum into adulthood'.<sup>120</sup> Safeguarding the precariousness of this transition from interference by predatory adults not only offers up the full might of the law but, by redefining the offence as rape might also have a deterrent effect; being labelled as a 'rapist' may damage reputation which may affect friendships, respect and community integration for the defendant.<sup>121</sup>

The next expostulation relates to the unfairness that the label 'rapist' may have upon the offender because 'fair labelling insists...that the fault element be appropriate for the nature of the crime in question'.<sup>122</sup> Therefore, it might be suggested that the label does little to communicate the extent of the victim's actions to the public, when consenting in fact to the intercourse and this renders the offender at fault for the entire act. In seeking to redress the balance as to the symbolic effect of offence labelling, it might seem to do little more than to swing the pendulum entirely in favour of the victim because, society's perception of a 'Real Rapist' is likely to be a sexual monster who demonises women through the taking of sex by

---

<sup>116</sup> Art 8(2) Human Rights Act 1998.

<sup>117</sup> *R v Mitra* [1979] Crim. LR at 560.

<sup>118</sup> Gregor, M and Timmerman, J (eds) *Kant, I. Groundwork of the Metaphysics of Morals*. (2<sup>nd</sup> edn, Cambridge 2012) 45.

<sup>119</sup> Fischell, J and O'Connell, H. 'Disabling Consent or Reconstructing Sexual Autonomy' (2015) 30 *Columbian Journal of Gender and Law* 448.

<sup>120</sup> Faust, B. 'Child Sexuality and Age of Consent Laws: The Netherlands Model' (1995) 5, *Australian Gay and Lesbian Law Journal*, 79.

<sup>121</sup> Gibbon, T. 'Defamation Reconsidered' (1996) 16 *Oxford Journal Legal Studies* 590.

<sup>122</sup> Ashworth, A. *Principles of Criminal Law*. (8<sup>th</sup> edn, OUP 2016) 361.



force.<sup>123</sup> The postulation is that this unduly stigmatises the offender which is likely, as its primary effect, to be detrimental upon his ability to say, obtain employment due to the label appearing on antecedent history and thus visible upon any Disclosure and Barring Service check that an employer may perform. However, to label the same act as 'sexual activity with a child' upon antecedents provides a means by which to mitigate the extent of the wrongdoing overtime because the magnitude of the behaviour can be downplayed or explained away by the offender. Essentially, the offender is able to exculpate himself by blaming the victim (and the offence label is broad enough to accommodate this). Augmentatively, the offence label on the antecedent history does little to provide a description of the otherwise coercive, abusive or exploitative circumstances that existed which means that whilst the offender is able to absolve himself of the crime and move on with his life, the victim is living with the effects that manifest from children being sexually involved with adults.<sup>124</sup>

In addition, to redefine as rape is not only then to evince the socially-inadequate monster that has become synonymous with the term rapist and widen it by contemplating that one's father, brother, uncle or nephew may become so labelled through inappropriate sexual choices but,<sup>125</sup> it also has the effect so as to re-inform social norms whereby children are not considered as a viable sexual options for adults, no matter the victims background or behaviour. Furthermore, it acknowledges that sex with children is not just a race problem as was proclaimed in the Rotherham case but,<sup>126</sup> a gender problem that transcends all sections of society and, which justifies such indiscriminate stricture.

#### IV. CONCLUSION

It then 'speaks not of leaden despair but, with a joyful promise of better things to come',<sup>127</sup> that restitution of the age of consent can be fulfilled through the negation of putative legal capacity to consent to sexual intercourse with adults, for those under 16. And whilst the contrariety between societal and legal notions of consent may have originated as a means by which to be seen to give effect to the somewhat progressive desire to align consent with cognition and not puberty, there is an undertone that de-emphasises the role of the perpetrator as being one that capitulates to the overt feminization of a girls physical appearance rather than to contemplate the presence of her coexistent psychological development when determining whether his belief in her consent is a reasonable one. Thus, consent has simply become an apologia, betoken of the genderised narrative that excuses the masculine and assigns fault to the feminine.

Further, whilst it is commendable that the law seeks to render consensual sexual activity with a child as a crime, the breadth of the proscribed acts, coupled with the dubiety of

---

<sup>123</sup> Itzin states that by highlighting that abusers are normal, ordinary, heterosexual men, that this shifts the focus from deviancy to masculinity. Itzin, C. 'Incest, Paedophilia, Pornography and Prostitution: Making Familial Males More Visible as the Abusers' (2001) 10 Child Abuse Review 39.

<sup>124</sup> Jay, A. *The Independent Inquiry into Child Sexual Exploitation in Rotherham* (August 21 2014) 37, [5.37] cites some of the consequences for the victims. Those being where family situations break down, homelessness, drug and alcohol dependency, serious and lasting emotional harm, psychotic episodes, PTSD, suicide attempts and self-harm are all outcomes that children experienced as a result of the sexual acts that girls were performing with men, sometimes four times their age.

<sup>125</sup> Above at n.87.

<sup>126</sup> Home Affairs Select Committee 2<sup>nd</sup> Report, *Child Sexual Exploitation and the Response to Localised Grooming*. 5 June 2013, chapter 4, para 120. The select committee state that 'There is no simple link between race and child exploitation'. Available at <<https://publications.parliament.uk/pa/cm201314/cmselect/cmhaff/68/6806.htm>>

<sup>127</sup> Above, n.1.

the *communique* surrounding who does and who does not have the legal capacity to consent means that there is an incertitude in society, whose compunction only becomes aroused when an inordinate number of children are identified as victims of 'industrial scale grooming gangs' so as to render ignorance objectionable. Yet, these are not isolated and rare occurrences because coercive behaviour that is contrived to precipitate young girls to submit to masculine desires for sexual intercourse have become idiosyncratic of modern-day relationships. This is not therefore just encountered when 'masculine' intersects with age but also, where it intersects with power so that the incidence of female sexual subservience, in gang culture for example (where status and money dominate patriarchal structures) further perpetuates misogyny,<sup>128</sup> which in turn percolates society's confraternities of youth.

To this end, by re-categorizing the act of sexual intercourse with a child under 16 as rape, it challenges the social construct that has attenuated the age of consent and whilst this might be unpalatable for some, is of ameliorative benefit by inviting a legislative lexical discourse that is driven by a need to communicate the inappropriateness with which sexual intercourse with children is understood and more importantly, which cannot be countermanded by agreement. Sequentially, the agents involved in the criminal justice process acquire knowledge of and interpret the law so as to better identify those girls at risk of exploitative situations and as such, are able to define the significance of justice for them, to society through arrest, prosecution, publicization, support and education; achieving both symbolic and reflective justice.<sup>129</sup>

---

<sup>128</sup> Beckett H, Brodie. I, Factor. F, Melrose. M, Pearce. J, Pitts. J, Shuker. L and Warrington. C. 'It's Wrong...But You Get Used to It: A Qualitative Study of Gang-associated Sexual Violence and Exploitation' (2013) University of Bedfordshire, 21.

<sup>129</sup> St. Hilaire, C. 'What is the Role of Reflective Equilibrium and Symbolic Interactionism in a Society in a Quest for Justice? A Mixed Methods Analysis' (2014) 4 Journal of Social Justice 14.