

Please note: This is a translation of the paper delivered at the conference in June. The original version in Spanish has undergone subsequent revisions that are not reflected in this translation.

MODERN LAW OF SEX CRIMES: DOES IT MEAN WHAT IT SAYS?

“He who sins sexually sins against his own body”
(1 Corinthians 6:18)

“Now we see but as in a mirror”
(1 Corinthians 13:12)

Antonio Bascuñán Rodríguez
Universidad Adolfo Ibáñez

Summary

1. The anomaly.
2. The reverse.
3. The obverse.
4. Ambiguity, contraction and expansion.
5. Hypostasis, awareness and resistance.

Notes

1. The anomaly

Any theory justifying the punishment of sex crimes exclusively or mainly because it offends personal autonomy must take in account that there is an anomaly.

Protecting personal autonomy requires moral neutrality in regard to the acts through which it is materialized. Yet the feature that defines sex crime law is a radical asymmetry in the appreciation of sexual autonomy. Only actions that compel others to be involved in sexual interaction constitute sex crimes. On the contrary, actions that prevent others from interacting sexually do not constitute sex crimes. They might, perhaps, be punishable as a restriction of freedom, assault or battery, but this means that the legal consequences are incomparably less serious and, above all, are not discussed as offenses against sexual autonomy by the law or by legal culture or by public debate about the law and its enforcement. In other words, sex crime law merely protects the freedom of sexual abstinence, the interest of a person in not participating in sexual interaction. That is the radical asymmetry: when confronted with a contrary will, the will of those abstaining from sex is worth incomparably more to the law than the will of those practicing sex. [1]

Qualifying this asymmetry as an anomaly is, at first sight, counterintuitive. Modern sex crime law defines a sex crime, in its original formulation, as an abuse committed by performing a sexual action with the body of another against his or her will. In its more progressive formulation, it consists of having coerced a victim to tolerate a sexual action with his or her body. This definition is so representative of our understanding of a sex crime as abuse and of that abuse as an offense against personal autonomy that dispensing with it in the formulation of rules of law would make such regulation incomprehensible to us as sex crime law.

Perhaps overcoming that comprehension is indispensable to achieving sexual autonomy. That is a conjecture with which this paper sympathizes. Yet the objective here is not to propose new criminal laws on sexual freedom, but rather to propose a skeptical way of reading the regulations enacted during the end of the 18th century and the beginning of the 19th century, and rewritten at the end of the 20th century, which I will call “reverse reading.” The starting point of the reverse reading of modern sex crime law lies in realizing that, because of its asymmetry, sexual autonomy is only protected under that law in the form of a sex crime at the expense of restricting sexual autonomy. The reverse reading of that regulation finds that the primary purpose is not to protect autonomy but rather to restrict sexuality.

This conclusion does not refute the cultural fact thus identified, at least not entirely. What the theory challenges is the validation of that cultural fact as a protection of autonomy. That validation ignores the asymmetry (its anomaly) and thereby impedes attaining a reflective equilibrium between the institutional definition of sex crime law and its liberal moral justification. What the reverse reading refutes is, therefore, the self-complacency of liberal discourse on sex crime law.

There is no field where the ineptitude resulting from that self-complacency is more apparent than modern sex crime law on minors (infants and juveniles). The difficulty inherent to characterizing bodily contact as “sexual” from the minor’s viewpoint and the characterization of their personal condition of being the victim of an “offense against freedom” makes this starting point of liberal discourse precarious. Forbidding physical contact with children and youths not only restricts the autonomy of the other, but also directly restricts the partial or potential autonomy of the child or youth. Added to this precariousness, which is co-original to the formulation of modern sex crime law, the recent expansion of the sex crime law on minors

fostered by international law, proves the ineptitude of liberal discourse. Varied is the discourse justifying this expansion. In comparison, the reverse reading suggests that it is, once again, the manifestation of a culture that represses sexuality, concealed by thematization in protecting autonomy.

I will develop this theory in the following way. First (2) I will briefly discuss the features that define the regulatory model against which modern criminal law reacts and then (3) the features of its definition by contrast. Then (4), I will very briefly review the historic moments in the regulatory model of modern sex crime law, concentrating on the German and Spanish Codes, to put the phenomenon of the expansion of sex crime law in context. Lastly (5), I will outline some considerations to confront this phenomenon critically.

2. The reverse

Modern criminal law understands itself to be a definition by opposition of the regulatory model inherited from moral scholastic theology and the medieval canonic law. The simplest formulation of that model is found in the moral theology of Thomas Aquinas. In Section II-II of *Summa Theologica*, forbidden sexual behavior is conceived as a sort of lechery (q. 154) [2] that is classified in two ways. The first consideration is whether that behavior violates the natural order of sex or its rational order. Any use of sexual pleasure that deviates from its natural reproductive purpose is a violation of the natural order of sex. This class includes sins against nature that range from masturbation to sex with animals. Any use of sexual pleasure ordained for reproduction that takes place outside of a monogamous and undissolvable marriage required to ensure the breeding and education of the offspring is a violation of the rational order of sex. This class covers all extramarital situations of heterosexual vaginal coitus, from simple

fornication to abduction. The second consideration involves the relationship of the sexual act to other people, i.e. its consideration as a wrong or injustice against another. According to Thomas Aquinas, this consideration only applies to vaginal heterosexual coitus that may result in an offense against a woman (incest or *stuprum*) or an insult to a person who has power over her (father or husband). In summary, all use of sexual pleasure is forbidden, except for vaginal coitus between a husband and wife.

Modern criticism of the medieval regulatory model concentrated on refuting the imperative of reinforcing the moral standards by state coercion.[3] That is not what is of interest here, but rather the analysis of the conceptual consequences that this model entails in the definition of a sex crime by criminal law.

First of all, all sex crimes require that there be a sexual act. If sex crime is perceived as a sort of lechery, it would not, by this definition, merit punishment unless there is sexual pleasure. This first requires that action be taken on a human body. Lechery is a sin of touch (cf. Note 3). Secondly, this makes the perpetrator of the sex crime a direct offender, i.e. he used his own body. A sex crime is not committed through another.

Secondly, coercion is a secondary factor in the configuration of sex crimes. The crime may be specified by coercion, such as abduction in respect of *stuprum* (q. 154 a.7). It may aggravate the crime (q. 154 a.12), but in no case does it constitute what is specifically unlawful in a sex crime. The essential element is the disorder of sexual placer: “Using violence (vis) against someone is incidental to lechery, which essentially involves carnal delight” (q. 154, a.7 obj. 2).

Thirdly, based on the two preceding observations, **sex crimes are not primarily victim crimes** in the modern sense. It is true that in one way, the types of lechery depend on who is

offended. In those cases, one can speak of the presence of a victim. But these victims are not victims because the sexual act is done against their will. They are not victims because they were forced to tolerate a sexual contact. When coercion is relevant in identifying a victim, an unmarried woman who is abducted, thus the victim of the coercion, is not the victim of the sexual act: the father of the woman is the one offended by the coercion inherent to that abduction. He is the victim of the offense present in the fornication, without his consent, with his daughter subject to his authority. Even in the case of a woman who is forced to have extramarital vaginal coitus, it is not the coercion she suffers that makes her a victim. The injustice of coitus for a woman lies in her corruption, i.e. in the loss of her status of a sexually intangible person, either in absolute terms (*stuprum*) or relative terms (incest). The woman involved in the extramarital heterosexual vaginal coitus is a participant in a sex crime (fornication, at the least). In that regard, her position is no different from that of any participant in a crime against nature. Since the crime occurred because the act is contrary to the natural and rational order of sexual pleasure, in principle, all who intervene in it are perpetrators.

There is, however, another meaning in which a generalized use of the word “victim” is possible in the context of the medieval regulatory model. It is a meaning symmetrically opposite to its modern meaning. The modern meaning of the concept of victim is prescriptive because it relates conceptually to the affirmation of a standard of behavior that another infringes. In the modern sense, “victim” is the holder of a right correlative to the duty that is infringed by the perpetrator of the crime or, in utilitarian terms, the subject whose interest is harmed by the crime. In the context of the medieval regulatory model, “victim” cannot have that generalized meaning. In this context, “victim” can only mean “not guilty” of the crime. Here, the status of victim does

not here imply the legitimate right to reproach another for the offense, but rather **exoneration from reproach for lechery**.

This is a concept of victim by ascription, i.e. related to the affirmation of a rule of imputation that, when applied, excuses the infringement of a rule of conduct.

3. The obverse

The plans for criminal legislation in the Enlightenment and the early penal codification broke with the medieval regulatory model by rejecting its meta-ethical matrix. Substituting one cosmological conception of the fundamentals of the principles of justice by an instrumental or communicative conception, expressed in the different concepts of the social contract, meant that the imperative of the rational domination of the animal impulse could not be conclusively used as justification for punishing sex crimes. Under the new meta-ethical matrix, only an offense of the rights of another or the rights of the State or of society or a collective interest could be ascribed the status of crime. The rupture was manifested by the break of the unity of the systematic class—crimes of the flesh (=sexual)—and their division into two categories in opposition of each other: the offenses of sexual abuse, conceived as violations of an individual right, assigned the status of felonies; and the offenses against good custom, conceived as infringements of social sexual morality, assigned the status of misdemeanors.[4]

This break has a significance that is representative of modern sex crime law. That differentiated systematic treatment affirms the claim of having identified that punishment of sexual abuse is deserved and needed, but without ever considering that abuse to be an infringement of a sexual moral standard. The reverse reading notes, however, the datum disproving that claim in the asymmetric definition of sexual abuse.

For dogmatic history, the crucial moment in the asymmetric construction of the class of sexual abuse crimes occurred in the years 1800 and 1801, which are the years when the fundamental work of Paul Johann Anselm Feuerbach on the theory of penal law was published and when the first edition was made of his influential treatise on positive penal law. In the first of such works, when he puts forth the abstract conditions of proportionate punishment, starting from the definition of the crime as the injury of a right, Feuerbach says that the first original private right of individuals is the right to the free use of the body. He assigned three specific contents to that right: (1) the right to possession of the body (the right to life), (2) the right to undisturbed possession of the bodily forces (the right to health); and (3) the right to the undisturbed use of those forces for one's own ends (the right to bodily or physical freedom). [5] In the second of such works, when he applied this system of systematic reconstruction to German common penal law, Feuerbach held that Roman-German laws contained three types of harm to the right to free disposition of the body: (1) the harm from using the body for indeterminate purposes (the crime of plagiarism), (2) the harm from use coupled with misappropriation for the purpose of satisfying sexual impulses (abduction), and (3) harm from unauthorized, forcible use of the sexual parts of a person by violence (rape).[6]

Here is the point of inflection. A conceptual change takes place in the step from the abstract definition of the type of crime against bodily freedom to its application, as a standard for systematic reconstruction, to governing penal law. While the crime against bodily freedom is, in the abstract, a crime of injury (=disturbance of the use of one's own body by another), it concretely becomes a crime of displacement (=use of another's body). This new definition provides a basis for explaining the asymmetry of protection of sexual freedom, but it makes the concrete class of crimes against freedom an anomaly with respect to its abstract definition.

The anomaly did not remain the same in the definition of the class of crimes against freedom that evolved in German culture. The systematic reconstruction of this class that dominated legislative and doctrinal evolution in Germany is owed to Karl August von Tittmann (1806), who defined the harmful effect of all crimes against freedom as “the impediment against using the capacity for action and the imposition of another’s will in doing or not doing,” under the following explicit explanation:

The effect of this (violent) action is an unwanted action or inaction. One must not consider its effect apart from the action itself, i.e. the action must be the most important thing and the effect of that action must not be considered the principal thing. [7]

Tittmann’s explanation affirms the principle of moral neutrality in the protection of personal autonomy. Its systematic consequence is to demand symmetry in the penal protection of personal liberty. Under this premise, the crimes of coercion, enclosure and robbery of man were configured, three basic criminal forms distinguished by Tittmann and accepted in German law. [8]

The crimes of sexual abuse, however, did not undergo that reformulation. Sexual coercion was defined from the victim’s perspective to sanction compelling someone to an undesired bodily contact, without ever considering the possibility of sanctioning preventing a desired bodily contact. The one-sidedness (asymmetry) of the sex offenses made them an anomaly with respect to the two-sidedness (symmetry) of the crime of coercion within the system of the special part of penal codification. In other words, **crimes against sexual freedom did not receive the form assigned by the system in its definition of crimes against freedom.**

In the dogmatic history of the legal concept of coercion, the problem posed by the definition of sexual abuse by the early codification is a special case in a much ampler and more complex evolutionary process, that of moving from a concept of coercion by ascription to a

concept by prescription. Said otherwise, it moved from a concept related to a rule of imputation to a concept related to a rule of conduct. Its historic extremes are identifiable. The starting point is canonic law (*Decretum Gratiani*, 1140-1142), which states that only suffering *vis absoluta* can excuse guilt in committing a crime because such suffering precludes any possible imputation. The ending point is the argument by Friedrich Karl von Savigny (*System des heutigen römischen Rechts*, 1840-1842) that suffering *vis compulsiva* allows a legal act to be declared void because such *vis* is a legally forbidden behavior. One of the main milestones in the intricate intermediate phases of these seven hundred years is the establishment of the modern concept of sexual abuse.

The reverse reading has a hypothesis: the one-sidedness (asymmetry) of the configuration of sexual offenses is explained by the latent survival of the concept of victim by ascription, inherent to the medieval regulatory model.[9]

It is common to assert that the inflection point of modern sex crime law is found in the decriminalization of simple fornication. But that assertion loses sight of the fact that divergences between state penal law (secular law) and canonic law were a given historical fact and, moreover, in the case of the slightest sexual sin, the medieval regulatory model itself had wise reasons to dispense with a sanction of that sin by state penal law (cf. Note 3). The inflection point lies, as said above, in the definition of a sex offense as a crime of abuse, i.e. as a victim crime under a prescriptive concept of victim.

That definition undoubtedly has a liberal component since it questions the legitimacy of any penal sanction of non-abusive sexual behavior. In the context of the bodily contacts constituting a sex crime, that definition put into doubt the legitimacy of the penal sanction of the crime against nature, prostitution and *stuprum* by seduction (sexual initiation of younger people by older people). All subsequent discussion of the legitimate limits of sex crime law has

revolved around this question. Yet the anomalous component was as important as the liberal component to the legal culture of the 19th and 20th centuries: the restriction of the concept of abuse to forcible undesired bodily contact.

That restriction is so representative of the modern concept of sex crime that in the two times in recent history where a legal text could be interpreted to be unrestricted protection—i.e. bilateral and symmetric—of sexual autonomy, there has been no hesitation in interpreting and enforcing those provisions under the paradigm of sexual abuse as forcible bodily contact not desired by the victim.

The Spanish penal code of 1995 forbid, as general crime of sexual aggression, “violating the sexual freedom of another person by violence or intimidation” (article 178). It would be hard to conceive of a formulation that more explicitly encompassed both the offense against the freedom of sexual abstinence and against the freedom of sexual realization. Spanish doctrine and jurisprudence, however, have virtually unanimously considered, while still containing that possibility of a symmetrical interpretation of the protection of sexual autonomy, that the offenses against freedom of sexual realization are excluded from the scope of application of that rule. The new “offense against sexual freedom” is nothing more than the same “sexual abuse” in the codification, i.e. exclusively sexual contact not desired by the victim. [10]

Article 7-1-g) of the 1998 Rome Statute of the International Criminal Court forbid, as a residual crime of sexual significance, “any other form of sexual violence of comparable gravity.” If we understand “sexual violence” to be the “coercion of sexual freedom”—and in principle, it is a semantically correct interpretation—, then the impediment to exercise sexuality would be a crime under the Rome Statute. Nonetheless, the Elements of Crimes did not hesitate to uphold a restrictive interpretation, requiring first “that the perpetrator have performed an act sexual in

nature against one or more persons or have made that or those persons perform an act sexual in nature” (Art. 7-1-g-6). Preventing one or more people from performing a sexual act does not, hence, count as sexual violence. [11]

This restriction coincides perfectly with a concept of victim-by-ascription. For the reverse reading, the restriction means that we can conjecture that the modern crime of sexual abuse has a double standard. Formally and explicitly, it is a legal affirmation that declares that a person who has been coerced holds a right to sexual freedom; informally and tacitly, it is a cultural assertion that declares that a person who has been coerced is innocent of infringing the imperative of sexual abstinence. For that reason, the sexual freedom protected under the modern crime of sexual abuse is only the freedom of abstinence.

In light of this explanation, it is false that modern sex crime law has been consistently shaped around the distinction between legality and morality. It is not true that modern criminal law has become, not even partially, a regulatory ambit that is fundamentally differentiated from a social morality that restricts sexuality, leaving the issue of repression or liberalization of sexual behavior to other legal institutions or to the evolution of custom. On the contrary, even in the revolutionary core of modern sex crime law, the thematization of sex crime was never separated from a cultural imperative of repressing sexuality.

The many manifestations of this cultural nexus in the judicial practice of the second half of the 20th century are a well-known fact. Absolving the accused because of the behavior of the victim—insufficient resistance, preceding insinuation—is based, in the end, on imputing sexual contact to whomever pretends[claims] to be a victim of abuse, in the precise meaning of the concept of victim by ascription. The usual viewpoint in liberal discourse is to criticize this consideration as a moralizing disturbance of the conceptual structure of sexual abuse, in the

sense of the intrusion of a cultural valuation alien to a legal space created separately from that valuation. The hypothesis of the reverse reading demonstrates the superficiality of that criticism. Far from representing an intrusion, the interpretation of the crime of sexual abuse as a victim-by-ascription crime does nothing except clearly show the deep grammar of the law. Of course, it is a grammar incongruent with the moral foundation of that law, but made plausible precisely because of the incongruence of the law itself with its moral foundation.

4. Ambiguity, contraction and expansion.

As stated in the previous section, the Enlightenment model kept an explicit remnant of the medieval model—crimes against social sexual morals—even though two conceptual transformations took place. On the one hand, as explained earlier, the Enlightenment model contrasted those crimes against violations of a supposedly individual and very personal interest. On the other hand, it adopted a third-party position in regard to the need for punishment. The penal laws in question did not directly reproach lechery as did canonic law and secular penal law subordinate to the medieval model. The Enlightenment affirmation was indirect: it affirmed the convenience of reinforcing cultural affirmations of the reproachableness of lechery by a state punishment. This change in perspective, which differs from the correctness of the affirmation of reproachableness, was expressed in the modern consideration of those crimes as offenses against a collective interest: the validity of a social sexual morality.

What characterized sexual penal law in the mature European codification, as compared to early codification, was a compromise between the medieval model and the Enlightenment model. Contextually, this compromise implied consolidating the modern concept of sexual abuse, but in a general framework that revalidated the medieval holdover, albeit under the modern (indirect)

concept of the object of protection. The mature codification rejected the Enlightenment's systematic break and put all sexually significant crimes into one same category: the "crimes against good custom" (*Sittlichkeit*) in the 1851 Prussian penal code (second part, title xii) and in the 1871 penal code of the German Empire (second part, paragraph xiii); or the "crimes against honesty" in the Spanish penal codes of 1848 (book ii, title x) and 1870 (book ii, title xii). The crimes of sexual abuse within this category constituted a special subclass, marked by being considered victim crimes. This specificity in the Spanish codification was even emphasized in the law itself.

This is an extraordinarily ambiguous regulatory model. Systematically, the central issue is undoubtedly that of reunifying all sexually significant crimes under the viewpoint of an infringement of sexual morals. That legislative decision expressed a concept opposite to the Enlightenment concept as even sexual abuse is thematized as an infringement of social sexual morals. Nonetheless, that thematization does not alter its prescriptive structure of victim crimes. Together with adopting an indirect perspective to affirm the merit or need for punishment, it impedes considering it to be pre-modern regulation.

The debate in the 19th and 20th centuries on the configuration of modern sex crime law revolved around the (il)legitimacy of penal protection of social sexual morality, concentrating on punishing obscenity, consensual homosexuality, sexual contact with the young and prostitution.

By the end of the 20th century, the liberal viewpoint celebrated in Germany and Spain what seemed to be a final victory over the nearly two hundred years of ambiguity in modern sex crime law. In Germany, the regulation inherited from the old penal code of the Empire underwent a radical liberalization after the 4th act reforming penal law, in 1974, which expressively changed the heading of the respective title, substituting the old thematization by its

liberal denomination: “crimes against sexual self-determination.” The 29th act amending the penal code, in 1994, put an end to the last remains of penal discrimination against sexual orientation, replacing the ban against male homosexuality with pubescent minors by a general rule protecting sexually inexperienced youths from abuse.

In Spain, the successive reforms to the 1944 penal code (essentially, the old 1870 code), which characterized the law of the post-Franco democracy, were expressed, in regard to sex crimes, by organic law 3/1989, which replaced, among other changes, the old phrase of “crimes against honesty” by the phrase of “crimes against sexual freedom.” It ended in the new 1995 penal code that regulated sex crimes more strictly in relation to the liberal principle of all Western penal law in the 20th century.

In both cases, the legislature’s decision followed standards previously elaborated through debate by university professors who understood themselves to be advocates of the legislative policy of the Enlightenment, postponed by the influence of Christian sexual culture in the law of the 20th and 19th centuries. The principle of legislative policy asserted by these authors was simple and drastic. A major decision had to be made about each penal norm that reinforced a moral ban on exercising sexuality: either the norm had to be reformulated as a rule that banned a violation of the freedom of another, or it had to be repealed. [12]

This liberal discourse was characterized not only by the refutation of paternalism and perfectionism, but also by its commitment to an exigent version of the principle of proportionality. According to this commitment, the scope of what was punishable and the magnitude of the punishment had to be kept at the minimum level required to attain, adequately, the objective of protection sought by establishing and enforcing penal regulations. [13] The reforms in the second half of the 20th century—especially the one introduced by the Spanish

penal code of 1995—satisfied both exigencies, that of the reformulation/repeal principle and that of the commitment to minimalism.

However, there has been a significant change in that state of things in the sex crime law since the change in century. The most interesting feature of actual sex crime law is the combination of a relative predominance of the reformulation/repeal principle and an ostentatious failure of the commitment to minimalism. Sex crime law in the last fifteen year has been one of the most relevant areas of expansion of state punitive power within—at least apparently--the limits legitimized by the justification that punishment deters the abuse of another.

Four aspects of this expansion are particularly relevant symbolically: (a) the amplification of the scope of application of the crime of rape, the most serious of sexual abuses, to behavior other than the genital penetration of the vagina; (b) the repeal of marital exemption, i.e. the inclusion of abusive sexual contact between spouses among the crimes of sexual abuse; (c) the emergence of sex crime law in the context of international criminal law; and (d) the development of a sexual penal law regarding minors that is highly differentiated and filled with the utmost coercive potential, fostered by international human rights law.

The usual criticism that this phenomenon generates in liberal discourse is based on the exigencies of the principle of proportionality: the expansion of sex crime law would be unnecessary and disproportionate. From the point of view defended in this paper, the commitment to minimalism is secondary, particularly in regard to the assertion that there is no need. Since we do not have a simple and safe way of determining the need for the punishment, the internal standard for the egalitarian distribution of the punishment as a burden usually proves to be more operative than any external criteria. The objection that asymmetry is an anomaly is obviously due to the use of an internal standard of egalitarian distribution because sexual

autonomy is considered to be the object of protection. For this reason, wherever new punitive rules simply reproduce the asymmetry in modern sex crime law, the opposite interpretation is not incompatible with considering the expansion in sex crime law to be an improvement over the situation of contextually justified impunity.

That possibility of a contextual justification for overcoming impunity does not, however, preclude considering the phenomenon to be a consolidation and intensification of the latent validity of the medieval regulatory model. The reverse reading can note that symbolic dimension in the aforesaid four aspects. Making such a critical interpretation would require, nonetheless, too much attention by the reader to matters of detail. It suffices here to refer briefly to the moralizing background that an opposite interpretation reveals in the regulation of sexual contact with impubescent minors.

What should be the punishment for sexual contact with impubescent minors in the context of the system of sexual abuse? Feuerbach's answer was simple: a punishment equatable to non-violent sexual abuse that must always be less severe than the punishment for violent sexual abuse. That was not, however, the viewpoint in the mature penal codification. The sexual penal law of the mid-19th century assigned the same penalty for violent abuse as for non-violent abuse and an even more severe punishment to simple sexual contact with impubescent minors.[14] The recent history of the German penal code has exactly replicated that fluctuation: it has regressed from a differentiated and attenuated treatment of the penalty for non-violent sexual abuse and sexual contact with an impubescent minor imposed by the liberal reforms of the 20th century to the treatment in the 19th century.

The hypothesis of opposite interpretation notes here an intensified influence of the medieval regulatory model. Merely from the viewpoint of the victim-by-ascription concept, non-

coercive abuse must necessarily be equated to coercive abuse because all innocent people are equally innocent under the excuse from culpability for infringing the imperative of sexual abstinence. And the concept of victim by ascription helps us understand what would otherwise be unexplainable, that is, that mere sexual contact with an impubescent minor, regardless of the circumstances in which it takes place, merits a punishment that is the same as or, eventually, more severe than the punishment for the most brutal sexual violence: the punishment proclaims the innocence of the impubescent minor; the maximum penalty proclaims his supreme innocence. This latter is a case where equal innocence does not suffice. Considering the peculiar intensity of the purity requires an intensified symbolic exclusion of the impurity.

That is the deep grammar of the actual sex crime law supposedly protecting minors.

5. **Hypostasis, awareness and resistance.**

At least one thing is clear at this stage. Conceiving sexual abuse as specific coercion to do, omit or tolerate a specific action, like Feuerbach intended, is unlikely. As unlikely as describing the crime of rape as a brute fact, like the introduction of the protuberance of one body into the cavity of another body. The regulatory context of modern sex crime law makes it unlikely that there will be a naturalist comprehension assumed because of its justification of an offense against the free use of the body.

We do have another naturalist comprehension of sexual abuse: its definition as an **offense against sexual wellbeing**. This concept changes the object protected by penal law, displacing the consideration of a specific sexual interaction by the consideration of all sexual interaction possible. From this standpoint, what sexual penal law protects is not the absence of momentary constraints of actual sexual intent but rather the permanent capacity for sexuality.

At first sight, this explanation for a liberal justification of sex crime law is highly attractive. It would seem to argue that sexual freedom is a valuable ultimate moral justification of sex crime law and to maintain the naturalist orientation of the modern justification. According to this concept, we should no longer understand sex crimes to be non-consensual sexual interactions and start conceiving them as specifically sexual means of psychological damage, akin to a very serious method of physical abuse. In the same way that penal law on bodily harm protects the capacity of bodily functions as condition for the exercise of freedom of action, sex crime law would protect the capacity for sexuality as a condition of sexual freedom. This would help explain the asymmetry. Under this definition, preventing another from having sexual contact would not affect his permanent capacity for sexuality as intensely as forcing him to have a sexual contact because withstanding an undesired contact would be a much more harmful experience to that capacity for sexuality than the frustration of the desired contact. Put into psychological terms, the trauma caused by undesired sexual contact would be incomparably more profound than the frustration of desire.

It is clear that this concept encounters a considerable difficulty since thus far it has not been expressed in the legal definitions of sex crimes. Sex crime law does not condition the punishment to substantiating a traumatic outcome for the victim, not even to substantiating how capable the sexual contact is of producing that outcome. However, the intuitive force of this concept manages to overcome that objection. Thus, it is concluded that for strategic reasons—the difficulty of proving because counterevidence is available—the law prefers to dispense with that requirement in order to protect the capacity for sexuality effectively against the damage caused specifically sexual means. Said in the jargon of the German theory of crimes, sex crimes would be crimes of abstract danger to the individual's sexual wellbeing.[15]

Including reliable knowledge on the trauma to punitive practice is undoubtedly valuable because it facilitates recognizing that the criminal investigation and trial may have a traumatic (or therapeutic) effect on the victim. This recognition is important because it guides the conduct of the investigation and trial in the framework permitted by the rules of procedure and because the trilemma can be argued (and resolved) where the State may find itself at a crossroads between intensifying the victim's trauma, reducing the right to a defense and waiving the punishment of the accused.

But unfortunately for the theory of sexual wellbeing, this valuable recognition, made possible by taking trauma into account, refutes its central supposition. Recognition of the potential traumatic effect of the investigation and trial demonstrates that the choice that the law would have made—according to this concept--, consisting of sanctioning only sexual means of producing the trauma, is not justifiable in the naturalistic terms that are imposed by equating sex crimes with crimes of bodily injury. Why is a non-consensual sexual contact an incomparably suitable way to cause trauma to a victim? What are its exclusive properties?

Perhaps there is a naturalistic response to this question, but at the expense of reducing the scope of the concept of trauma solely to a disorder of the nervous system and putting the explanation of the causal relationship between sexual contact and the nervous disorder in a “black box.” That is a cost that a theory that intends to handle an ample concept of trauma cannot assume. Nor is it an acceptable cost in terms of legitimizing penal law. A theory that asserts the unique suitability of specific modes of behavior in causing a harmful outcome and uses that assertion as a reason to justify the law selecting only those modes as punishable behavior cannot elude demonstrating the truth of the assertion.

To be admissible, the theory of wellbeing must thus have a non-naturalistic theory of the trauma that can explain the specific traumatic relevance of the sexual connotation of an interaction, apart from all the additional circumstances that may eventually be present. It must explain not only the traumatic effect of violent sexual abuse—something that is relatively easy in consideration of the violence—but also of a sexual contact that went unnoticed and even a consensual sexual contact, whenever the law decides that such consent is irrelevant. That non-naturalistic theory would inevitably have to include the dimension of the meaning of the sexual contact, i.e. it must include a **consideration of the existing sexual culture**.

From the liberal perspective, it is, at first, counterintuitive to consider the sexual culture as the basis for an understanding of sexual abuse alternative to naturalism that also can explain the asymmetry that characterizes it and is compatible with considering the protection of sexual autonomy as the fundamentals of sex crime law. Yet if a distinction is made between the constitutive rules and the regulative rules, it can be seen that the liberal objection refers to the consideration of regulative rules, meaning the cultural bans on protecting the realization of sexuality. The authentic modern argument that lies at the base of the theory that personal autonomy is the ultimate grounds for justification of sex crime law is not primarily affirmative but rather critical: no cultural ban on exercising sexuality, howsoever firmly established that it may be in the community, is, in itself, a justification for state coercion. Recognition of the individual right to autonomous configuration of the personal life plan has priority over the collective interest in reinforcing the validity of social morality.[16]

The assertion of the priority of personal freedom takes place, nonetheless, in the context of a culture of sexuality, defined by rules. Refusing to reinforce cultural bans does not require completely ignoring the culture to which those bans belong. The need to include constitutional

rules of the sexual culture is obvious, for example, in the legal definition of the forbidden behavior. The question of what counts as sexual behavior, whether the comportment of the perpetrator of the crime or the suffering of the victim, is a question that sex crime law cannot answer entirely without resorting to those rules of the culture. Apart from the penetration of certain bodily cavities by male genitals, which allows a purely anatomical standard of identification, deciding that a bodily contact is “sexual” is a matter of meaning, defined by rules of the sexual culture.

Obviously, the asymmetry is explained as the inclusion of a cultural rule. The sexual culture dominating in the West defines sexual contact as discrete, in that it is excluded *prima facie*, its admission requiring that exclusion to be lifted. The historic processes that can be deemed to be a transition from a more repressive sexual culture to a less repressive sexual culture or vice versa have not entailed the rule of exclusion disappearing or appearing, but rather a variation in the rules that define the socially recognized way to lift that exclusion. So, the sexual liberation of the first two decades and the 60’s of the 20th century was a transition from heterosexual marriage to the individual decision of an adult as socially recognized ways to lift the *prima facie* exclusion of sexual contact. The asymmetry is due, precisely, to the preponderance of the (permanent) rule of exclusion over the (fluctuating) rules on lifting it. Anyone who claims, against the existing rules, the prerogative to lift the exclusion in order *to infringe* the rule of exclusion is treated much more severely than someone who *in order to enforce* the rule of exclusion, ignores, against the existing rules, the prerogative of others to lift the exclusion.

Including a *prima facie* rule of exclusion of sexual contact also helps easily explain the cases to which the theory of wellbeing is difficult to apply. The socially recognized way to lift it

requires meeting conditions for a decision to allow sexual contact to count as a decision. Unnoticed sexual contact and consensual sexual contact with impubescents do not meet those conditions. It therefore follows that they are infringements of the rule of exclusion of sexual contact and in that capacity, are equatable to violent abuse.

Of course, the advantages to the explanation do not necessarily have an equivalent justification. Just because taking sexual culture into account makes the anomaly of sexual criminal law intelligible does not mean that it makes it legitimate. Modern penal law follows the liberal principle of the priority of freedom because it recognizes the individual's decision to be a legitimate way to lift the *prima facie* rule of exclusion on sexual contact. Here lie the great differences that separate the modern sexual culture from the medieval regulatory model. The original moral ban on sexuality has turned into a cultural presumption of the individual intent to exclude sexual contact while the original mode institutionally linked to authorization of sexuality—marriage—turned into a mode institutionally severed from refutation of that presumption—the simple intent of inclusion by the individual adult. These are, without a doubt, relevant cultural transformations. Yet to the hypothesis of latent validity, those transformations are incomparably less important than the continuity of the definition of sexual contact as discrete behavior, in the sense of a state of things excluded *prima facie*.

The asymmetry between protecting the freedom of sexual abstinence and protecting the freedom of sexual realization therefore continues to need justification. Precisely because the principle of the priority of the freedom is expressed in the new rules on how to lift the exclusion, it is problematic for modern sex crime law to ignore its specific relevance in respect of violations that impede its validity and favor, instead, the rule of exclusion. That is the hard essence of the

hypothesis on the latent validity of the medieval regulatory model, confirmed time and again by an opposite interpretation.

Should we conclude that a rigorously liberal sexual culture would have to dramatize impeding the exercise of sexuality until it is equivalent to the actual negative (maximum) valuation of being compelled, or banalize the latter until it is equivalent to the actual negative (minimum) valuation of the former? And since the rigorous application of Tittmann's principle can only be consistent with the second of these choices, should we sustain that any thematization of the sexual significance of the behavior where one is forced to do, omit or tolerate is incompatible with punishment in protection of personal freedom?

In an exercise of reflective equilibrium, this seems to be an unlikely conclusion. It is as relevant now to see how implausible a proposal is on dispensing with the thematization of sexual behavior in penal law as it has been to see the inconsistency of modern regulations and their claimed liberal justification. Yet, do we have any justification for the punishment of sexual abuse—be it symmetrical or asymmetrical—alternative to merely protecting personal freedom consistent with the principle of the priority of freedom? What considerations, immune to the imperative of sexual abstinence, can justify the relevance of the sexual significance of the behavior, particularly the undesired behavior that one is forced to tolerate?

The test of immunity to the imperative of sexual abstinence makes the best proposed justifications virtually unviable. A normative theory of trauma, for example, cannot overlook that dimension of cultural reproach for the involvement in a sexual act. That applies particularly to the most sophisticated version, the theory of making a person into a thing that is the object of sexual abuse, that is, the fact that a person was objectified is a reason for the differentiated punishment of sexual abuse. This version of the theory cannot overlook, either, the correlation

between objectifying someone and innocence, and, for the same reason, to the medieval cultural reproach. And of course, it must account for the peculiar relevance of sexual objectification with respect to all other forms of social treatment in which a person's dignity is denied. Lastly, considering how more operative abusive sexual contact is as a mode of aggression, which is relevant in emergencies, like war, loses relevance when projected indefinitely over time unless the sexual contact is assigned a greater aggressive (harmful) potential. In that case, the theory refers to a consideration like that of the two previous theories that are not immune to the cultural imperative of sexual abstinence.

Always present is the consideration of sexual abuse as a crime of displacement, as seen in Feuerbach's construction of 1801. In other words, it does not represent an offense that is just harmful to the victim, but rather an act useful to the perpetrator, an act to take advantage of the body of another. Sexual abuses would be thus differentiated from offenses against freedom in a way similar to how theft (equivalent to non-coercive abuse) and robbery (equivalent to coercive abuse) are differentiated from the damage to things. Perhaps there lies an important idea that is not sufficiently explored, common to sex crimes and to crimes against property, in understanding the transformation of the legal material of the ancient regime into the regulatory system of the codification. A consideration of this type would considerably attenuate the role thus far assigned to what Feuerbach called the objective-external standard of determining the proportion between the crime and the punishment (the harm principle in Anglo-American legal culture). This is a standard that can only be admitted *certeris paribus* by a utilitarian theory of penal law, like that of Feuerbach himself and the discourse of the Enlightenment. But precisely the consideration of sexual impulse or greed alters that supposition. [17]

Yet regardless of the outcome of that exploration of the subjective-internal standard of determining the proportion between the crime and the punishment, it is clear that the claimed analogy to the attack against the instrumental means of realization of autonomy fails. The protection of property does not rest, as an underlying grammar, on an imperative of refraining from using or disposing of the property. The protection of the possession of things has no effect on the use that the possessor gives to the things. For that reason, the attack of displacement causes harm to another (dispossession) to one's one benefit. The most unlikely explanation conceivable of sexual abuse is considering the damage correlative to undesired sexual contact, in the sense of opportunity cost, to be analogous to impeding desired sexual contact.

So here we reach the dilemma: ignoring the very personal nature of the interest affected by the sexual abuse is unviable and recognizing it is to validate the cultural imperative of sexual abstinence. There is no way to attribute severity to sexual abuse unless its dimension of meaning is included and that dimension is constituted by that imperative, even in the debilitated way of a rule of exclusion *prima facie*. Faced with this dilemma, the only strategy possible for liberal discourse is to redesign a moderate naturalism as a cultural tool of criticism and a source of limitative criteria on the deployment of the state's potential for sanctioning sexual behavior.[18] In other words, instead of supposing an unlikely naturalist understanding—as Feuerbach does—and instead of concealing the cultural constitution of the concept of harm to the victim of sexual abuse—as the theory of wellbeing does--, we should appeal to that naturalism as one way of discursively reducing the superlative personalization of sexuality, which is the way in which the imperative of abstinence has been able to subjugate liberalizing cultural concessions.

Then, perhaps, we will be able to see face to face.

Notes

[1] The confrontation between each will and a contrary will is not a confrontation of those wills against each other. The assertion of the text does not refer to the case where the person practicing sex requires the participation of the abstainer for satisfaction, whether it be against or without the will of the abstainer. That case is resolved in favor of the latter in consideration of mere autonomy, without having to qualify the act as abstinence or the realization of sexuality, and it does not occur inversely because satisfying the intent of the abstainer regarding himself does not require the abstinence of the practitioner with regard to others. The assertion in the text refers to the case where satisfying the practitioner's will does not require the participation of the abstainer but this latter impedes the former from obtaining that satisfaction. Although it is an attack against another's sexual freedom and although it is an unjustifiable coercion, it is not a sex crime.

[2] Lechery is the vice (q. 153) contrasted with the virtues of chastity and decency (q. 151), which are part of the virtue of temperance (q. 141). Temperance moderates the natural inclinations that man has in common with animals, subordinating them to the order of reason. As a special virtue, temperance takes care of the pleasures of touch, which refer either to alimentation or sexual acts. Like alimentation is the object of the virtues of abstinence (food) and of sobriety (drink), becoming a vice in excess (gluttony), sexual acts are the object of chastity (coitus) and decency (other venereal acts), becoming a vice in lechery, as said above (q.143): the use of sexual pleasure against correct reason (q. 154 a.1).

[3] The characterization that the regulatory model of Thomas Aquinas represses sexuality is candid. In order to judge Aquinas' model in that way, one must take at least three considerations into account: (1) historically, the doctrine of Thomas Aquinas is a stance that categorically values marital heterosexual vaginal coitus as a virtuous act because it conforms to a natural inclination according to the order of reason (reproduction); (2) the historic relations of the theological model to civil penal (secular) law were never of complete subordination. Unlike canon law, the European criminal statutes of the 14th to 18th centuries never translated all bans on sinning into bans on offenses; (3) the theological model does not require penal reinforcement of all moral prohibitions: the moral theology of Aquinas accepts margins of civil impunity for reasons of prudence. Finally, it is clear that reducing the concept of cultural repression to a model of explicit prohibitions does not account for the ample variety of ways in which a culture that represses sexuality may develop.

[4] These features are shared by the French codification (1791, 1810), the Austrian codification during the Enlightenment (1797), the Bavarian codification (1813) and the early Spanish codification (1822). They are not shared by the early Prussian codification (1794) or by the early Austrian codification (1803). The texts that share Enlightenment features were not, however, able to clearly indicate the individual right injured by sexual abuse. The French codification (1791, 1810) was limited to rating it an offense against persons, like homicide and injury. The Enlightenment Austrian codification (1797) and the Bavarian codification (1813) treated sexual abuse as an offense against freedom, like deprivation of freedom. The Spanish codification (1822) treated it as a "force" like other violations of individual freedom.

[5] *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts* (= Review of the fundamental principles and concepts of positive penal law), Second Part, p. 235-236 (Chemnitz: 1800, reprinted by Aalen: Scientia Verlag, 1966).

[6] *Lehrbuch des gemeinen in Deutschland geltenden Peinlichen Rechts* (= Treatise on common penal law in effect in Germany), § 289, p. 222 (Giessen: 1801).

[7] *Beiträge zu der Lehre von den Verbrechen gegen die Freiheit* (= Contributions to doctrine on offenses against freedom). Meissen: Erbsteinische Buchhandlung, 1806, p. 3.

[8] The German concept of offenses against freedom, as opposed to the French one, had an influence on the Italian codification as it was accepted in the Tuscan codification. The Italian codification had an influence, in turn, on the South American codification, mainly as it was accepted in the Argentine codification. The fact that the Spanish codification has demonstrated a close affinity with the German concept of offenses against freedom, both in 1822 and in 1848, remains a mystery. A certain Chilean conservative historiography has argued that the influence of the 1803 Austrian penal code was key to the peculiarities in the Spanish 1848 Code. This supposed key is useless in the case of offenses against freedom and sex crimes. The Austrian code of 1803 was premodern in these matters.

[9] Three aspects of the theory need to be explained: (1) The affirmation of a relationship between the anomaly in modern sex crime laws and the victim-by-ascription concept is related, yet distinct from the general analytical and regulatory relations between the concept of coercion by ascription and coercion by prescription. This latter issue is the opposite of the controversy between the positive (by ascription) and negative (by prescription) concepts of freedom: does the negative concept presuppose a positive concept where the priority of a positive freedom must be recognized over a negative freedom? The affirmative answer to this question—present, for example, in the theory of a mutually obligatory relationship between freedom and responsibility—may explain the requirement of the victim resisting any coercion, but it does not explain the anomaly in modern sex crime laws. (2) The hypothesis of the opposite interpretation does not assert a survival of the medieval model because modern sex crime laws require substantiation of two infringements of legal rules: (a) an infringement of the imperative of no coercion and (b) an infringement of the imperative of sexual abstinence. If this were so, it would not explain the absolution of the person accused of abuse by attributing responsibility for the act to the victim: under a legal imperative of sexual abstinence, unless the accused is exculpated, in turn, for reasons external to the act done together with the alleged victim, both are responsible for infringing the imperative of sexual abstinence. What the hypothesis affirms is that recognizing the injury of a right to freedom of sexual abstinence held by the victim (prescriptively) is conditioned to substantiating the exculpation of the victim because that deed is considered to be an infraction of cultural standards. The absolution of the accused is the cultural condemnation of the victim, which demonstrates an unequal (discriminatory) distribution of responsibility for the validity of that imperative, in addition to the relevance of the cultural imperative. (3) The survival of the medieval model is not latent but rather explicit in Feuerbach's treatise (note 6), but it is so in that text because it is, there, a rational reconstruction of the premodern legal material that explicitly excluded people from legal protection who did not

deserve it because of impudence (prostitutes, in the case of rape, sexually experienced women, in the case of defloration). It is possible that this circumstantial conceptual nexus has culturally influenced the latent survival of the medieval regulatory model after the codification. Regardless, the hypothesis of the opposite interpretation is stronger: it is not a matter of the anomalous consequences of a transitional phase but rather the anomaly of the inherent conceptual definition of the codification.

[10] The following passage from the most recent student manual applies to everything: "... it would be mistaken to think that all of this content [of sexual freedom] is guided by the precepts in title viii that we are studying. They are intended to mean that no one should be forced or induced by another to exercise a sexuality that is not wanted or accepted freely and consciously or accepted because will is vitiated by another (minors or the incapacitated) whose consent is not considered relevant in most cases, and not to protect or promote the sexual activity preferred by each citizen" (Tomás Vives Antón et al., *Derecho Penal. Parte Especial*; Valencia: Tirant lo Blanch, 2008, p. 213-214).

[11] The Spanish version of the U.N. already adopts this restricted interpretation in the final legal text. Instead of saying "any other form of sexual violence," it says "other sexual abuses" (Documento A/CONF.183/9, July 17, 1998). Using the traditional phrase of the codification settles any possible controversy about interpretation.

[12] The most significant German works are the doctoral thesis of Herbert Jäger, *Strafgesetzbuch und Rechtsgüterschutz bei Sittlichkeitsdelikten* (Penal law and protection of legal assets in offenses against good custom), 1957, and the report prepared by Ernst-Walter Hanack for the 47th congress of legal experts in Germany, *Empfiehl es sich, die Grenzen des Sexualstrafrechts neu zu bestimmen?* (Is it recommendable to set new limits in the law on sexual offenses?), 1968. The equivalent for Spain is found in the first part of the doctoral thesis of José Luis Díez Ripollés, *El derecho penal ante el sexo*, 1981 (Penal law in regard to sex). In both cases, the academic discourse expressed regulatory proposals that preceded and guided the amendments to the law: Tome iii of the Alternative Draft on the Penal Code (1968) in Germany, and the Proposed Draft on the New Penal Code (1983) in Spain. The great difference between one process and the other is that the 1995 Spanish penal code went much farther than the 1983 draft in the liberal reformulation of regulations.

[13] This formulation supposes a standard of prospective legitimization according to which the legitimacy of the punishment depends on how the conditions are met that justify using it as the adequate means to attain a valuable end. That is the usual case of liberal legitimizing discourse. A reader who rejects this conceptual matrix may substitute the language used by one that contains the structure of a standard of retrospective legitimization, i.e., that conceives the punishment as the right expression of a negative valuation of the criminal behavior.

[14] The Spanish penal codes of 1848 (articles 354, 355) and 1870 (articles 453, 454), the Prussian penal code of 1851 (144) and part of the 1871 penal code of the German empire (§§ 176, 177) shared these characteristics. Despite being from the Enlightenment, the Spanish penal code of 1822 also shares these features (articles 664 to 671). The most conclusive proof of the cultural force of the medieval regulatory model is to be found undoubtedly in France. The

French penal codification literally opted, radically, for suppressing the penal sanction of non-coercive sexual abuse. Following the penal code of October 6, 1791, the 1810 penal code merely sanctioned rape, qualifying it explicitly as an abuse “by violence against persons” and extending the rule to other offenses against decency (Articles 331, 332, aggravated if committed against a girl younger than 15). Despite this definition in the law, French jurisprudence did not hesitate to extend the concept of violence to non-coercive abuse and declare all sexual contact with impubescent minors to be violent by definition.

[15] Considering this explanation to be satisfactory depends on the degree with which the legislature can be deemed to be required to maintain a congruency between the grounds for a standard of punishment and the conditions under which that standard is to be enforced. This requirement can be enforced (1) by a judicial control of the assumptions for the validity of a rule of law, if that possibility exists, or (2) by proposed interpretations of the rule of law. In both cases, determining the degree of enforceability of the duty of congruency is a controversial issue.

[16] This is a strong version of the liberal theory that has the nature of a general principle of justice. It is usual for the weaker version of the theory to prevail in penal discourse, according to which the infringements of the social morals would not be socially harmful in a way specifically required to justify state coercion as a means of preventing the harm (the harm principle or the principle of exclusive protection of legal assets). Identifying said specific harmful way has always been controversial. It can be said that the consequences associated with one version or the other represent the distinction between a strong permission and a weak permission handled by the theory of norms. Historically, the acceptance of the weak permission (the weak version of the liberal theory) in legislative policy precedes recognition of the strong permission (the strong version of the liberal theory).

[17] This is an old argument. Thomas Aquinas uses it to explain the fact that the Ten Commandments do not thematize the intent to murder but do thematize the intent of adultery and of a thief: “Homicide is not desirable in itself, but is rather detestable because there is no reason of good in it. On the other hand, adultery does have a reason of good, that of delight. Theft also has a useful reason of good. Yet all good is desirable for itself. Therefore, the desire of thievery and of adultery had to be forbidden under special rules, but not that of homicide” (*Summa Theologica*, II-II, q. 122, a. 6).

[18] The principles limiting sexual criminal law derived from this moderated naturalism, under acceptance of the asymmetrical definition of sexual abuse, are quite obvious and can be summarized in the following ten points:

1. The most serious punishment assigned to bodily harm is the maximum limit on the punishment assigned to sexual abuse.
2. Coercive abuse by violence or serious threat is the most serious case of sexual abuse.
3. Non-coercive abuse must be treated differently, as a less serious case of sexual abuse.
4. Coercive abuse merely deserves a punishment equal to the most serious punishment for bodily harm when the action that one is forced to tolerate entails a danger to the reproductive autonomy of the victim.
5. The best legislative technique to sanction case (4) is by leaving it to a rule on comparison between the offense of sexual abuse—whether or not coercive—and an offense against

- reproductive autonomy configured as physical abuse separate from any sexual significance.
6. The age through which a minor's consent is irrelevant must be set so that it does not make the incipient sexual autonomy of a pubescent minor irrelevant. Recognizing his or her autonomy requires a differentiation from impubescent minors. The "Romeo and Juliet exemption" is not enough to adapt a regulation that does not make that distinction because recognizing the incipient autonomy of a pubescent minor is not compatible with that restriction of the possibilities of sexual company.
 7. In order for sexual contact with an impubescent minor to be equated to coercive sexual abuse, the contact must have been under coercion, if it makes sense given the capacity of the minor to form intent or, otherwise, have been committed by serious physical abuse of the minor other than sexual contact. Otherwise, it should merely be equated to non-coercive abuse.
 8. The sanction for exploitation requires substantiating taking advantage of a situation of need where the possible alternatives to sexual behavior are substantially reduced. The reduction attributable to the perpetrator is more conclusive proof of exploitation than one not attributable. Being a minor or a foreigner is not a condition that alone meets this requirement. Repeated sexual exploitation or sexual exploitation for commercial benefit is the main source of danger to the autonomy of the people practicing prostitution.
 9. Only the production of child pornography physically using minors can be legitimately considered to constitute a crime, under the same standards of punishment of the abuse of minors. The legitimacy of the penal sanction for commercialization of that pornography depends on whether the factual conditions are present that make it analogous to punishable pimping (number 8) as a source of danger to a minor's autonomy.
 10. There is no justification for punishing merely possession child pornography.