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Sexuality of Minors and Criminal Law

Jaime Couso

Introduction

Criminal law mandates punishment, in a variety of circumstances, for sexual relations with minors, including cases in which the minor consents to having such relations. In the past, criminal punishment for such relations seems to have been more useful for protecting the monopolistic control of the *pater familia* over the sexuality of his children in order to efficiently protect the interests of the family he headed (above all in order to promote advantageous alliances through matrimony). In contemporary criminal law, the amount of care for family interests entrusted to the father (or both parents) can still be appreciated, albeit together with protection of the interests of the minor and altogether framed within the concept of “incapacity for sexual consent.” This approach is being challenged by the conception – that has gained ground in legal theory – holding children and adolescents to be autonomous subjects, entitled to basic rights and freedoms, even though this conception does still call for protection against the possibly harmful consequences of the exercise of these freedoms. In any case, the concept of children as bearers of rights, such that was specifically developed starting with the ratification of the International Convention on the Rights of the Child (CRC), postulates the necessity of redefining the criminality of sexual relations with children and adolescents: their sexuality can no longer be understood in function of the paternal/parental interests, hence those interests do not warrant protection at the cost of undue interference into the privacy of the child or adolescent. Instead what is necessary is reformulating the matter of the legal status of the sexuality of children and adolescents in general, plus the legal role of parents as regards their children’s

sexuality and the protective function that criminal law must perform (and refrain from performing) in particular.

This paper will advance certain reflections on this needed reexamination, borrowing from the history of legal parental-filial regulation in various countries in the Americas (I), the basic characteristics of the regulation in place in these countries following the reforms introduced in the 20th century (II), an analysis of the way the “harm principle” should be applied in the case of child-adolescent sexuality that brings to bear state of the art research in psychology and anthropology (III), and legal and comparative jurisprudential theory (IV), concluding with a review of certain operative principles that should guide the necessary revision of the criminal regulations currently in place for this matter (at the end of section IV).

I. Historical origins of penal control over the sexuality of minors: patriarchal power, gender stereotypes, and normalization.

Even before independence, having sexual relations with single women under a certain age was prohibited by law, in the metropolitan centers of Europe as much as in the colonies of North and South America. The basis of the prohibition had to do with protecting the family and paternal interest in preserving the virginity of daughters until marriage, a value both moral and religious (Retamal, 51), but also economical – as a commodity (Cocca, 11) – associated by the white elites with the protection of the family’s and woman’s honor, on which in turn depended the prospects for forming advantageous alliances through marriage. The interests of the progeny in enjoying the same social and economic status as their forbears were also indirectly at stake, as being born *illegitimately* brought with it a marked drop on the social scale (Milanich, 228).

The prohibition, which only applied to white women, coexisted with an open tolerance of sexual access to black, indigenous, or *mestizo* women (single and underage), both in terms of

formally consensual relationships and ones that were openly coercive, such as the case of girls who worked as maids in the homes of their employers who were frequently forced to engage in sexual relations (on the case in Chile, see Salazar, 297). In fact, written into the law of the United States having sexual relations with single underage women was defensible when “sexually experienced” or “impure” women were involved, which considered together with the myths spread regarding the promiscuity and natural salacity of black women (Cocca, 11; in Chile, Retamal, 53 recounting the myth about indigenous and black women), explains why legal protection was unavailable to them.

In any case, the regulation of sexuality of minors in the West seems to have from nearly its earliest days distinguished two different phenomena: sexual relations with underage girls around ten to twelve years of age and sexual relations with girls who were older but still legally considered “minors.” Relations of the first type have been prohibited from relatively remote times, as evidenced as early as 1275 in the Westminster Statute when they were considered a serious crime (capital crime or felony, depending on the period) (Cocca, 10). Sexual relations with girls older than 10 to 12 years of age, who according to the law could marry with their parents’ consent, was only considered criminal – with relatively minor punishments – under certain circumstances which, as will be seen, seem to have been different in Latin America and the United States.

In England and the United States of America (USA), criminal punishment for having sexual relations with girls under the age of 10 to 12 years was not, as has been noted, absolute, since there was the available defense that the girl was “sexually experienced” or “impure,” which demonstrates that these prohibitions had little to do with the question of whether or not the girl possessed the competence for consenting to sexual activity, and was much more centered on

protecting premarital chastity (Cocca, 11). As further proof of this, the law itself permitted these sexual relations if the girl was married, which in some states in the USA was not subject to any age limitations if the girl was pregnant (Cocca, 9).

With regards the expansion of punishments for sexual relations with girls above this age, it did not come about so much in terms of a distinct offense, but rather as a broadening of the scope of the same crime, which starting then (1865 in England and a few years later in all of the states in the USA) included minors (women under 18 to 20 years of age) (Cocca, 14). The increase in the age of sexual consent was due, in the USA, to an effort to normalize the sexual behavior of young women from the middle and lower classes, whose licentiousness was seen as immoral, as an opportunity for abuse by more powerful and experienced men, and as one step away from prostitution (Cocca, 12-13).

In Latin America, the legal prohibition operated in the first instance on the base of a minimum age (around 12 years) under which harm was presumed (and the offense was assessed) by the mere occurrence of sexual relations, even when the victim was not forced or deceived.

Outside of these cases, and to reinforce the power the law placed in the hands of the father to control the marriage and sexuality of his marriageable daughters (which in the case of Spain and its colonies began in the 18th century; Muñoz, 111), legal punishment for “consensual” relations (without violence or coercion) was extended to include those involving women above 12 years of age up until a point that fluctuated between 20 (in Chile) and 23 (in Spain) as long as the woman in question was a “damsel,” that is, a virgin. For some offenses in which sex was coerced, the distinction between women of “honorable repute” and women who were not was even of importance in determining the seriousness of the crime.

In one and the other case, the basis of the prohibition – equally to what was initially the case in England and the USA – had little to do with competence to freely consent to sexual relations. In fact, it is hard to imagine that a virgin induced by her father to marry at the age of twelve, or a girl of the same age initiated into prostitution (which would mean she is no longer a “damsel”), might have had any more competence to freely consent to having sexual relations than a single virgin of 19 years of age (in Chile), or even 22 (in Spain), who fled with her suitor to consummate the sexual act (which comprised the offense known as “rape with the victim’s assent”).¹ Furthermore, there are other attributes of the criminal laws adopted during the 19th century in the former Spanish colonies in the Americas from the Spanish criminal code of 1848 that reinforce the idea that the interest protected was not that of the woman’s freedom, but rather her honor and the paternal and family honor, on which depended her children’s prospects for marriage and the continuation of her material well-being: 1) if the offender married the offended, the trial or sentence was suspended (even in cases of rape); 2) the offense could not be prosecuted without prior formal complaint by the victim, her parents, or her grandparents; 3) the condemned was given an accessory sentence of providing a “dowry to the offended” and “adequate nourishment” for any offspring.

The protection of these socio-economic interests, however, was not placed under the state’s direct control, as it was content with bolstering the power of the family father to make decisions regarding matrimonial alliances and control his daughters’ sexuality. In principle, he enjoyed an exclusive prerogative to decide whether or not and in what circumstances to lodge a complaint over the incident, or whether or not to consent to the posterior marriage with the

¹ It is true that for the offense of statutory rape, however, the conditions surrounding the damsel’s consent were indeed important, inasmuch as evidence of deceit was required (in both the Chilean and Spanish criminal codes), whereas deceit was not necessary for rape with victim’s assent.

offender – which would terminate the court proceedings, a prerogative he could ideally use to reach the solution he found most convenient for his daughters – independently of what they themselves might prefer – or then again according to his own whim, whose reasons lay beyond the reach of state scrutiny.² None of this had anything to do with the capacity or incapacity of the girl or woman to freely give her consent in an independent sexual relationship.

For the rest, there was no other prohibition in colonial and 19th century regulations similar to the ones studied that applied to boys and young men. It was clearly held that the crimes of rape, statutory rape, or abduction could not be committed against them, whether they be under twelve years of age or older. The only relevant penal infraction was sodomy, which was severely punished on moral grounds, not as an offense against sexual freedom; the fact that the punishment was greater when a child was the victim (under 12 to 14 years of age) is more due to the fear that the child might be somehow corrupted than to interest in guaranteeing the consensual nature of these sorts of sexual relations, which were even punished when maintained by adult males. As regards heterosexual relations, boys and young men were never considered victims; society thought it natural – and the Church tolerated as inevitable – that young unmarried men underwent sexual initiation with older more experienced women – typically, prostitutes.

The grounds for this gender difference in the regulation of sexuality of minors had nothing to do with, once again, one's capacity to freely consent to sexual relations, but instead with the fact that, in the case of males, sex did not jeopardize one's honor or socio-economic future, or the honor or interests of one's father. What could, however, put the future of a well-to-

² For more on the extension of this power which involved the imposing symbol of the state's legitimate monopoly of violence, see Couso, p. 134.

do young man and his father's interests in jeopardy, was an inconvenient marriage, which is why the law, which made no issue of the boy's capacity to have sex from whatever age he desired it, denied him the competence to marry without his parents' or guardian's consent until he reached an age set very high – 25 in the case of the Chilean civil code of 1857, furnishing the father a veto on this question that was almost impossible to circumvent.

II. New grounds for a new (old) prohibition: protection from abuse and, still, normalization.

Providing a unified explanation for the reforms in the criminal regulation of sexual relations with minors introduced in Latin American and the USA over the past century and a half is impossible, but a few common threads that, starting with amendments implemented in the last three decades of the 20th century, drastically modify the landscape of existing rules and the justification that accompany them can be identified.

- 1) The age limit protecting against precocious or abusive sexual relations is raised (or reduced) until it coincides – in most cases – with the age of legal majority, which in turn, in most countries, has been lowered to 18 years of age; in several countries another age is fixed for minor sexual consent (14 in Chile), below which harm (derived from the abusive character of the relation) is legally presumed.
- 2) More and more frequently the law establishes that there must be a minimum difference between the ages of the victim and perpetrator (the age span), which fluctuates between 2 and 6 years, for criminal proceedings to be brought.

- 3) Gender stereotypes (male perpetrator, female victim) have tended to vanish from the law, such that women that have sex with underage men are guilty of an offense if the age difference specified by law is met.³

These reforms were carried out against the backdrop of an essential modification in the “cultural map of sexuality” in the societies that implemented them, starting with a model of reproductive sexuality associated with traditional concepts of marriage and family of patriarchal bent, towards one of non reproductive sexuality, centered on happiness and desire (Frayser, 262, 266). This explains how, following the trend, worry focuses on the possibility that the minor – male or female – may be the object of abusive relations, whether this be presumed by difference in age or require proof of abuse, instead of on the danger that the women (only the woman) might lose her virginity before marrying or that adolescents exercise their sexuality without their parents’ permission.

In fact, in the text of one of the most representative normative instruments of certain international consensus on the topic, the International Convention on the Rights of the Child (CNA) of 1989, the prohibition of sexual relations with minors is subject to the condition that the relations be “unlawful,”⁴ in the sense that – as explained by the representatives of France and Holland who proposed it – the introduced protection of what would become Article 34 of the CRC did not represent an attempt to regulate the sexual life of children but rather to combat their sexual exploitation (Hodgkin/Newell, 523).

³ While the laws in some countries (like Chile) distinguish between sexual relations with children under 12 to 14 years of age and sexual relations with older minors, laws in other countries (like the USA) do not make the distinction nor take into account the existence or lack of abuse or manipulation.

⁴ Despite the motion made by some delegates to have that adjective removed.

This general trend notwithstanding, acts of legislation considered separately are often at variance with this new basis for regulation, attempting to gain more normative control, or least permitting it, over childhood sexuality:

- Many of the acts dispense with the age difference requirement (Cocca, 23-24 identifies 8 states in the USA where this is so as of 2000) or set a requirement that is too narrow (two years); while others, having set the age of sexual consent relatively high (at 16 to 18 years of age), dispense with the requirement that the offender abuses their authority or the dependency of the victim, presuming abuse on the sole basis of age difference. This often leads to cases where what is punished is not abuse, but rather disobedience to parents, especially where pregnancy resulted:

Seventeen-year-old Delia was two months pregnant when she went to her doctor for a checkup. The doctor, knowing that Delia's fiancé was 22, called the police. Her fiancé's public defender noted, 'The couple is happy together. He is working and supporting the child and they intend to be married and live with the girl's parents. What purpose does this serve?' The two were married by the time they went to court, where he was sentenced to time served. Delia was frustrated and scared, 'Loving somebody is not a crime' (Cocca, 1).⁵

In fact, the reprimand for disobedience does not only affect the person formally occupying the position of offender, but also the person who appears before the law as the victim, when it is

⁵ This footnote recounts a recent case in Chile where a happy adolescent couple was prosecuted. En el caso de Chile, hace tan sólo unas semanas (en abril de 2009), una asistente de un proyecto de investigación que dirijo, sobre la justicia penal de adolescentes chilena, me reportó sus observaciones de una audiencia en la que una adolescente embarazada de 14 años (que tenía 13 años al momento de la concepción) asistió junto a su pareja de 17 años al acto en el cual el tribunal decidiría sobre la eventual suspensión condicional del procedimiento penal seguido en contra del segundo, por violación impropia de su joven pareja. En ese acto también compareció la madre de la embarazada, quien era en realidad la principal interesada en ejercer el rol de víctima, al punto que la negociación de la suspensión y sus condiciones fue en todo momento con ella, sin que a la joven embarazada se le dirigiese la palabra en ningún momento. De hecho, sentada junto al imputado, su rol era más bien el de la pareja del infractor. La suspensión fue finalmente decretada, con condiciones que son sintomáticas de la verdadera naturaleza del conflicto y de lo bizarro que resultaba la criminalización del asunto: el adolescente debía terminar sus estudios y contribuir a la mantención de su futuro hijo. Tras el acuerdo, la pareja se retiró de la sala de audiencias tomada de la mano, ¡acompañada de la madre de la adolescente! Si se hubiese propuesto y aprobado, además, una condición de asistir a terapia de pareja y mantenerse junto a la madre de su futuro hijo, la audiencia no habría sido menos bizarra.

generated by a normative measure operating through the system for protecting children.⁶ The most extreme case, which was not uncommon until recent years in Chile, is that of interning in protective residences – for correctional ends – female adolescents who display precocious sexual behavior, which is interpreted as a “behavioral imbalance” that proves they are “outside parental control.”

- Several acts of legislation anchored in the cultural assumption of “sexual innocence” for children and adolescents (Frayser, 261), especially ones protecting children, start with the premise that the sexual contact of children is harmful in and of itself, independently of the context and ages of those (who are generally also children and adolescents) who perform the contact. On the basis of this assumption and supported by (pseudo) expert discourse holding any sexual behavioral by children that contrasts with ideal of “sexual innocence” to be pathological, these expressions of sexuality are criminalized and actions to control and reprimand their young authors are promoted (generally through the system of childhood protection):

In November 1993, the Child Protective Services of San Diego County declared Tony Diamond [9 years old] a serious danger to his sister. Jessica [8 years old]⁷ had been heard saying at school that her brother had “touched her in front and in back.” Following the obligation to report any suspicion of abuse of this nature by the Child Abuse Prevention and Treatment Act of 1974, even when committed by a minor, the school phoned the Child Abuse Hotline. The social worker that carried out the family interview assembled an entire dossier of Tony’s prior misbehavior: At the elementary school he

⁶ See Couso, p. 145, 150, on the normative and disciplinary function of the child protection system.

⁷ The bracketed information comes from the author.

used sexual language and looked under girls' skirts. When he was 4 he climbed on top of Jessie while she took baths.

Based solely on Jessica's testimony, the juvenile court accused Tony of "sexual abusing" Jessie "a minor," "which includes, but is not restricted to, touching her vaginal and anal areas [. . .] poking her buttocks with a pencil, and threatening to hurt her if she told anyone . . . the interview categorically evaluated the situation this way: "Examination of the case leads one to believe that Tony is a sexual delinquent waiting to happen" (Levine, 90 – 91).

- The legislation removing the distinction between males and females as potential victims of sexual abuse (or of improper relations or statutory rape) and assigning them the same minimum age for sexual consent often includes an exception that stands at odds with the new grounds for criminalization (preventing abuse): homosexual relations, for which punitive prohibitions extend to older ages.⁸

III. Legal norms, social normativity, and psychological normativity: how to apply the harm principle in the case of child and adolescent sexuality?

Discontinuities between legal norms and social reality

"SANTIAGO, Chile — It is just after 5 p.m. in what was once one of Latin America's most sexually conservative countries, and the youth of Chile are bumping and grinding to a reggaetón beat. At the Bar Urbano disco, boys and girls ages 14 to 18 are stripping off their shirts, revealing bras, tattoos and nipple rings.

The place is a tangle of lips and tongues and hands, all groping and exploring. About 800 teenagers sway and bounce to lyrics imploring them to "Poncea! Poncea!": make out with as many people as they can.

And make out they do — with stranger after stranger, vying for the honor of being known as the "ponceo," the one who pairs up the most.

Chile, long considered to have among the most traditional social mores in South America, is crashing headlong into that reputation with its precocious teenagers. Chile's youths are living in a

⁸ Which the UN Committee for the Rights of the Child denounced in a report on the Isle of Man as a violation of Art. 2 of the CRC which prohibits arbitrary discrimination of children (Hodgkin/Newell, 524). Chilean law also discriminates in this way.

period of sexual exploration that, academics and government officials say, is like nothing the country has witnessed before.”⁹

According to Chilean law any sexual rapprochement (such as “ponceo”) between a 16-year old adolescent and a 13-year old boy or girl is a criminal offense. The necessary age difference for abuse to be presumed is, in this case, 3 years. Were it a matter of sexual relations with penetration, the maximum age difference would be 2 years. In both situations, the ban does not apply to sexual relations with children over 14 unless it is a case of statutory rape or remunerated sex.

The statistics concerning the sexual behavior of Chilean children and adolescents, for their part, evidence a steep decline, from 1990 to 2007, in the age of sexual initiation (sexual relations with penetration), and a significant prevalence of its occurrence before the age of 14:

Age	11-13	14-15	16-17	18-23
Males	7%	25%	39%	28%
Females	2%	18%	34%	46% (18-25)

Source: Flacso-Chile¹⁰

The average ages of the partners with whom girls first had sex found its highest concentration in the segment between 17 and 20 years of age, which suggests a high incidence of couples with 4 or 5 years difference in age. In the case of the first sexual experience of boys, their partners tend to be in the 15 – 18 age group.¹¹

⁹ “In tangle of young lips, a Sex Rebellion in Chile”, The New York Times, 12 September 2008.

¹⁰ Salud Sexual y Reproductiva en Chile – 2007. Actualización de Datos Estadísticos, 2008, en http://issuu.com/flacso.chile/docs/ssr_chile_2007/21, citando datos del Instituto Nacional de la Juventud, “V Encuesta Nacional de Juventud 2007” (también disponible en <http://www.injuv.gob.cl/pdf/Vencuestaprensanoviembre.pdf>).

¹¹ Ibid

Epidemic or cultural revolution?

To be sure, no normative conclusions of whether punitive prohibitions should be relaxed, maintained, or strengthened can be directly deduced from these changes in the sexual behavior of Chilean children and adolescents – or those of any other country where sexual precocity has increased. Law could consider this an epidemic of a dire evil ensnaring our children, or a cultural transformation requiring us to modify our previous assumption regarding their sexual innocence. It depends on an ascertainment of whether or not these relations are or not harmful for them, something which is not directly deducible from the frequency with which they occur.

The harm principle and child and adolescent sexuality

In accordance with a liberal conception of Law and State, such that John Stuart Mill advanced, what does no harm to others cannot be prohibited. In criminal matters, this requirement is commonly expressed in the continental legal systems as the “harm principle” or the “exclusive protection of legal goods,” which was specifically invoked (in some cases, successfully) to remove punitive prohibitions on sexual behaviors that do not harm others, however much they shock the cultural sensibility of the majority (Roxin, par. 2, nms 1-3). Nino (p. 269), writing from a perspective reflecting the Anglo-Saxon tradition, considers that the requirement should be generalized in a liberal criminal system, such that only behaviors that cause harm would be punished, and furthermore that punishment meted by law be aimed at preventing precisely that harm caused by the behavior.

The transformation of the cultural map of sexuality in the West from a reproductive and patriarchal model – that considers sexual relations with minors as immoral and an affront to the honor and prerogative of the family head – to a non-reproductive one centered on the realization

of sexual desire and the search for personal happiness, establishes a basis for redefining the legal regulation of sexuality in general, and also that of minors, (exclusively) in terms of the harm principle: sexuality is conceived as an area of personal realization that should not be subject to control by others unless it results in harm, to others or themselves – in the case of those who do not yet possess enough autonomy, as regards those for whom legal paternalism is justified (Garzón Valdés). Although liberal philosophy (particularly that of Mill) considers in a more or less undifferentiated way children and minors as belonging to the category of people who must be protected against actions that may cause harm to themselves, the conception of the rights of the child specially developed from the ratification of the CRC only recognizes to limited extent the justification for paternal actions regarding behaviors of children and minors that are only harmful to themselves (Freeman, 1997, defending the thesis of a *liberal paternalism* which not only protects future autonomy, but also the current autonomy of children). Before analyzing the degree to which children and minors are capable of carrying out actions considered by others to be harmful to themselves under a cultural model of sexuality centered on personal realization, it is first necessary to ask whether perhaps, and if so under what conditions, the expressions of sexuality by children and minors might not cause them harm.

In response to this question, jurists generally look to the behavioral sciences for help, so far without finding very conclusive or satisfactory answers; it turns out that the “scientific” conclusions in this field vary widely, probably due to the fact that sexuality is a cultural battlefield where so many ideological and religious approaches conflict that the “science” because permeated with them.

Nevertheless, psychological and anthropological research does offer some patterns that help identify potential harms associated with early sexual relations. Yet, as will be seen, this

information does not afford a direct response regarding the proper beginning for prohibition (not every harm merits prohibition), but instead only indicates the proper end (anything that does no harm must not be prohibited).

On the question of what harm can stem from child sexuality

As has been pointed out more than once in these pages, the existence of sexual relations between children in early life, especially between brothers and sisters, is a very common occurrence. The libidinal craving of small children, intensified as it is by their Oedipus frustrations, together with the anxiety emanating from their deepest danger-situations, impel them to indulge in mutual sexual activities, since these, as I have more particularly tried to show in the present chapter, not only gratify their libido but enable them to obtain many refutations of their various fears in connection with the sexual act. I have repeatedly found that if such sexual objects have acted in addition as ‘helping’ figures, early sexual relations of this kind exert a favourable influence upon the girl's relations to her objects and upon her later sexual development. . . . Nevertheless, although, as we see, experiences of this kind can have a favourable effect upon the girl's sexual life and object-relationships, they can also lead to grave disorders in that field. If her sexual relations with another child serve to confirm her deepest fears—either because her partner is too sadistic or because performing the sexual act arouses yet more anxiety and guilt in her on account of her own excessive sadism—her belief in the harmfulness of her introjected objects and her own id will become still stronger, her super-ego will grow more severe than ever, and, as a result, her neurosis and all the defects of her sexual and characterological development will gain ground. (Klein, 1932, pp 233-34)

We owe to psychoanalysis, it seems, the discovery of childhood sexuality and its transcendental importance in the development of a mature personality capable of forming satisfactory mutual interpersonal relationships. Yet as can be deduced from these early observations by Melanie Klein, children's sexual impulses can express love or hate, and have “helping” or sadist and destructive effects on other children.

Anna Freud holds that the task of parents regarding the sexuality of their children is a complex one. On one hand – she writes in 1949 – the expression by children of sexual urges through games and experimenting should be recognized and permitted as a normal part of their children's healthy development (and not as “bad habits”), at least when they are small (Freud,

29-30). On the other hand, they cannot “put themselves on the same instinctive level of the children by proffering the satisfactions they desire,” meaning “to seduce the child while allowing free license for aggression,” but rather parents must openly confront the necessity to frustrate instincts as a condition for civilized coexistence, not with prohibitions or punishment but instead by teaching children to “displace their energy from one object to another” (sublimation) (Freud, 42-43).¹² The successful acquisition of the ability to displace instinct – defined in terms that are as normative as the necessary passing through the oral, anal, and genital phases for the young child’s development – would lead to, in children whose development is “normal” – now according to Sigmund Freud himself – to the “latency” period of sexual development. In contrast, when the sexual expression of children above the age of 3 or 4 years does not respond to this ideal model of sexual development, they tend to be observed with preoccupation. The very concept of “sexually aggressive children and youth” (SACY) that is currently applied in Child Protective Services in the USA to individuals who – without having assaulted anyone – display sexual behavior that does not fit in with standard behavior patterns considered adequate for their age and that is employed by the system for preventing, detecting, reporting, and treating high risk behaviors in various child protective agencies, captures in some measure that preoccupation in the authorities’ stigmatizing and criminalizing reaction¹³ (Thigpen et al, 241).

¹² Freud on how children learn to replace the objects they desire with others. “El niño puede resistir por un tiempo este proceso de transformación instintiva y aferrarse a sus deseos originarios. Mas si se lo maneja correctamente, aceptará las satisfacciones substitutas que se le entregan. Se contentará con gozar de los placeres permitidos en lugar de los prohibidos. La curiosidad sexual se transformará en el deseo de aprender; la manipulación de las heces prestará sus energías a la pintura creadora... El amor objetal puede perder su carácter exclusivo y, bajo la forma del afecto, extenderse a otros miembros de la familia, etcétera... es cosa afortunada que ningún otro instinto se preste a la transformación con la misma facilidad que el instinto sexual” (Freud:43-44).

¹³ In any case, this is clearly far from the ideal represented by sensible adults who accompany the child without prohibitions and punishments as they learn the process of sublimation rather than criminalizing expressions of child who during their supposed “latency period” are “stuck” in an earlier phase.

We see then that in the first formulations of psychoanalysis, the sexual expressions of children in their earliest childhood were interpreted as an essential dimension of the formation of a mature personality. In these same expressions, however, psychoanalytic theory also identifies potentially serious dangers, especially when they do not correspond to the expected behavioral patterns defined for each phase, or if they are maintained into the latency period. Pathology and harm lie in wait outside the confines of normality.

Normality and normativity

An examination of expert discourse on sexual normality and the harms caused by “abnormal” sexual behavior reveals a serious lack of knowledge (Di Mauro, 443) and shared theoretical framework for interpreting the fragmented data collected through scientific research (Bancroft, 449-50). In light of this, the categorical affirmations regarding the abnormal, pathological, and harmful character of certain behaviors is proof of a good measure of certain ideological orientation, or more specifically the influence of the dominant cultural models of sexuality rather than scientific knowledge. So it is, for example, that the supposed abnormality of sexual behaviors during the latency period, associated with a conception of the “sexual innocence of children” that is still determinant in assessments made by the middle class in the USA, is qualified as an ideology in a (relatively) recent reappraisal of the state of the art of the scientific debate of the issue: “[we] remain wedded to an ideology of sexual innocence” (Herdt, 275). And although elaborating and applying inventories of sexual behaviors considered normal and abnormal to each age is a common diagnostic practice (sometimes used to diagnose for symptoms of evidence of abuse) (Thanasiu, 309), maintaining that the behaviors contained in these lists (such as “touching someone else’s private parts,” even in contexts where no one is uncomfortable with it) comprise inappropriate behavior that harm the health or the healthy

development of the child is not supported by any empirical evidence, but rather, as admits the director of an extensive study carried out using these lists in Oklahoma, is based on purely moral values (Levine, 103, 113).

Once the ideological character of the conception regarding the “sexual innocence of children” (which implicitly establishes a norm) is identified, researches find themselves before the necessity of, for the sake of scientific knowledge, “looking at childhood without any standards . . . [because] we have somehow lost sight of the ranges of normalcy” (Di Mauro, 444). For these reasons it is not surprising that expert discourse has turned back to an investigation of what those ranges are:

“an important starting point is the range of behavioral parameters of different populations of children by age, ethnicity, and culture – an outlining of the variability of sexual behavior, of the benchmarks of sexual and gender development over the life course, and the process of sexual socialization” (Di Mauro:444).

The importance of this assertion cannot be underestimated: although it is true that the “normativity” or statistical normality of a behavior in and of itself does not directly say anything about whether we should prohibit it or not, since the prohibition depends on whether or not the behavior causes harm (in this case, to the children who display it), when dealing with a sexual behavior, the people who might be able to tell us something about its “abnormal,” pathological, and harmful character turn back, for want of sufficient parameters, to the reexamination of what the normative constructs of the issue are, to observe what children really do with their sexuality.

Part of this research has already been undertaken in the past, so it is not starting from zero. From this early research emerges data relevant to the “normativity” of sexuality during the “latency period.”

...tendencies towards sexual behavior before maturity and even before puberty are genetically determined in many primates, including human beings. The degree to which

such tendencies find overt expression is in part a function of the rules of the society in which the individual grows up, but some expressions are very likely to occur under any circumstances” (Ford and Beach, 1951, cited by Frayser:259).

Thus, when a comparative study carried out in 1982 analyzed the attitudes of children in various Western countries (USA, England, Australia, and Sweden) as regards sexuality, although “each of these societies differs in the permission they give children to think about sex, with the United States being the most restrictive and Sweden the least,” from the point of view of the children’s attitudes in all of the countries, it becomes clear that “there is no latency period about sex, as Freud hypothesized” (Frayser, 260). In fact, more recent research reveals that “a wide range of sexual activities occur in childhood” and that “cultural prescriptions may be at odds with the children’s interest in sexual activity” (Frayser, 260). Notwithstanding, another study that uncovers “considerable differences” in the amount of sexual behavior displayed by children between 2 and 6 years of age in the USA and Holland (parents in the latter reported a much higher frequency) hypothesizes that the differences could be explained by cultural differences in the sexual socialization of children by parents, without ignoring that “sexual behavior in children is normal, expected, and includes a wide range of behaviors” (Friedrich et al, 117-18), while another study confirms this impression in its reporting of different levels of sexual autonomy acquired by children (with parental permission) in the USA, Denmark, and Holland (Frayser, 281). Once again, however, despite these differences, the supposition of a latency period lasting to puberty is refuted in the research of Herdt and McClintock:

“[we] try to establish the importance of the development of sexual attraction by age 10 in males and females, heterosexual and homosexual, using the best data that exists from studies in the United States,”

emphasizing that,

“...When I present these findings around the country... although college students and teens are fascinated by the idea that their sexuality reaches a memorable phase by age 9½ or 10, their parents are perplexed, and even academic, middle-class parents can become

anxious and troubled by the idea that children living with them at home right now are sexual beings” (Herdt, 274).

In turn, regarding the attitudes of parents towards the sexual behaviors of their children, an intercultural perspective reveals various “normativities,” some of which break taboos held by the majority:

“Societies may impose mild restrictions on heterosexual play, masturbation, and other erotic activities during early childhood and apply stronger restrictions in the later childhood... However, there is a wide variation in parents’ and adults’ attitudes toward children’s expressing sexual interest or engaging in sexual behavior. Parents may encourage children’s sexual activities, and games with other children may include sexual interaction. Homosexual as well as heterosexual behavior in childhood is accepted as a normal part of childhood in many societies (Herdt, 1990). Children may have opportunities to observe adults engaging in sexual relations, and they may talk with adults about sex. Sometimes children may engage in sexual relations with adults, more often in ritual contexts (Feierman, 1990). However, most societies disapprove of child-adult sexual relations involving prepubescent children” (Frayser, 260).

On this point, however, it is worth insisting that there is no necessary relationship between normative behaviors and psychological determinations of “normality,” especially in a diverse and conflicted cultural context such as exists more and more in societies subject to globalizing influences. Because of this, despite the fact that the lack of parameters for “normality” makes it necessary to begin by examining “normativity,” it is still possible that what is considered “normative” is really “abnormal,” and harmful. Herdt thus warns that there is a risk in assuming that childhood sexual behavior is innocuous on the basis of its cultural normativity, noting that it:

“...accepts too globally the notion that culture equals adaptation, or if something is cultural it will promote child development. Culture in such a relativist epistemology is too large and vague, too far removed from the shame, silence, stigma, and oppression of real people in real-life communities” (Herdt:277)

Because of this, although the scientific task starts with investigating the operative normativities for childhood (and adolescent) sexuality, the next step is defining what sexual behavior should be considered abusive for expressing manipulation or coercion (Di Mauro, 444), even when it is a question of “normative” expression. It is not necessary to start from zero to do this either, and

special attention must be paid to instances of structural violence in which sexually abusive behaviors are manifest (even when they are normative), such as racism, poverty, and homophobia, in which an important prevalence of sexual prostitution, sexual tourism, and sexual migration can be found (Herdt, 277).

Child sexuality, taboo and harm

On the path towards identifying abusive expressions of child sexuality, starting with instances of structural violence, it is possible and necessary to exclude as non abusive normative sexual behaviors and parental attitudes toward them (tolerance, support, celebration, play), where there is no expression of manipulation or coercion. With this in mind, it is important to remember that sexual abuse is not determined by an isolated action, but rather in large measure depending on its context (one can take the example of the father of a newborn boy who, in a tribal ceremony, prays to the gods for the fertility of his first born while kissing, before those assembled, the genitals of his son; as well as other less exotic examples in which the context removes any suspicion of abuse).

Now, still keeping in mind the context, in a society with coexisting cultures – that sometimes compete and fight with one another – it is perfectly possible that specific manifestations of child sexuality and particular parental attitudes towards them, that in some groups reach a level of normativity, protrude into thresholds of what is considered taboo in other cultures, and often the dominant one. And within the space where taboos apply the question of harm can hardly be formulated. The manner by which liberal Law must confront this problem implicates having a broader discussion of multiculturalism and, more generally still, of ideological pluralism. The harm principle can still be useful in these discussions, as Mill

demonstrates in his analysis of how certain behaviors so scandalous to the religious sensibilities of certain groups (such as eating the meat of an “impure” animal) as to be erected into taboos by them are nonetheless, outside these belief systems, not demonstrably harmful.

In the area of child sexuality as well, the harm principle should be the stick used to measure which cultural norms – inspired by a determinant taboo – should be given the status of legal prohibition. Before a right is given preeminence over conflicting taboos in a pluralistic society, the area of the taboos must be entered and examined to see where the harm lies.

Taboos that are commonly shared, however, will, I believe, continue to be impervious to law. An obvious example, it seems to me, is that of incestuous relations between a parent and their child (whom for the purposes of this analysis we take to be a minor) with the assumption that the clear purpose of the relations is the sexual satisfaction of (at least) one of the parents and not, on the other hand, other types of contact which might have the appearance of sexual (and may even be agreeable to the child), but whose context gives them a distinct purpose from the parents’ perspective (play, education, ceremony). Another commonly shared taboo in most Western societies, I believe, is that of sexual relations between prepubescent children and adults, and again I am thinking of those in which (at least) the adult engages in with the idea of satisfying their own sexual desire.

The sources of the taboo, in both cases, are difficult to analyze (especially from the internal point of view that we all share as members of the culture that maintain the taboo), but they are rationalized by appeals to the categories of abuse, manipulation, and instrumentalization that come forward when an adult is pictured using a child as an object for their own satisfaction by means of an experience that for the child can only result confusion, shame, stigmatization,

and pain, all of which appears to be truly the case, even if these are due in good (most?) part to the iatrogenic effects (Di Mauro, 445) of the reactions provoked by the violation of a taboo. In any case, legislation incorporates the taboo by means of the qualification of “incapacity to consent” to sexual relations (which practically no “Western” legal system sets at under 12 years), which actually does not reflect the true nature of the problem, that is, the harmful character of the behavior – which is precisely what taboos allow us to ignore – but it does not pose many difficulties either,¹⁴ except when an effort is made – as is it not infrequently is – to extend the taboo to sex between children and other minors (and not with adults), independently of the issue of whether there is harm; this certainly goes beyond the bounds of cultural consensus, that is, beyond the true limits of the taboo.

Precocious sexuality of adolescents and harm

As regards the sexuality of adolescents (having reached puberty), I believe we clearly exit the domain of socially shared taboos, even if, according to a relatively (although conflicted) dominant ideology that supposes the sexual innocence of adolescents, in many acts of legislation sex between adults and adolescents is prohibited and subject to punishment without any consideration of whether there was harm involved. Of course, it cannot be denied *a priori* that these relations can harm the adolescent. In fact, the literature contains many examples of the risks entailed by precocious adolescent sex, especially (but not only) when it occurs with adults.

¹⁴ This way of posing the problema is too simplistic. Esa manera de plantear el problema expresa una visión muy simplificada sobre la formación de la voluntad y la expresión de los deseos y preferencias de los niños, así como del valor que el ordenamiento jurídico debe darles en ciertos casos. Ello podría ser funcional a una protección indebida, en otras materias, si se niega categóricamente la capacidad de los niños para expresar válidamente deseos y preferencias, por ejemplo, de mantener contacto con ciertos familiares que no tienen su custodia, o de seguir siendo educado en un colegio con determinada orientación religiosa –si su padre o madre custodio, que ha modificado sus propias convicciones, quiere imponérselas a su hijo-, o de relacionarse con otros niños.

As will be seen, taken together, the harms involved are very diverse in nature, many of which are not directly caused by the actual sexual relations.

Possible harms of precocious sexual relations between adolescents and adults

One source of harm stems from the experience of manipulation and coercion in situations where sexual relations were not explicitly forced, but did occur in a coercive context.

The potential for coercion in adolescent sexuality particularly lies in certain contexts, such as those involving dependence, whether in the family or of another type (educational or religious instruction), or involving commercial sexual exploitation (such as prostitution). Moreover, some of these contexts comprise zones of “institutional violence,” where the normativity is not tied to child development, but rather to harm done to development.

Besides these contexts, it has also been asked whether, on a broader level, early sexual experiences (ESE), for example around 12 years of age, could imply of themselves a correlation to abusive and coercive situations; but in this case, given that for many children these experiences have not had a negative impact, the abuse and coercion cannot be evaluated in terms of a specific incident (the ESE), but rather must be inferred from the sexual trajectories of the adolescent following the experience (Laumann et al, 322-323).

The research on the impact of precocious sexual relations between adolescents and adults has also revealed certain statistical correlations indicating a higher probability – in the case of an adolescent girl and adult male – of attempted suicide, drug and alcohol use, and risky sexual behavior (without using a condom) that can result in HIV infection or adolescent pregnancy, even though it is impossible to draw clear conclusions on the causes of the correlations, as it is perfectly possible that other factors lead these youth to display these risky behavior (without

precocious sex serving as a gateway to the others) (Hines/Finkelhor, 306-07). Regarding relations between an adolescent boy and adult female, the statistical correlation between precocious sex and psychological problems, alcohol use, and deliberate self-destructive behavior is slightly higher (compared to boys who have not had these relations), although once again it is difficult to discern the causal relevance of the correlation; furthermore, the majority of adolescents think of the experience in positive terms, whereas a third esteem them neutrally and a minority (5%) think of them negatively (Hines/Finkelhor, 308). There is practically no information available on the possible negative impact of precocious homosexual relations during adolescence.

Possible harms resulting from precocious sexual relations between adolescents

Although no information was found on the possible dangers of precocious sexual relations between adolescents, some of the risks just mentioned regarding precocious relations between adolescents and adults can be applied using common sense, such as the higher risk of HIV infection or teen pregnancy.

In Chile, for example, of all adolescents between 15 and 19 that have had sexual relations, only 54.8% used a condom the first time and only 8.2% have been tested for AIDS.¹⁵

On the possible harms of protecting children from sex

In her resounding study entitled, “Harmful to Minors: The Perils of Protecting Children from Sex” (2002), Judith Levine clearly demonstrates how children can suffer from sexual regulation because of unjustified prohibitions. A policy inspired by the anxiety and moral panic of adults with regards the possibility (considered to be imminent and ubiquitous) that children

¹⁵ Flasco-Chile, citando datos de la V Encuesta “V Encuesta Nacional de Juventud” 2007, del Instituto Nacional de la Juventud (en <http://www.injuv.gob.cl/pdf/Vencuestaprensanoviembre.pdf>).

may be victims of sexual abuse or sexually aggressive behavior, which occurs in almost any manifestation of sexual interest anyways, even between children of the same age, can lead to serious risks for their sexual development, education, and maturity, which are already becoming evident in the USA. The legal and social norms that arise from this state of panic and anxiety stigmatize (or criminalize) children and adolescents who do not follow the norm or meet their parents expectations, prevent children from learning to speak openly and confidently of their desires and genuine fears, socialize them within a perspective that predominantly considers sex negatively with little regard for pleasure, satisfaction, or sexual gratification, and introduce a logic of suspicion into the intimacy of family relationships, hindering the necessary physical contact that children also depend on for assurance of their parents' affection, among other dangers (Levine).

Synthesis

To synthesize, examining the expressions of child and adolescent sexuality from the perspective of the harm principle leads us to identify some behaviors that are considered harmful because: 1) they involve deeply entrenched and widespread taboos we associate with the idea of exploiting children as objects; 2) even without explicitly open coercion, they do involve manipulation and abuse stemming from the coercive contexts they take place in (prostitution, abusing a position of dependence or authority).

Together with these we find a broad range of “normative” sexual behaviors of children and adolescents – without forgetting that the “normativity” is not universal, but instead varies depending on cultural context – of which, although subjected to various degrees of control or restriction based on cultural patterns imposed by families or institutions, we have no real proof

that they do harm: i) most sexual expressions by children, including their contact with other children or even their sexual expressions towards adults that appear devoid of the notion of adult sexual satisfaction; ii) most sexual relations between adolescents; iii) a considerable amount of sexual relations between adolescents and adults that occur outside contexts marked by coercion and do not involve extremely young children (around 12 years of age).

Lastly, some fully consensual behaviors (that take place in contexts without any coercive nature) are associated with negative indirect consequences (promiscuous sexual behavior – associated with HIV infection and teen pregnancy, psychological problems, self-destructive tendencies), whose causal connection with the sexual behaviors is at best obscure; and, b) to a lesser degree, very early sexual experiences (ESEs).

To be certain, the fact that a type of sexual behavior be statistically correlated with particular harms or indirectly capable of producing them still does not provide sufficient grounds for prohibiting them. Nino (339 – 340) clearly demonstrates that a liberal system of criminal liability must respect the principle that only an act that directly causes the harm that the law is meant to prevent can be prohibited or punished as an infraction. This principle is not respected when sexual relations, in themselves not harmful, are subject to punishments in order to prevent indirect effects that may occur because of them, such as teen pregnancy or HIV infection.

Furthermore, weighing against the real or supposed harm to children represented by sexual contact and relations with other children and adults, there are reasons to suspect – as was mentioned – that the punitive prohibition of these contexts can in some contexts cause significant hurt for children.

IV. The age of sexual consent, child rights, harm, and regulating child and adolescent sexuality

Generalized incapacity to consent to sexual contact and relations?

In many cases, legislation addresses the question by declaring adolescents (and not only children under twelve) incapable of sexual consent without explicitly requiring there to be harm or considering the degree to which these relations cause harm.

In this section I am interested in briefly examining the degree to which this opinion of the capacities of children is compatible with the conception of children as rights bearers, capable of progressively exercising them independently proportionately with the evolution of their faculties.

The issue of capacity for sexual consent has been considered rather cryptically and inconsistently within the confines of the relevant competent international institutions. I have already mentioned how France and Holland, when proposing to include in the CRC a regulation to protect against sexual abuse and exploitation, maintained they were not seeking to control the sexual lives of children, but rather to ban and combat their sexual exploitation. In fact, the CRC does not set any “age of sexual consent.” And even if the UN Committee on the Rights of the Child does not recommend setting a particular age, it does consider that one should be set, and it has expressed concern when the age set is very low, criticizing Indonesia for setting it at 12 and expressing preoccupation at Iceland’s limit at 14 years of age, even though it is clear that Article 34 of the CRC protecting against sexual exploitation of minors applies to anyone under 18, regardless of whether there exists a lower “age of sexual consent” (Hodgkin/Newell, 523).

Incapacity and child rights

These considerations by the Committee on the Rights of the Child, which appear to express the hope that the signatory members of the CRC set the age of sexual consent somewhere around 16 years, are not congruent with the statement denying any ambition to regulate child sexuality, since the establishment of an age of sexual consent, especially when it is not accompanied by the establishment of a minimum age span prerequisite to criminal prosecution of sexual relations, is equivalent to establishing a prohibition against the exercise of sexuality.¹⁶

Furthermore, setting an age for sexual consent when it goes hand in hand with “incapacity to consent” runs counter to the trend recognizing the competency of children, especially starting in adolescence (12 – 14 years old), to make good decisions in matters related to their right to privacy. Thus, for example, decisions that are well consolidated in English (*Gillik v. West Norfolk and Wisbech Area Health Authority and Another*, House of Lords, 17 Oct. 1985) and United States jurisprudence (*Planned Parenthood v. Danforth*, 42 US 52; *Belotti v. Baird*, 443 US 622, 1979) grant autonomy to adolescents who have entered puberty and are sufficiently mature to decide for themselves whether to have an abortion or use contraception. For the Supreme Court of the USA, it is an expression of the right to privacy that also applies to children and adolescents. Keeping this in mind, the supposition of a general incapacity of boys and girls under 14 or 16 years of age to consent to any sexual contact or relations whatsoever appears to deny their rights to privacy that are upheld in these decisions.

¹⁶ If it is accompanied by a considerable age span (4 to 6 years), it is technically inexact to speak of an age of sexual “consent” since it is more accurately only a restriction on the capacity of children or adolescents to consent.

In addition, maintaining that children are temporarily incapable – until they reach a certain age or maturity – of exercising a particular faculty that is included among the basic rights can only be justified as an exception to the general rule holding that everyone, even children, are capable of exercising fundamental rights (Aláez Corral, 125) and enjoy constitutional freedoms, as the Supreme Court of the USA itself recognizes: “whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone” (in re Gault, 387 US 1, 13 (1967)); “constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights” (Planned Parenthood of Central Missouri v. Danforth, 428 US 52, 74 (1976)).

It is true that the degree of autonomy that should be granted children is minor during the first years of infancy and only at a much later age and maturity – in proportion to the “evolution of their faculties,” according to Art 5 of the CRC – does it begin to increase, to the point of reaching a level of full autonomy in many matters during adolescence. This explains why a child’s basic rights are not always exercised directly by the bearer but instead by someone who represents them in their name, and why on other occasions, even when exercised directly by a bearer who is a minor, they are subject to restrictions placed by their parents or guardians in order to protect that minor’s other interests. According to Aláez Corral (125-126), in German and Spanish constitutional jurisprudence this depends on, among other reasons, the competence the minor has attained in exercising the faculty and the size of the space that the legislator has granted to the parents to interfere with the minor’s autonomy in that respect (“hetero-protection”). Similarly, the Supreme Court of the USA holds that:

“ . . . the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them” (Belotti v. Baird, 443 US 622).

When faculties of a basic right are involved that consist in themselves of a natural act (and not a legal act), such as that of expressing oneself (which is necessary for the exercise of the right to freedom of expression), the capacity to exercise it is attained when the individual possesses the necessary biological and cognitive competence and does not depend on any legal rules. When it comes to deciding whether the minor is mature enough to exercise it without affecting their other interests, however, in order to decide if limiting a minor’s freedom is called for (based on the interests of “hetero-protection”), there is a guiding criterion, developed by Aláez Corral, that is associated with the sphere of life in question:

“If the sphere is of character personal and, in particular for what is of interest here, related to the minor’s exercise of rights and freedoms, hetero-protection must be rigorously weighed against self-protection while keeping in mind the principle that the minor’s volitional autonomy gradually increases. On the other hand, if the sphere of life is of patrimonial nature, or even if it is personal but unrelated to the exercise of the minor’s basic rights and freedoms, the criterion that the legislator uses to direct the realization of the interest is distinct and thus has different normative effects. Consider, for example, that while in the personal sphere of basic rights the gradual volitional autonomy of the minor causes their interest to center on the future as much as the present, with special emphasis on the latter; in the patrimonial sphere, it may happen that the legislator allows prejudice to the minor’s interest fundamentally to assure the bases for their future position. Likewise, while in the personal sphere of rights, maturity cannot be exclusively judged by the rationality of the decisions, in the patrimonial sphere this rationality becomes the determinant criterion for the decision-making by the legal guardian for the benefit of the minor” (Aláez Corral, 159-160).

This explains why the rule regarding civil incapacity to transfer real estate, which is governed by a strict commercial rationality for this type of operations and based on a concern for the future economic position of the minor who is the owner, does not imply an equivalent incapacity to join

associations, or to decide to participate in a religious ceremony, and even less to establish an emotional relationship by “making out.” It seems clear to me that the capacity to autonomously exercise privacy rights, such as the decision to initiate sexual contact, falls in the second category.

Child agency, infant-adolescent cultures, and harm

The subject of a minor’s incapacity to consent to sexual relations, as can be noted in the examination of the general grounds for the hetero-protection of basic rights, ends up distracting us from the fundamental issue of child and adolescent sexuality: the prohibition, even when concerning a child who is still immature, can only be justified by the existence of harm or a risk (that is, the danger of a probable harm). To use a rather trite analogy: it does not make sense to ask ourselves at what age a child may consent to play soccer unless there is a plausible argument that the activity is harmful or dangerous for children. So neither does it make sense to consider what age to fix for sexual consent unless it is plausibly argued that sexual activity is harmful or dangerous; and what was questioned in the previous section was precisely the assumption – the fruit of an obsolete ideology – that sex is in itself harmful for children because they are naturally innocent in sexual matters. This assumption fundamentally rests on a cultural and value judgment, that is not universal either, but instead contested, in most modern societies, in degrees proportional to multiculturalism and ideological pluralism.

With this in mind, it is understandable that the last recourse for those who subscribe to the ideology is to take refuge in their own local culture, as if to say: “not in my culture,” that is, to maintain that, even if it is not clear or certain whether or to what degree sex harms children, adults belonging to certain (sub) cultures (and a family integrated into those cultures) should be

granted the right to regulate the sexuality of “their children” according to their values. Moreover, it can be argued that, even if certain sexual practices are not harmful to children of a certain age in theory, they might well be so in practice if they run counter to the cultural values of a particular community – in the extreme case, if they are taboo – both because of the iatrogenic effect of the inevitable reaction to the infraction of the cultural norm and for the subsequent stigmatization the child will be subjected to.

I believe that a good deal of the dangers attributed to child and adolescent sexuality actually do exist in reality in places where the activity socially constructed as harmful and shameful.

On this point, however, two things should be kept in mind.

The first: for those who accept that the boundaries of cultural pluralism are set by the recognition of certain “basic values” or “minimum requirements of human welfare” (physiological and psychological) that, albeit compatible with very diverse cultural forms, enable the determination of transgressive behaviors (such as the castration of girls) (Freeman, 1979, 140, 142), and who accept that the intercultural constants of child sexuality normativity expresses a kind of basic need – physical contact, sensuality, self-exploration, and self-satisfaction, for those people there is then a normative limit to the forms of “social construction of sexuality” that convert any expression of child and adolescent sexuality into taboo.

The second consideration has to do with the discovery by the “New Sociology of Childhood” of the active, creative, and transformative character of peer groups during childhood and adolescence (Corsaro, 2004) that shed new light on the relation between adult culture (which may construct sexuality as taboo) and child and adolescent cultures (which are capable of

forming cultural constructions that are different to some degree). From this perspective, in the midst of these peer cultures, although the substance of the dominant adult culture is passed on to them, the cultural codes and practices received are creatively reinterpreted through games and experimentation, and in this way give rise to their own uses, practices, and patterns in one or several different child-adolescent cultures that differ to greater or lesser extent from the adult culture and so constitute permanent processes of “negotiation” with adults meant to obtain legitimate spaces for the expression of these new uses, practices, and patterns.

Corsaro calls this daily process “interpretive reproduction” and analyzes it in extensive longitudinal studies using ethnographic methods to follow the creative transformations that children and their peer groups operate on the cultural routines and language they receive from adults. The process is usually almost imperceptible, but represents the most convincing explanation of the process of intergenerational cultural change. I believe the importance of this is obvious in terms of the limits, not normative but factual, to the “social construction of sexuality” based on a traditional reproductive model of sexuality that persists in the repressing normative expressions of child and adolescent sexuality through which basic needs associated with this dimension of human interaction are insistently expressed. The cultural transformation operated by the appearance of new sexual practices (normativities) among children and adolescents collectively comprises an exercise of autonomy and contributes to the transformation of the cultural map of sexuality towards a non-reproductive (and non-patriarchal) model centered on desire and self-realization.

Yet the perspective gained by the concept of “interpretive reproduction” also strikes me as beneficial in examining from a new angle the delicate problem of determining whether sexual expressions are harmful, inasmuch as they involve manipulation or abuse. The cultural

construction itself by the peer groups that express themselves sexually in innovative ways could provide the criteria for determining which are expressions of sexual autonomy, that are experienced satisfactorily, that do not put children or adolescents in uncomfortable positions or make them feel ashamed, and those that, on the contrary, are sexual experiences interpreted as abusive, that occur in large part because of circumstances of extreme necessity or coercion, that are experienced as shameful and that stigmatize the children and adolescents that go through them. To return to an example already mentioned, that of the phenomenon of “ponceo” among Chilean preadolescents and adolescents, currently it is culturally experienced in the former way, and is even likened to an expression of political autonomy from more “repressed” generations:

“We are not the children of a dictatorship; we are the children of democracy,” said Michele Bravo, 17, at a recent afternoon party. “There is much more of a rebellious spirit among young people today. There is much more freedom to explore everything.” (“In Tangle of Young Lips, a Sex Rebellion in Chile,” *The New York Times*, September 12, 2008).

Adolescent prostitution, however, it also appears quite clear to me, belongs in the second category of experience.

Operative principles for the criminal regulation of child and adolescent sexuality

On the basis of the prior analysis, I believe that the criminal regulation of child and adolescent sexuality and a revision of the punitive guidelines in place should be subjected to the following operative principles:

- Sexual behaviors whose manner (forceful, intimidating, etc) or context of coercion (dependent relationship, commercial sexual exploitation) leaves no room for doubt regarding their harmful and abusive nature should be prohibited. The child’s opinion and

the way these sexual behaviors are socially constructed in their peer culture might be a relevant factor to consider in determining whether there is abuse.

- Setting a minimum age for sexual consent as the unique basis for punitive prohibition should be renounced. Establishing a minimum age (12 years) together with a maximum age span for the individuals sexually involved (4 or 6 years) could eventually be used as a refutable presumption of abuse (associated with a commonly shared social taboo) if necessary for the optimization of protection or to get around problems where evidence is lacking, as long as the parties involved are given the occasion to demonstrate that no abuse took place, only an expression of sexual autonomy.
- Discriminatory punitive prohibitions should be annulled, such as those that put different limits on homosexual expressions with respect to minors.
- Punitive prohibitions of behaviors whose risks are merely statistical (corresponding to a higher instance of self-destructive behavior) or that are only indirectly connected to the sexual behavior (harms resulting from teen pregnancy or accidental HIV infection) should be annulled.
- Furthermore I believe that legal regulation, although not as a principle but as an expression of the difficulty of law to rationally enter the domain of commonly shared taboos, at least until relevant transformations in these taboos take place, should not attempt any innovations as regards the punitive prohibitions currently in place that presume abuse in cases of incestual relations between parents and children of a certain age in which the father (or mother) seeks their own sexual pleasure through sexual contact.

- Lastly, and although the necessity to punitively regulate this behavior is not altogether clear to me, the legal system (of family law, for example) should consider the arbitrary repression of child and adolescent sexuality that goes beyond the diverse culturally admissible forms and hurts the basic needs of the child or adolescent as a breach of parental responsibility.

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