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# The "Exile" of Malcolm Watson: Was this United States Citizen and Convicted Sexual Offender Really Expatriated to Canada?

N. Pieter M. O'Leary

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## The “Exile” of Malcolm Watson: Was this United States Citizen and Convicted Sexual Offender Really Expatriated to Canada?

N. Pieter M. O’Leary\*

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Canada and the United States have a long and unique relationship.<sup>1</sup> They share the longest undefended border in the world,<sup>2</sup> across which over a billion dollars of trade passes each

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1. As President John F. Kennedy declared on May 17, 1961 in his address before the Canadian Parliament in Ottawa, “. . . we share more than a common border. We share a common heritage, traced back to those early settlers who traveled from the beachheads of the Maritime Provinces and New England to the far reaches of the Pacific Coast. . . [w]e share common values from the past, a common defense line at present, and common aspirations for the future-our future, and indeed the future of all mankind. Geography has made us neighbors. History has made us friends. Economics has made us partners.”

2. See, Embassy of the United States of America, Ottawa, Canada, *A Canada/ United States of America Accord on Our Shared Border* at [http://canada.usembassy.gov/content/textonly.asp?section=can\\_usa&subsection1=borderissues&document=sharedborder\\_accord\\_0295](http://canada.usembassy.gov/content/textonly.asp?section=can_usa&subsection1=borderissues&document=sharedborder_accord_0295) (last visited Feb. 20, 2007) (noting the common past, interests and objectives of the two countries). The Canada – United States Border is nearly 9000 kilometers or 5,550 miles long including the border between Canada and Alaska. See, The International Boundary Commission – *The International Boundary*

day.<sup>3</sup> Further, they share a common heritage resulting in a shared belief in the basic ideals of freedom, the rule of law, equal rights, and security.<sup>4</sup> With respect to immigration, while both nations vary slightly in the type and number<sup>5</sup> of immigrants each admits, as well as having somewhat different motivations for admitting one immigrant over another, both Canada and the United States share a common view of basic immigration goals.<sup>6</sup>

Much of the present international border between the two nations originates with the Treaty of Paris in 1783 and the subsequent Treaty of 1818 between Great Britain and the United States.<sup>7</sup> With the exception of current disagreements regarding

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at <http://www.internationalboundarycommission.org/ibcp2.htm> (last visited Feb. 19, 2007).

3. David Armstrong, *Passport Requirement to Expand: As of Jan. 8, Anyone Entering U.S. by Air Must Carry Document*, THE SAN FRANCISCO CHRONICLE, Oct. 25, 2006 (stating that the United States and Canada generate \$1.2 billion in trade *per day*, including \$450 million at the Detroit-Windsor, Ontario, border, the busiest in the world. Moreover, that in 2005 alone, 32 million Americans visited Canada and 36 million Canadians visited the United States).

4. See *supra* note 1; The United States Department of State, *The U.S.-Canada Relationship*. Roger F. Noriega, Assistant Secretary of State for Western Hemisphere Affairs at <http://www.state.gov/p/wha/rls/rm/31402.htm> (last visited Oct. 11, 2007).

5. Compare Mara Schulzetenberg, *U.S. Immigration Benefits For Same Sex Couples: Green Cards for Gay Partners?* 9 WM. & MARY J. OF WOMEN & L. 99, 105 (2002) (noting that both Canada and the United States emphasize family reunification as a high priority, but that the two countries, for example, have different views on providing immigration benefits to same sex couples) with Ellen G. Yost, *Proceedings of the Canada-United States Law Institute on Understanding Each Others Across the Largest Undefended Border in History: U.S. Speaker*, 31 Can.-U.S. L.J. 151, 153 (2005) (stating that the United States “approaches the movement of people in a way very different from Canada. Canada starts from the premise that it wants immigrants, even though it wants the right ones; the ones that every country wants, those who have talents, skills, money, or the potential to be productive. By contrast, the U.S. starts from the premise that it does not want migrants.”).

6. Samia A. Malik, *Protecting the Persecuted and Fulfilling the True Goals of a War on Terror Through Immigration Policy*, 2 LOY. INT’L L. REV. 333, 345-46 (2005) (mentioning Canada’s strengthened security element now a fundamental part of Canadian immigration policy).

7. The 1783 Treaty of Paris ended the American Revolutionary War and was instrumental in establishing the eventual boundaries between Canada and the United States. See The Treaty of Paris, U.S.-U.K., art. 2, Sept. 3, 1783, 8 Stat. 80. The International Boundary Commission, charged with surveying and mapping that boundary, was established by the Jay Treaty of 1794. See generally International Boundary Commission, <http://www.internationalboundarycommission.org/ibcp2.htm> (follow “Boundary History” hyperlink) (last visited Feb 19, 2006.) The Treaty of 1818 outlined the border area between the two nations between the Rocky Mountains in the west and the Lake of the Woods in the East. See The International Boundary Commission – *Boundary History* at <http://www.internationalboundarycommission.org/ibcp2.htm> (last visited Feb. 19, 2007).

the boundaries in the Arctic region,<sup>8</sup> the border between Canada and the United States is well marked, stable, and undisputed.<sup>9</sup> Today, both nations monitor the border for everything from the movement of drugs and weapons to air and water pollution.<sup>10</sup> Moreover, in the wake of September 11, 2001, there have been vast changes along the border.<sup>11</sup> One of the clearest changes is the increased use of passports and travel documentation for travelers in an effort to more carefully monitor every person who crosses between the two countries.<sup>12</sup> In October 2006, however, the individual detained at the border was not an international terrorist, drug smuggler, or petty gunrunner.<sup>13</sup> Rather, the man detained by Canadian officials was a high school English teacher from Buffalo, New York.

In October 2006, Mr. Malcolm Watson, a United States citizen and convicted sex offender was, according to the international media, "exiled" to Canada as a term of his plea agreement entered into in an Erie County, New York courtroom. This article chroni-

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8. *PM Starts Fight for the North: Canada to Build Two New Military Facilities in Far North to Lay Claim to Northwest Passage*, TORONTO STAR, Aug. 10 2007 (noting that the until recently, Canada's claims to the Arctic have been all but ignored. However, with warming temperatures resulting in melting ice and the potential for increased exploration and maritime traffic, Canada's claims to the north are being questioned; particularly by the United States which traditionally held Canada can have the Arctic islands, but the water is international territory).

9. See generally Government of Canada, Canada Border Services Agency at <http://www.cbsa-asfc.gc.ca/menu-e.html> last visited Feb. 2, 2007).

10. See generally Government of Canada, Canada Border Services Agency at <http://www.cbsa-asfc.gc.ca/menu-e.html> last visited Feb. 2, 2007). See also United States Customs and Border Protection at <http://www.customs.ustreas.gov/xp/cgov/home.xml> (last visited Feb. 2, 2007); See also Erik K. Moller, *The United States-Canadian Acid Rain Crisis: Proposal for an International Agreement*, 36 UCLA L. REV. 1207, 1207-08 (1989) (discussing generally border relations in the context of environmental issues).

11. Timothy G. Moran, *Life in the Fast Lane*, 28 VER. B. J. & L. DIG. 23 (2002) (noting the basis for change along the border after September 11, 2001, specifically, that "U.S. Homeland Security Director Tom Ridge, and John Manley, then Canadian Minister of Foreign Affairs, signed a document entitled 'The United States - Canada Smart Border Declaration'" which is a thirty-point action plan covering four categories (referred to in the Declaration as "Pillars") the Secure Flow of People, the Secure Flow of Goods, a Secure Infrastructure, and a Coordination and Information Sharing in the Enforcement of these Objectives. *Id.*; See also Donald Kerwin, et al., *Special ABA Committee Report: The Canada-U.S. Border: Balancing Trade Security, and Migrant Rights in the Post 9/11 Era: ABA Immigration and Nationality Committee, International Law Section*, 19 GEO. IMMIGR. L.J. 199, 219 (2004).

12. Jeff Sallot & Paul Koring, *Heading South? Getting a Passport Will be Simpler*, THE GLOBE AND MAIL Jun. 9, 2007, at A3.

13. Nancy A. Fischer©, *23 Are Accused of Drug Smuggling; Several Trips a Week From Canada Alleged*, THE BUFFALO NEWS, Aug. 22, 2007 at B1, *Trucker Fined for Trying to Smuggle Guns Into Canada*, THE RECORD (Kitchener-Waterloo, Ontario) Jan. 13, 2007 at A5.

cles Mr. Watson's story, from the criminal acts that brought him before a judge in Cheektowaga, New York to Canada's outcry that this sexual offender was being "dumped" in Canada by the United States.<sup>14</sup>

Part I outlines the facts underlying the events leading to Mr. Watson's arrest in the United States and the subsequent court actions taken in both the United States and Canada. Part II outlines the relevant domestic and international legal issues arising from this case. From the age of consent laws underlying the story to the alleged exile of an American citizen, the story was international news and raised interesting legal issues. In essence, the Watson Affair is another unique tale in the Canadian-American relationship and not only exposes some of the subtle differences between the two nations, but also raises new issues in immigration and citizenship law.

### I. THE FACTS BEHIND WATSON'S "EXILE"

Malcolm Watson is a natural born American citizen who taught at a prestigious all girls school in Buffalo, New York.<sup>15</sup> The thirty-five year-old Mr. Watson, however, lived across the border in St. Catharines, Ontario, Canada with his wife and three children.<sup>16</sup> Each weekday, he crossed the international border and made the short journey to and from the American girls school where he taught. As a United States citizen and as a Landed Immigrant<sup>17</sup> in Canada, he had little difficulty entering either country. In April 2006, however, Buffalo Police discovered Mr.

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14. Robert Benzie, *McGuinty Demands Action on Sex Offender*, TORONTO STAR, Oct. 25, 2006 (quoting the Premier of Ontario, Liberal Leader Dalton McGuinty).

15. Colin Perkel, *"Exiled" Teacher Held at the Border*, TORONTO STAR, Oct. 27, 2006. Mr. Watson was a popular English teacher at the private school that has 174 girls in Grades 9-12. Phinjo Gombu, *U.S. Teacher Exiled to Canada*, TORONTO STAR, Oct. 23, 2006.

16. Colin Perkel, *"Exiled" Teacher Held at the Border*, TORONTO STAR, Oct. 27, 2006. Mr. Watson's wife and her child are not U.S. citizens, however, and could be delayed or prevented from joining Mr. Watson in the United States should he be forced to serve jail time there or simply be denied entry to Canada.

17. See § II(b)(i) *infra*; A "Landed Immigrant" is the term used by Canadian immigration authorities to describe a non-citizen permanent resident. There are several ways to become a Canadian permanent resident, such as a refugee, skilled worker, or for family reunification. See generally *Immigrating to Canada*, Citizenship and Immigration Canada at <http://www.cic.gc.ca/english/faq/immigrating-1.html> (last visited Feb. 1, 2007); Donald Kerwin, et al., *Special ABA Committee Report: The Canada-U.S. Border: Balancing Trade Security, and Migrant Rights in the Post 9/11 Era: ABA Immigration and Nationality Committee, International Law Section*, 19 GEO. IMMIGR. L.J. 199, 219 (2004) (noting concern among U.S. immigration officials about Canadian immigration policies after

Watson in a car with a fifteen year-old girl with whom he was having a relationship.<sup>18</sup>

On Monday, October 23, 2006 Mr. Watson pleaded guilty to endangering the welfare of a child and third degree sexual abuse.<sup>19</sup> Cheektowaga Town Judge Thomas S. Kolbert instructed Mr. Watson that he could spend a year in jail in the United States or choose three years of probation in Canada.<sup>20</sup> According to Erie County District Attorney Frank Clark,<sup>21</sup> the plea agreement was designed to protect the young female victim from having to testify in court and to enable Mr. Watson to work things out with his family in Canada.<sup>22</sup> As such, the agreed upon plea bargain declared Mr. Watson a Level 1 sex offender,<sup>23</sup> ordered him to sur-

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September 11, 2001 and specifically the ease with which Canadian Landed Immigrant / permanent residents could cross into the United States).

18. Colin Perkel, *"Exiled" Teacher Held at the Border*, TORONTO STAR, Oct. 27, 2006. After a complaint of a suspicious vehicle at a local shopping mall, Cheektowaga police officers were dispatched to investigate. Upon arrival and investigation, the officers believed an improper relationship might have existed between Mr. Watson and the alleged underage female victim. Mr. Watson was subsequently arrested. See generally Cheektowaga Police Department Police Report, April 2, 2006. While greater detail of the incident is found in the report, the author is precluded from providing specific detail at the request of the Cheektowaga Police Department. Moreover, to protect the victim's identity and because the specific detail of the alleged incident is irrelevant for the purpose of this study, See Anthony Cardinale, *Ex-Teacher in Sex Abuse Held in Ontario*, BUFFALO NEWS, Oct. 27, 2006.

19. Robert Benzie, *McGuinty Demands Action on Sex Offender*, TORONTO STAR, Oct. 25, 2006. According to Watson's American defense attorney, Oscar Smukler, "[t]he press has made him out to be some kind of high-risk criminal. . . He was convicted of having kissed a young lady and touched her breast outside her clothing." Colin Perkel, *"Exiled" Teacher Held at the Border*, TORONTO STAR, Oct. 27, 2006.

20. Robert Benzie, *McGuinty Demands Action on Sex Offender*, TORONTO STAR, Oct. 25, 2006.

21. District Attorney Frank Clark is the chief prosecutor in Erie County, New York. His office handles approximately 45,000 misdemeanor and 2,500 felony matters a year with a staff of approximately 175 attorneys and support staff. See, Erie County District Attorney at <http://www.erie.gov/depts/government/da.phtml> (last visited Feb. 14, 2007). District Attorney Clark later admitted the plea agreement was a "little dicey." See *Man Convicted of Child Abuse Exiled to Canada*, CTV.ca at [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061022/exile\\_061022?s\\_name=&no\\_ads](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061022/exile_061022?s_name=&no_ads) (last visited Feb. 14, 2007).

22. Colin Perkel, *"Exiled" Teacher Held at the Border*, TORONTO STAR, Oct. 27, 2006. Mr. Clark is quoted as saying that Mr. Watson asked the Court for permission to return to Canada to be with his family and serve out his probation in Canada. Anthony Cardinale, *Ex-Teacher in Sex Abuse Held in Ontario*, BUFFALO NEWS, Oct. 27, 2006. Mr. Clark also acknowledged that Canadian authorities were not consulted before the sentencing, but he filed them in before Mr. Watson arrived back on Canadian soil. *Id.*

23. Under the New York Sexual Offender Registration Act (SORA), courts have the discretion to classify a sex offender among three different levels, from one to three with one being the lowest risk level. See NY CLS Correc. § 168 et seq. (2007); See also

render a DNA sample, and forbid him from re-entering the United States except for probation hearings.<sup>24</sup>

Needless to say, the reaction in Canada, fueled by the media,<sup>25</sup> was swift and harsh. The Premier of Ontario, Mr. Dalton McGuinty, declared in the provincial legislature that "it is certainly not a precedent that we are prepared to accept."<sup>26</sup> Recognizing that the Canadian federal government had the responsibility for handling an "international issue like this," he declared his provincial government's support in preventing other "jurisdictions south of the border that might want to use Ontario as a dumping ground for convicted felons."<sup>27</sup>

After an October 25, 2006, appearance in a Cheektowaga courtroom, Mr. Watson attempted to return to Canada. Canadian Border Services Agency officials, however, detained Mr. Watson whom they identified as a danger to the public and on suspicion that he had contravened the Canadian Immigration and Refugee Protection Act.<sup>28</sup> Federal Public Safety Minister Stockwell Day<sup>29</sup>

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*New York State Bd. of Examiners of Sex Offenders v. Ransom* 249 App. Div. 2d 891 (1998) (finding a New York state court was not bound by the recommendation of the New York State Board of Examiners of Sex Offenders); *People v Cropper* 170 Misc. 2d 631 (1996) (pertaining to a level one sex offender's challenging the manner of classification); *People v. Dexter* 21 App. Div. 3d 403 (2005), app. den. 2005 NY LEXIS 3305 (noting an upward departure in classifying a sex offender as a level two offender).

24. Colin Perkel, "Exiled" *Teacher Held at the Border*, TORONTO STAR, Oct. 27, 2006.

25. Anthony Cardinale, *Ex-Teacher in Sex Abuse Held in Ontario*, BUFFALO NEWS, Oct. 27, 2006.

26. Hansard Oct. 24, 2006. Premier McGuinty was responding to a question from the representative of Leeds-Granville, Mr. Robert W. Runicman who, as a member of the opposition to McGuinty's Liberal Party, declared the decision to sentence Watson to the comfort of his Canadian home rather than a U.S. jail was a "mind-boggling, horrific decision and hopefully not a precedent for U.S. courts." *Id.*

27. Hansard Oct. 24, 2006.

28. Colin Perkel, "Exiled" *Teacher Held at the Border*, TORONTO STAR, Oct. 27, 2006, See Immigration and Refugee Protection Act, [S.C. 2001, c. 27] at <http://www.canlii.org/ca/sta/i-2.5/> (last visited Feb. 12, 2007); Catherine Dauvergne, *Canada's New Immigration and Refugee Protection Act in Its Global Context*, 41 ALBERTA L. REV. 725 (2003) (identifying changes to Canadian immigration law under the Immigration and Refugee Protection Act specifically, changes to legislative practice, attempts to include legal recommendations, and changes due to globalization).

29. Stockwell Day is the Current Minister of Public Safety, a position he has held since 2006. See *About Stockwell Day*, The Government of Canada at [http://www.stockwellday.com/EN/about\\_stockwell/](http://www.stockwellday.com/EN/about_stockwell/) (last visited Feb. 23, 2007). "Public Safety and Emergency Preparedness Canada was created in 2003 to ensure coordination across all federal departments and agencies responsible for national security and the safety of Canadians." See generally Public Safety and Emergency Preparedness Canada homepage at <http://www.psepc-sppcc.gc.ca/abt/index-en.asp> (last visited Feb. 23, 2007).

promptly wanted Mr. Watson declared inadmissible to Canada and shipped back to the United States.<sup>30</sup> Mr. Watson was released several days later after a Canadian Immigration Judge declared he was not a high-risk offender.<sup>31</sup>

After reviewing the evidence and convening an admissibility hearing on Monday, December 18, 2006, Canadian Immigration and Refugee Board member<sup>32</sup> Ms. Liz Lasowski declared Mr. Watson was in a position of trust and authority over his victim.<sup>33</sup> Consequently, she ordered Mr. Watson to be deported.<sup>34</sup> Mr. Watson's Canadian attorney, Mr. Stephen Green, immediately appealed the decision and it may be a year before the appeal is heard.<sup>35</sup> In the

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30. Colin Perkel, *"Exiled" Teacher Held at the Border*, TORONTO STAR, Oct. 27, 2006. While outside the House of Commons in Ottawa, Ontario, Federal Public Safety Minister Stockwell Day declared he and did not "want to see Canada become a haven for pedophiles or anyone else committing a serious crime." *Id.*

31. *Canadian Judge Releases American Sex Offender*, CTV.ca at [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061026/watson\\_arrest\\_061027?s\\_name=&no\\_ads=](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061026/watson_arrest_061027?s_name=&no_ads=) (last visited Feb. 20, 2007) Under conditions of his release from Canadian custody, Watson must continue to live with his wife and children in their St. Catharines, Ontario home and check-in with Canadian officials whenever he crosses the Canada-United States border. *Id.*

32. See The Canadian Immigration and Refugee Board at [http://www.irb-cisr.gc.ca/en/index\\_e.htm](http://www.irb-cisr.gc.ca/en/index_e.htm) (last visited Feb 12, 2007). In summarizing the role of a member of the Immigration and Refugee Board's general role and duties, Mr. Clive Joakim, a retired member of the Immigration and Refugee Board, noted that a member of the Canadian Immigration and Refugee Board has the power to convene a hearing into the merits of a case that has been referred by the Immigration. The member decides on whether or not he will need the assistance of a Refugee Protection Officer (RPO) at the hearing. The RPO is a staff person responsible for researching the file, placing on the file all the relevant documentary evidence and outlining the issues. The member is responsible for approving the list of issues that may include such things as identity, political affiliation, credibility, internal flight alternative, exclusion, state protection, and others. Next, upon reviewing the file, the member may decide to dispense with the services of the RPO for the actual hearing. Generally, if there is the prospect of a lot of questions on credibility, it is better for the RPO to be present asking the questions so that the member can find it easier to not enter the fray and maintain his impartiality. However, in practice most experienced members are very familiar with the country conditions and the type of story being presented so that he may prefer to go it alone and question the person himself.

33. *American Teacher Will Remain in Canada Despite Order of Deportation*, CityNews, at [http://www.citynews.ca/news/news\\_6217.aspx](http://www.citynews.ca/news/news_6217.aspx) - Dec. 18, 2006. (Feb. 13, 2007).

34. *American Teacher Will Remain in Canada Despite Order of Deportation*, CityNews, at [http://www.citynews.ca/news/news\\_6217.aspx](http://www.citynews.ca/news/news_6217.aspx) - Dec. 18, 2006. (Feb. 13, 2007).

35. *American Teacher Will Remain in Canada Despite Order of Deportation*, CityNews, at [http://www.citynews.ca/news/news\\_6217.aspx](http://www.citynews.ca/news/news_6217.aspx) - Dec. 18, 2006. (Feb. 13, 2007); See also email from Mr. Stephen Green, Canadian attorney for Mr. Malcolm Watson. Feb. 22, 2007; See also March 7, 2007 email from Mr. Clive Joakim noting that appeals may be based on a variety of factors, including humanitarian and

meantime, however, Mr. Watson is permitted to live and work in Canada and come and go as he pleases.<sup>36</sup>

## II. THE THORNY LEGAL ISSUES – AGE OF CONSENT LAWS, IMMIGRATION, & CITIZENSHIP

The Watson case abounds with both domestic and international legal questions. Whether it is the different age of consent laws between the two countries or the interplay of domestic Canadian and American immigration and citizenship laws, the case is unique in many ways. As one of Malcolm Watson's earliest attorneys declared soon after the media scrum began, Mr. Watson faced becoming a man like Alfred Dreyfus in France during the 1890s.<sup>37</sup>

### a. *Age of Consent Laws – Canada vs. the United States*

The facts of the Watson Affair expose differences in the age of consent laws between the two nations and were the basis for the subsequent exile row. In Canada, the Watson Affair renewed the debate concerning age of consent for sexual relations.<sup>38</sup> Currently, Canadian federal law criminalizes sexual contact with a person under the age of fourteen unless the sexual relationship springs from a relationship of authority, trust, or dependency.<sup>39</sup> Accord-

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compassionate grounds which, for example, an individual under a deportation order has Canadian born children or is married to a Canadian spouse.

36. *American Teacher Will Remain in Canada Despite Order of Deportation*, CityNews, at [http://www.citynews.ca/news/news\\_6217.aspx](http://www.citynews.ca/news/news_6217.aspx) - Dec. 18, 2006. (Feb. 13, 2007); See also email from Mr. Stephen Green, Canadian attorney for Mr. Malcolm Watson dated Feb. 22, 2007.

37. The Dreyfus "Affair" occurred in France between 1894 and 1906 when a young French Army officer of Jewish ancestry, Alfred Dreyfus. Dreyfus was enveloped in a political scandal after being wrongfully charged and convicted of treason. Despite later learning of Dreyfus' innocence, French military officials covered-up evidence and committed numerous procedural errors at his trial. The scandal, many believed rooted in anti-Semitism, divided the France. After years of imprisonment and a second court martial, he was eventually exonerated and served with distinction during World War One. See generally JEAN-DENIS BREDIN, *THE AFFAIR: THE CASE OF ALFRED DREYFUS* (1986).

38. The issue was debated during the summer of 2006. See Dafna Izenberg, *Sixteen and Ready for Sex?* MACLEAN'S, Jul 3-10, 2006 at 22. Prior to the 2006 debate, Canada had not revised its age of consent laws in over 100 years when the age of 14 was established. *Shield for Children*, TORONTO STAR, Jun. 27, 2006, at A18; See also Doug Beazley, *Loophole or Noose: Harper Government Looks to Raise Age of Consent for Sex to 16*, EDMONTON SUN, Jun. 24, 2006, at 13.

39. Criminal Code of Canada pt. 5, §§ 151 & 153 (noting that anyone who touches, for a sexual purpose, any part of the body of a person under the age of fourteen is

ingly, many officials in the United States, where Mr. Watson was deemed a Level 1 sex offender, question Canadian anger since Mr. Watson was charged with engaging in sexual activity with a fifteen year old. After all, Mr. Watson's New York victim was one year older than Canada's age of consent requirement.

In Canada, the Criminal Code governs criminal conduct and the resulting punishment for offences.<sup>40</sup> Specifically, the Criminal Code of Canada states that anyone over the age of fourteen may consent to sexual activity.<sup>41</sup> In 1984, with the publication of the *Sexual Offences Against Children Report*, also known as the "Badgley" Report,<sup>42</sup> it was recognized that Canada should give greater protection to children under the age of fourteen.<sup>43</sup> As such, legislation was later passed criminalizing sexual activity involving a person between the ages of fourteen and seventeen where there was a "relationship of authority, trust, or dependency" between the participants.<sup>44</sup> Such relationships include parents, teachers, babysitters, employers, and the like.<sup>45</sup> As Professor Jeremy Patrick has noted, the Supreme Court of Canada decision in *R. v. Audet* outlines such a sexual relationship between a teacher and his student.<sup>46</sup> In *Audet*, a twenty-two year-old high school

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guilty of an indictable offense and punishable by up to a term not to exceed ten years). See also Jeremy Patrick, *Sexual Exploitation and the Criminal Code*, 43 ALBERTA L. REV. 1057 (2006).

40. See generally Criminal Code (R.S., 1985, c. C-46) at <http://laws.justice.gc.ca/en/showtdm/cs/C-46> (last visited Feb. 11, 2007).

41. Criminal Code of Canada pt. 5, § 151 (2007); C. Gwendolyn Landolt, *Canadian Children Targeted on Internet*, STRATFORD BEACON-HERALD, Aug. 13, 2004 at 4 (arguing that Canada, "as one of the most wired countries" in the world, should do more to protect Canadian children from on-line or cross border sexual predators by, among other things, raising the age of consent to at least 16 in Canada); Sean McKibbin, *Gay Pornographer Going Home*, OTTAWA SUN, Nov. 17, 2005, at 11 (noting a 32-year old gay Texan pornographer who engaged in consensual sexual activity with a 14-year old Ottawa, Ontario boy was charged with a single count of possessing child pornography and sentenced to time served, but noting possible legal consequences in Texas); *Man Waiting for Trial in 'Net Case*, FORT McMURRAY TODAY, Jun. 13, 2005, at 6 (noting a 26-year old Winnipeg, Manitoba man accused of sexually abusing a 14-year old Phoenix, Arizona girl he met on the internet faced a maximum sentence of 31 years in jail. Arizona's age of consent is 18).

42. Marilyn Pilon, *Canada's Legal Age of Consent to Sexual Activity*, Library of Parliament 4 (2001) at <http://www.parl.gc.ca/information/library/PRBpubs/prb993-e.pdf> (last visited Feb. 1, 2007).

43. Jeremy Patrick, *Sexual Exploitation and the Criminal Code*, 43 ALBERTA L. REV. 1057, 1058-59 (2006).

44. Criminal Code of Canada pt. 5, § 153 (2007) (defining "young person"); Jeremy Patrick, *Sexual Exploitation and the Criminal Code*, 43 ALBERTA L. REV. 1057 (2006).

45. Criminal Code of Canada pt. 5, § 153 (2007); Jeremy Patrick, *Sexual Exploitation and the Criminal Code*, 43 ALBERTA L. REV. 1057 (2006).

46. *R. v. Audet*, [1996] 2 S.C.R. 171.

teacher had sex with a former student during the summer vacation period.<sup>47</sup> The court determined that the teacher, despite no longer being the student's teacher or the fact that it was summer vacation, remained in a position of authority over the underage female.<sup>48</sup> Authority was generally defined as not just legal authority, but also involves a power of command or an ability to enforce obedience.<sup>49</sup>

Consequently, despite Canada's age of consent law precluding sexual contact with a person under the age of fourteen, the "relationship of authority" that existed between Malcolm Watson and his fifteen year-old victim<sup>50</sup> would also constitute a criminal offence in Canada.

In comparison, New York State's age of consent is definitively seventeen.<sup>51</sup> New York Penal Law § 130.05, addressing age of consent, holds that a person "less than seventeen years old" is deemed incapable of consent.<sup>52</sup> As such, Mr. Watson, age thirty-five, was initially charged with one count of endangering the welfare of a child<sup>53</sup> and two charges of third-degree sexual abuse.<sup>54</sup>

Consequently, whether in the United States or in Canada, Malcolm Watson violated the law. He endangered the health and well-being of his young victim and abused his authority by carrying on any type of sexual relationship her. The question remains, however, was Mr. Watson's conduct of the type to have him "exiled" to Canada?

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47. *R. v. Audet*, [1996] 2 S.C.R. 171.

48. Jeremy Patrick, *Sexual Exploitation and the Criminal Code*, 43 ALBERTA L. REV. 1057 (2006).

49. Jeremy Patrick, *Sexual Exploitation and the Criminal Code*, 43 ALBERTA L. REV. 1057 (2006).

50. According to New York officials, the victim was a female student attending the all girls seminary in Buffalo where Malcolm Watson taught.

51. New York Pen. Law § 130.25 (2007) et seq; See also *People v. Dozier* 72 App. Div. 2d 478 (1980) (holding a 21-year old male guilty of rape in the third degree where he had sexual intercourse with a female under seventeen. The court, however, noted that where the offending male was under the age of 21 and the female between the ages of 14 and 16, a significantly less severe penalty is provided under Pen. Law § 130.20, 70.15, subd. 1).

52. New York Pen. Law § 130.05 (3)(a) (2007); See also *People v. Fielding* 39 NYS 2d 17 (1976) (addressing a minor's incapability of consenting to sexual misconduct of the defendant); *People v. Hinton* 40 NY 2d 345 (1976) (noting that the age of the victim is determined at the time of the crime, not the time of the trial).

53. New York Pen. Law § 260.10 (2007).

54. New York Pen. Law § 130.55 (2007).

b. *The Nature of Citizenship, Immigration, & Exile*

Citizenship is a basic human right.<sup>55</sup> In his dissenting opinion in *Perez v. Brownell*, a case which declared that a person had lost his American citizenship by operation of the Immigration and Nationality Act on the ground that the petitioner remained outside the United States in order to avoid service in the armed forces of the United States and that he had voted in a political election in Mexico, Justice Warren wrote that citizenship is "man's basic right for it is nothing less than the right to have rights."<sup>56</sup> While *Perez* was later overruled and Justice Warren's notion of citizenship given new meaning; the notion of citizenship is still being scrutinized, especially in post-9/11 world.<sup>57</sup> The question in this case is whether Malcolm Watson was expatriated, even temporarily, to Canada in violation of the United States Constitution and thereby stripped of his rights as a citizen.

1. Mr. Watson as a Canadian Permanent Resident (aka Landed Immigrant)

The Citizenship Act is Canada's primary source of citizenship law.<sup>58</sup> Prior to the enactment of the Canadian Citizenship Act in January 1947, people living in Canada were considered subjects of Great Britain.<sup>59</sup> Beginning in 1977, The Government of Canada recognized the concept of one person holding multiple citizenships

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55. Article 15 of the Universal Declaration of Human Rights declares that "(1) Everyone has the right to a nationality and (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." See art. 15 Universal Declaration of Human Rights at <http://www.un.org/Overview/rights.html> (last visited Jan. 30, 2007). For a poignant, though dated discussion on citizenship in the United States. See generally *The Functionality of Citizenship*, 110 HARV. L. REV. 1814 (1997).

56. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J. dissenting) (overruled by *Afroyim v. Rusk*, 387 U.S. 253 (1967)). In an earlier case, Justice Rutledge wrote in his concurring opinion in, *Klapprott v. United States*, that to take away a man's citizenship deprives him of a right no less precious than life or liberty. See *Klapprott v. United States*, 335 U.S. 601, 616 (1949) (Rutledge, J., concurring).

57. Linda Bosniak, *Symposium: New Dimensions of Citizenship: Contribution: Varieties of Citizenship*, 75 FORDHAM L. REV. 2449, 2449-50 (2007) (discussing the social and political implications of citizenship).

58. J. Donald Galloway, *The Dilemmas of Canadian Citizenship Law*, 13 GEO. IMMIGR. L. J. 201, 202 (1999). The Provincial Government of Quebec, however, has established its own immigration requirements under the Canada-Quebec Accord on Immigration. See Margaret Young, *The Canada-Quebec Accord on Immigration*, LIBRARY OF PARLIAMENT at <http://www.parl.gc.ca/information/library/PRBpubs/bp252-e.htm> (last visited Oct. 19, 2007).

59. J. Donald Galloway, *The Dilemmas of Canadian Citizenship Law*, 13 GEO. IMMIGR. L. J. 201, 201 (1999).

and permitted Canadians to be dual citizens.<sup>60</sup> Currently, the Government of Canada permits Canadians to be citizens of up to three separate countries.<sup>61</sup>

A person may become a Canadian citizen in one of three basic ways:<sup>62</sup> (1) by birth in Canada, (2) by birth abroad (after February 15, 1977) to a Canadian citizen parent, or (3) by naturalization.<sup>63</sup> Prior to 2002, a person admitted to Canada as a non-citizen resident was classified as a "Landed Immigrant." Currently, people admitted to Canada as a non-citizen permanent resident are classified as permanent residents.<sup>64</sup> Beginning in 2002, the Government of Canada began issuing Permanent Residence Cards (aka "PR Cards") to all existing and incoming permanent residences. This plastic, driver's license size card bears a photo of the permanent resident, lists their place and county of birth, and notes their status in Canada.<sup>65</sup> Beginning in December 2003, it became mandatory for all permanent residences in Canada to present the PR Card to Canadian immigration officials re-entering Canada.<sup>66</sup>

To become a Canadian citizen by naturalization, as Mr. Watson did, an immigrant to Canada must be over eighteen years of age, have lived in Canada for three of the last four preceding years, have permanent residence status, formally apply, know about the rights and responsibilities of being Canadian, and among other things, not be under a deportation order.<sup>67</sup> After three years of residence in Canada a permanent resident may be eligible to apply for Canadian Citizenship. In Mr. Watson's case,

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60. J. Donald Galloway, *The Dilemmas of Canadian Citizenship Law*, 13 GEO. IMMIGR. L. J. 201, 216-17 (1999).

61. William Kaplan, *Is It Time To Close Hotel Canada?* MACLEAN'S, Dec. 25, 2006 (Discussing the pros and cons of allowing dual citizenship for Canadians). *Dual Citizenship*, CITIZENSHIP AND IMMIGRATION CANADA at [http://www.cic.gc.ca/english/resources/publications/dualci\\_e.asp](http://www.cic.gc.ca/english/resources/publications/dualci_e.asp) (last visited Oct. 31, 2007) (noting Canada allows multiple citizenship).

62. See generally *How to Become a Canadian Citizen*, CITIZENSHIP AND IMMIGRATION CANADA, at <http://www.cic.gc.ca/english/resources/publications/howto-e.asp> (last visited Oct. 31, 2007).

63. See generally *How to Become a Canadian Citizen*, CITIZENSHIP AND IMMIGRATION CANADA, at <http://www.cic.gc.ca/english/resources/publications/howto-e.asp> (last visited Oct. 31, 2007).

64. *Permanent Resident Card*, CITIZENSHIP AND IMMIGRATION CANADA at <http://www.cic.gc.ca/EnGLlsh/information/pr-card/index.asp> (last visited Oct. 31, 2007).

65. *Permanent Resident Card*, CITIZENSHIP AND IMMIGRATION CANADA at <http://www.cic.gc.ca/EnGLlsh/information/pr-card/index.asp> (last visited Oct. 31, 2007).

66. *Id.*

67. J. Donald Galloway, *The Dilemmas of Canadian Citizenship Law*, 13 GEO. IMMIGR. L. J. 201, 204 (1999); Canadian Citizenship Act (R.S., 1985, c. C-29) at <http://laws.justice.gc.ca/en/ShowFullDoc/cs/c-29///en> (last visited Feb. 11, 2007).

depending on when he became a Canadian permanent resident, his criminal plea agreement may render him deportable under Canadian law absent a showing that other factors, such as having a Canadian wife and young children, outweigh his past criminal conduct in the United States. This issue is still pending as Mr. Watson appeals his deportation order from Canada.

## 2. Mr. Watson as a U.S. Citizen and his alleged "Exile"

Exile is, among other definitions, "the expulsion from one's native land by authoritative decree."<sup>68</sup> However, a person may voluntarily go into exile or he may be forced into exile for other reasons.<sup>69</sup> In the case at hand, Malcolm Watson accepted a plea agreement that gave him the choice: serve time in an American jail or serve three years of probation in Canada.<sup>70</sup> Arguably like anyone in his position, Mr. Watson chose to be reunited with his family in Canada and left the United States. Did his departure, however, arranged and ultimately ordered by the Erie County Court, amount to exile?

Malcolm Watson is a natural born American citizen,<sup>71</sup> and as such the United States Constitution protects his right to citizenship. Specifically, the Fourteenth Amendment prevents any branch of the government from stripping him of citizenship.<sup>72</sup> The Citizenship Clause of the Fourteenth Amendment holds that "all persons born or naturalized in the United States, and subject to

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68. See *Exile*, Dictionary.com at <http://dictionary.reference.com/browse/exile> (last visited Feb. 1, 2007) (also defining exile as "prolonged separation from one's country or home, as by force of circumstances.") See also Jacob Adelman, *Wrongfully Deported SoCal Man Found at Border Crossing*, SAN DIEGO UNION TRIBUNE, Aug. 7, 2007 (noting that a mentally disable U.S. citizen born in Los Angeles who was wrongly deported by U.S. Customs and Immigration Enforcement personnel was found three months later "traumatized and exhausted" from living on the streets of Mexico).

69. For instance, the Shah of Iran left Iran in January 1979 due to violent protests against his regime and the exiled Ayatollah Khomeini returned to rule the country. See Jamie Lang, *International Sanctions: The Pressure on Iran to Abandon Nuclear Proliferation*, 6 J. INT'L BUS. & L. 141, 148-49 (2007).

70. Colin Perkel, *"Exiled" Teacher Held at the Border*, TORONTO STAR, Oct. 27, 2006.

71. Colin Perkel, *"Exiled" Teacher Held at the Border*, TORONTO STAR, Oct. 27, 2006.

72. See *Afroyim v. Rusk*, 387 U.S. 253 (1967) (holding that the Fourteenth Amendment prevented government from stripping a person of their citizenship). See generally Rachel Baskin, *Citizenship Theories, Immigration, and Nationality Act Section 309 & Nguyen v. INS: How the Supreme Court Got it Wrong*, 3 CARDOZO PUB. L. POL'Y. & ETHICS J. 869, 873-78 (2006) (giving a comprehensive history of citizenship in the United States from the colonial period to the Immigration and Naturalization Act of 1952).

the jurisdiction thereof, are citizens of the United States and the state wherein they reside.”<sup>73</sup> While debate exists about the equality of the natural born versus naturalized citizenship,<sup>74</sup> Title 8 of the United States Code § 1481, relating to the loss of nationality by native born or naturalized citizens, outlines seven particular ways that a United States citizen may voluntarily lose his or her citizenship.<sup>75</sup> Specifically, they are as follows: (1) a United States citizen over the age of eighteen who applies for and obtains naturalization in a foreign state may lose his or her American citizenship;<sup>76</sup> (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state,<sup>77</sup> (3) entering, or serving in, the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the United States, or (B) or serving as an officer or noncommissioned officer;<sup>78</sup> (4) accepting, serv-

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73. U.S. Const., amend. XIV (2007). It must be remembered that the passage of the Fourteenth Amendment in 1868, after the tumult of the Civil War, was designed to award and protect the citizenship rights of newly freed slaves. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (dissenting opinion by Justice Fuller & Justice Harlan which declared that the American-born children of foreign-born nationals should not be permitted to become U.S. citizens despite being born on American soil); *Afroyim v. Rusk*, 387 U.S. 253 (1967); See generally JACOBUS TEN BROECK THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951).

74. This distinction and debate are beyond the scope of this article. See generally David A. Isaacson, *Correcting Anomalies in the United States Law of Citizenship by Descent*, 47 ARIZ. L. REV. 313 (2005) (chronicling various hypothetical paths to citizenship for the descendants of U.S. citizens as governed by §§ 301 & 309 of the Immigration and Nationality Act); Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 B. Y. U. L. REV. 927 (2005) (examining the historical roots of the native born requirements of the presidency).

75. See generally 8 U.S.C.S. § 1481 (2007). Additionally, subd. (b) mandates that when the loss of nationality is put in issue, the party claiming loss has occurred has the burden of proving by a preponderance of the evidence that loss actually occurred. Moreover, any person who engages in an act of expatriation enumerated in subd. (a) shall be presumed to have done so voluntarily, but may rebut the voluntariness presumption but show, by a preponderance of the evidence, that the expatriating act was not done voluntarily. *Id.* at § 1481 (b) (2007); Nora Graham, *Patriot Act II and Denationalization: An Unconstitutional Attempt to Revive Stripping Americans of Their Citizenship*, 52 CLEV. ST. L. REV. 593, 596-600 (2004-05) (giving an historical overview of American expatriation legislation).

76. 8 U.S.C.S. § 1481(a)(1)(2007); *Richards v. Secretary of State, Dep't. of State* (1985, 9th Cir.) 752 F.2d 1413. (holding that an American citizen voluntarily and intentionally relinquished his citizenship by becoming naturalized citizen of Canada and explicitly renouncing United States citizenship in order to obtain particular type of employment in Canada).

77. 8 U.S.C.S. § 1481(a)(2)(2007); *Richards v. Secretary of State, Dep't. of State* (1985, 9th Cir.) 752 F.2d 1413 (discussing renouncing citizenship in the United States).

78. 8 U.S.C.S. § 1481(a)(3)(2007); *In re Quintanilla-Montes* (1970, BIA) 13 I & N. Dec. 508 (noting that “Sunday marching” and drill instruction for about one hour in Mexico under direction of soldier from the regular Mexican Army, over period of

ing in, or performing the duties of any office, post, or employment under the government of a foreign state or political subdivision thereof;<sup>79</sup> (5) making a formal renunciation of American nationality before a diplomatic or consular officer of the United States in a foreign state;<sup>80</sup> (6) making a formal written renunciation of nationality while in the United States;<sup>81</sup> or (7) committing an act of treason, or attempting by force to overthrow, or bearing arms against the United States, or conspiring to overthrow by force the Government of the United States.<sup>82</sup> In Mr. Watson's case, however, he failed to act in a manner that would lead to the loss of citizenship under 8 U.S.C. § 1481. Specifically, he was not a naturalized citizen of Canada, only a permanent resident. Moreover, he had not taken a formal oath or made a formal declaration of allegiance to the Government of Canada with the specific intent of relinquishing his United States citizenship.

For instance, unlike the 1979 case of *Davis v. District Director, Immigration & Naturalization Service* which involved a native born citizen of the United States who had served as a bomber pilot during World War II and who later voluntarily signed an oath of renunciation of United States nationality at the American Embassy in Paris stating, among other things, "I should like to consider myself a citizen of the world,"<sup>83</sup> Mr. Watson never made or signed such a formal (or informal) renunciation of his American citizenship. Moreover, while courts in the United States have long recognized that a United States citizen may declare "temporary allegiance" to a foreign country while abroad in that they have a "duty to obey all laws of a country not immediately relating to citizenship so long as he remains in that country,"<sup>84</sup> Mr. Watson's United States citizenship could not be

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approximately one year, during which time no rank was held, no firearms were issued nor instructions given in use of weapons, no uniforms, pay nor allowances of any nature were received, and no food, transportation nor medical services were furnished, did not constitute service in Armed forces of foreign state under 8 USCS § 1481(a)(3)).

79. 8 U.S.C.S. § 1481(a)(4)(2007).

80. 8 U.S.C.S. § 1481(a)(5)(2007).

81. 8 U.S.C.S. § 1481(a)(6)(2007).

82. 8 U.S.C.S. § 1481(a)(7)(2007).

83. *Davis v. Director, Immigration & Naturalization Service* (1979, D.C. Dist.) 481 F. Supp. 1178.

84. *Fletes-Mora v. Rogers*, (1958) 160 F. Supp. 215, 218 (quoting Justice Field in *Carlisle v. United States*, (1872) 83 U.S. 147, 154-155 in that "[a]ll strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection.")

stripped because he merely lived in Canada and enjoyed the protection of the Government of Canada.

A formal declaration of allegiance to a foreign state, as noted in *United States v. Matheson*,<sup>85</sup> requires a "knowing and intelligently intended act" to not merely take an oath, but to relinquish United States citizenship.<sup>86</sup> In *Matheson*, the United States Court of Appeals for the Second District was asked to reverse the District Court's ruling granting summary judgment to the United States government in finding appellant estate liable for federal income taxes.<sup>87</sup> The case stemmed from the death of a wealthy deceased United States citizen whose estate sought to establish, over the government's opposition, that the deceased expatriated herself. At issue was several million dollars in tax liability which the estate might escape if it could sustain the burden of showing that the deceased lost her United States citizenship.<sup>88</sup> In affirming the lower Court's decision in favor of the government and finding that the deceased had not relinquished her citizenship, the Court of Appeals noted that "surely the Fourteenth Amendment right of citizenship cannot be characterized as a trivial matter . . . there must be proof of a specific intent to relinquish United States citizenship before an act of foreign naturalization or oath of loyalty to another sovereign can result in the expatriation of an American citizen."<sup>89</sup> In Mr. Watson's case, there was no such specific intent let alone a desire to relinquish his United States citizenship.

Moreover, despite the fact that the United States Constitution has no specific enumerated powers governing immigration, the Federal government, namely the United States Congress, holds the power to regulate immigration law and thereby dictate who may enter and/or remain in the United States.<sup>90</sup> There are several sources of this power, scholars argue,<sup>91</sup> including the Com-

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85. *United States v. Matheson*, (1976) 532 F.2d 809.

86. *Id.* at 814.

87. *Id.* at 809.

88. *Id.* at 811.

89. *Id.* at 814.

90. See generally Michael J. Almonte, *State and Local Law Enforcement Response to Undocumented Immigrants: Can We Make the Rules, Too?* 72 BROOKLYN L. REV. 655 (in discussing the role of state and local law enforcement agencies in enforcing immigration law, Mr. Almonte cites a 2005 case from Nashua District Court holding that state and local police department actions in enforcing immigration laws were preempted under the Supremacy Clause of the Federal Constitution because federal regulation in the field was "so pervasive.")

91. *Chae Chan Ping v. United States (The Chinese Exclusion Cases)* 130 U.S. 581,

merce Clause,<sup>92</sup> the Migration and Importation Clause,<sup>93</sup> the Naturalization Clause,<sup>94</sup> and the War Clause.<sup>95</sup> None of these clauses, however, came into play in Mr. Watson's case. Neither Congressional enactment nor any case law supports the notion that a state municipal court such as the one in Erie County, New York, could order a native United States citizen to be expatriated based on a criminal misdemeanor. A New York Supreme Court judge<sup>96</sup> is precluded from ruling on the admission or restriction of an immigrant let alone ordering a United States citizen be banished from his own county. Moreover, it must be recalled that Mr. Watson was ordered to *reappear* in the Erie County Court on a future date as a condition of his probation. As such, there is no greater evidence to support the fact he was not stripped of his citizenship than the fact that he retained his rights and privileges under the United States Constitution.

Thus, in Mr. Watson's case, there was no such "knowing and

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606-07 (1889); See generally STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 10-13 (2002).

92. U.S. Const., art. I, § 8, cl. 3. (2007) (permitting Congress to regulate commerce with foreign nations); See, e.g., *Edye v. Robertson (Head Money Cases)* 112 U.S. 580, 590-94 (1884) (validating federal immigration power under foreign commerce clause power); Allison B. Feld, *The Second Circuit Review: 1996-97 Term: Immigration Law: Section 434 of the Welfare Act: Does the Federal Immigration Power Collide With the Tenth Amendment*, 63 BROOKLYN L. REV. 551, 556-57 (1997).

93. U.S. Const., art. I, § 9, cl. 1. (2007) (holding Congress shall not prohibit the migration of people prior to the year 1808, but, implicitly, may prohibit migration after 1808); See also Lysander Spooner, *The Unconstitutionality of Slavery*, 28 PAC. L.J. 1015, 1100 (1997).

94. U.S. Const., art. I, § 8, cl. 4. (2007) (enabling Congress to establish a uniform Rule of Naturalization); See also Liza Cristol-Deman & Richard Edwards, *Symposium: Closing the Door on the Immigrant Poor: Creating a Permanent Underclass of Immigrants Residing in the U.S., 'Welfare Reform' May Deter the Entry of Many Talented, Industrious and Valuable Individuals*, 9 STAN. L. & POL'Y. REV. 141, 144-45 (1998).

95. U.S. Const., art. I, § 8, cl. 11 (2007) (providing Congress the power to declare war and restrict alien enemies from entering the United States). Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. U. L. J. 5, 17 (2004).

96. In New York State, the "trial courts of superior jurisdiction are the Supreme Courts, the Court of Claims, the Family Courts, the Surrogate's Courts and, outside New York City, the County Courts." Moreover, County Courts are established in each county outside New York City. They are "authorized to handle the prosecution of all crimes committed within the County." Other courts, such as the Town (like Cheektowaga) and Village Courts "have criminal jurisdiction over violations and misdemeanors, and civil jurisdiction over claims of up to \$3,000." New York State's highest court is the Court of Appeal that "is composed of a Chief Judge and six Associate Judges, each appointed to a 14-year term." See generally *Introduction to the Courts*, NEW YORK STATE UNIFIED COURT SYSTEM at <http://www.courts.state.ny.us/courts/intro.shtml> (last visited Feb. 2, 2007).

intelligently intended act" of renunciation before United States officials let alone an oath or declaration of allegiance to the Government of Canada specifically intended to renounce his United States citizenship. As such, the question arises, was Mr. Watson really "exiled" to Canada? In all likelihood, the answer is no. So what really happened?

The answer appears to be an attempt at a creative plea agreement which, when publicized, raised the ire of the Canadian public and, naturally, the Provincial Government of Ontario and the Federal Government of Canada. Moreover, the plea agreement drew curious glances from immigration lawyers throughout the United States.<sup>97</sup> Despite its best intentions at protecting the victim, however, Mr. Watson's plea agreement did not *exile* him to Canada. He retained his U.S. citizenship as well as his rights and privileges under the Constitution as evidenced by the fact he was permitted to re-enter the United States and have his rights adjudicated in a court of law.

### III. RECOMMENDATIONS

With respect to age of consent laws, the Watson Affair highlights the fact that, in Canada sexual contact with a person under the age of sixteen should be banned outright. Sexual conduct involving a person aged sixteen to eighteen should be criminalized where the partner is over eighteen and in a relationship of authority, trust, or dependency with the young person.<sup>98</sup> Moreover, in light of the ever-growing use of the internet to communicate and meet with persons under age sixteen and the ease with which an adult can travel to meet a person under the age of sixteen,<sup>99</sup> Canada should raise its age of consent laws to reflect the changing

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97. Local San Diego attorneys were quite surprised to learn that Mr. Watson, a United States citizen by birth, was sent to Canada to serve his probation. Considering the immigration issues which arise in many criminal cases along the Southern border, the facts of the Watson Affair were a shock and something to consider in the future.

98. See Dafna Izenberg, *Sixteen and Ready for Sex?* MACLEAN'S, Jul. 3-10, 2006 at 22; *Shield for Children*, TORONTO STAR, Jun. 27, 2006.

99. Eric Thomas Berkman, *The Responses to the International Child Sex Tourism Trade*, 19 B.C. INT'L. & COMP. L. REV. 397 (1996) (chronicling the problem of sex tourism and laws to combat the problem); Donna M. Hughes, *The Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children*, 13 HASTINGS WOMEN'S L.J. 127, 135 & 139 (2002) (chronicling the "global human rights crisis that is being escalated by the use of new technologies" and noting that "[s]talkers use these activities as part of a grooming process to entice children into more direct contact, such as telephone conversations and eventual physical meetings.")

technologies and prevent the exploitation of children by those coming from other countries with plans to engage in sexual activity in Canada with a person under age sixteen.<sup>100</sup> Additionally, Canada should implement laws restricting “cross border” solicitation of young people under the age of 16 by predators outside the country.

With respect to immigration and citizenship matters and considering the apparent uniqueness of Mr. Watson’s plea agreement, United States defense attorneys, prosecutors, and judges should be mindful the international impact of the plea agreements they arrange. Whether along the Northern border with Canada or the Southern border with Mexico, United States citizens or permanent residents should be counseled on the potential impact any plea agreement may have upon them if they live and/or work across the border. As such, authorities in either Canada or Mexico should be consulted and questioned (likely by a suspect’s own attorney) in order to determine any potential negative impact.<sup>101</sup>

#### IV. CONCLUSION

After investigating the New York laws Malcolm Watson is alleged to have violated and his subsequent plea agreement, it is evident that he committed criminal acts in the United States that were also punishable in Canada; despite the differences in the age of consent laws between the two nations. Mr. Watson’s conduct, however, neither deprived him of his American citizenship nor did the terms of the plea agreement amount to his “exile” to Canada. His conduct simply did not amount to a knowing and voluntary renunciation of United States citizenship. Moreover, a state court sitting in New York had no authority to make a determination that Mr. Watson’s actions resulted in expatriation. The fact that the length of the “exile” was limited to three years is further evidence that the term “exile” was improperly used because Mr. Watson was permitted to re-enter the United States for the express purpose of making future court appearances – a recognition that he retained legal standing and rights in his native country. As

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100. See generally Marilyn Pilon, *Canada’s Legal Age of Consent to Sexual Activity*, Library of Parliament (2001) at <http://www.parl.gc.ca/information/library/PRBpubs/prb993-e.pdf> (last visited Feb. 1, 2007).

101. While it appears that Erie County District Attorney contacted Canadian officials regarding Mr. Watson’s plea agreement, Frank Clark acknowledges Canadian officials were not contacted until after the plea agreement was arranged. Moreover, there is no indication Mr. Watson’s American defense attorney made any effort to determine the potential consequences for his client who lived in Canada.

such, Mr. Watson was certainly not "exiled" to Canada. Rather, the attorneys and the court, mindful of the underage female victim and in consideration of Mr. Watson's residency in Canada, engaged in creative lawyering that, rather than sheltering his victim, propelled Mr. Watson and his young victim into a media storm.