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ARTICLE

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The Concept of an "Act of a Sexual Nature" in Criminal Law

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Abstract
All jurisdictions assume a concept of an act of a sexual nature by regulating sex crimes. Until the sex revolution and feminist movements for equality in sexual relations, criminal law was mostly concerned with specific types of sexual acts, particularly non-marital sexual intercourse. With the paradigm shift of recent years, criminalization tends to embrace all acts of a sexual nature with another person without her valid consent. Whether the law contains a definition of a sexual act or not, borderline cases show that neither merely objective criteria nor purely subjective elements can serve as basis for the description of the conduct under prohibition. Our Article tries to overcome this deficit in the criminal law theory. Sexual acts should not be understood through the metaphor of a "picture," as German legal scholars believe, but with the metaphor of a script played out by an actor as sexual theorists put it.

Keywords: Sexual crimes; sexual act; criminal intent; sexual autonomy; sexual script theory

A. Introduction

> All definitions of "the sexual" known to me are either tautological, vague, or uninteresting. And yet, the concept of "the sexual" someone has, when he is speaking about sexuality, has a decisive relevance for his analysis and judgement on the constitution of sexual reality.[1]

The American case *State v. Kargar* deals with the conviction of the Afghan refugee Mohammad Kargar for gross sexual assault against his 18-month-old son. According to the Criminal Code of

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[1]Martin Dannecker, Das Drama der Sexualität 10 (1992) ("Alle mir bekannten Definitionen des Sexuellen sind entweder tautologisch, vage oder uninteressant. Und doch ist der Begriff, den sich einer, der über Sexualität spricht, vom Sexuellen macht, von entscheidender Bedeutung für seine Analyse und sein Urteil über die Beschaffenheit der sexuellen Wirklichkeit.").

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the state of Maine, an act of a sexual nature is defined, among other things, as "any act between two persons involving direct physical contact between the genitals of one and the mouth or anus of the other . . . ."[2]

Following Afghan tradition, Kargar had kissed his son's penis several times. This event was witnessed in his own house by guests, among other people by the daughter of an American neighbor of Kargar, who then brought the charge against him. The neighbor herself had already seen a photograph of Kargar before, on which he was also kissing his son's penis.

As the court investigations showed, Kargar himself had no doubt that the sexual abuse of children was a crime. He knew the Islamic prohibition according to which every sexual activity between an adult and a child can be punished by death. The Supreme Court of Maine accepted, however, Kargar's defense of his actions on the basis of his culture. According to the court, "Kargar's witnesses, all relatively recent emigrants from Afghanistan, testified that kissing a son's penis is common in Afghanistan, that it is done to show love for the child, and that it is the same whether the penis is kissed or entirely put into the mouth because there are no sexual feelings involved."[3]

This classical example of cultural defenses[4] is interesting because it shows the limits of legislation in matters of sexual criminal law. In our view, Kargar's kiss was not a criminal offense to be dismissed on the grounds of de minimis as the Supreme Court of Maine argued. Rather, the act was not of a sexual nature, and therefore it was not criminal in the first place. Independent of the question whether the Maine Criminal Code describes the purpose of sexual gratification as an element of sexual assault, the requirement that the actor had any intent related to sexuality through his performance is indeed a necessary condition in order to recognize his act as a sex crime. In reality, such an intent constitutes the type of action under prohibition itself. In the common law tradition, this particular state of mind is usually understood as a "specific intent" of the actor.[5] In the civil law tradition, the kind of motivation at stake is classified as a subjective element of the objective offense description (*subjektives Tatbestandsmerkmal*). In the following discussion, we shall refer to a "specific intent" of the actor, although we understand such state of mind as part of the offense description itself.

As a matter of fact, the arguments of the Supreme Court of Maine mentioned above point towards two components which exclude the sexual character of Kargar's kissing. Both of them are directly related to the concept of a sexual act itself. Objectively, the court recognizes that the case concerns Afghan tradition, according to which fatherly kisses on the son's penis are a common expression of parental love. Also, the feelings of the defendant are considered relevant as a subjective element of his action, namely because the oral contact with the genitals does not excite any "sexual feelings."

The ruling of the Supreme Court of Maine exceeds a superficial interpretation of the Maine Criminal Code, which apparently describes the relevant sexual act in a purely objective way —the oral contact with another person's genitals. The court's interest in the subjective aspect of the defendant's actions therefore counts to the defendant's favor because the court requires

[2]ME. STAT. tit. 17A, § 251 (1)(C) (2021) 'Sexual act' means: (1) Any act between 2 persons involving direct physical contact between the genitals of one and the mouth or anus of the other, or direct physical contact between the genitals of one and the genitals of the other; (2) Any act between a person and an animal being used by another person which act involves direct physical contact between the genitals of one and the mouth or anus of the other, or direct physical contact between the genitals of one and the genitals of the other; or (3) Any act involving direct physical contact between the genitals or anus of one and an instrument or device manipulated by another person when that act is done for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact.

[3]*State v. Kargar*, 679 A.2d 81, 83 (Me. 1996).

[4]For more details about *State v. Kargar* and similar cases as a problem of cultural defences, see Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829 (1999) and Alison Dundes Renteln, *The Use and Abuse of the Cultural Defense*, 20 CAN. J. L. & SOC'Y 47 (2005).

[5]Owen A. Neff, *Rape-Specific or General Intent Crime*, 15 WASH. & LEE L. REV. 128, 128 (1958).

additional criteria for holding someone guilty of sexual assault. Like the Maine Criminal Code, the Iowa Code[6] and the North Carolina General Statutes[7] also offer a detailed description of the sexual act under prohibition. Conversely, many jurisdictions do not contain a definition of a sexual act. Clear examples hereto are the Criminal Codes of Brazil,[8] Spain,[9] and Germany.[10] In Germany, § 184h of the German Criminal Code ("StGB") only limits the punishment to sexual acts "of a certain relevance."[11] In most countries, the law refers to particular kinds of sexual acts, such as penetration and touching, but only to the extent of determining the gravity of the offense. This feature is easy to see in the laws of Portugal[12] and the United Kingdom.[13] In some cases, the law defines the punishable conduct of a sexual crime by means of the intention to arouse or sexually satisfy the actor himself or a third person. So for example the Brazilian ban against sexual harassment[14] and the Austrian prohibition of sexual assault.[15]

In any case, the definition of the term "sexual act" is controversial. Sometimes, the relevant criterion is supposed to be the subjective perspective of the perpetrator,[16] sometimes the subjective perspective of the victim,[17] sometimes a subjective-objective approach,[18] or exclusively the objective aspect of the action.[19] In the past years, one can notice the general tendency towards a rather objective approach to the matter.[20]

In this Article, we defend the thesis that the evaluation of an act as a "sexual" act is determined not only by objective cultural standards, but also, at the same time, by the subjective intentions of the actor. However, we do not defend a purely subjective or even a subjective-objective approach

[6]*See* Iowa Code § 702.17 (2020).

[7]*See* N.C. Gen Stat § 14-27.20 (2019).

[8]*See* Código Penal [Criminal Code], arts. 213–218-C, de 7 de Dezembro de 1940, http://www.planalto.gov.br/CCIVIL_03/Decreto-Lei/Del2848.htm#art334 (Brazil).

[9]*See* Código Penal [Criminal Code], arts. 178–86, https://www.legislationline.org/download/id/6443/file/Spain_CC_am2013_en.pdf (Spain).

[10]*See* Sozialgesetzbuch [StGB] [Penal Code], §§ 176, 177, 183, 184i, https://www.gesetze-im-internet.de/sgb_9_2018/__176.html (Ger.).

[11]According to § 184h StGB, "[w]ithin the meaning of this statute, 1. 'sexual acts' are only those which are of some relevance to the protected legal interest in question, 2. 'sexual acts in the presence of a third person' are only those which are performed by a person other than the person observing them."

[12]*See* Código Penal [Criminal Code], arts. 163–67 https://www.verbojuridico.net/download/portuguesepenalcode.pdf (Portugal).

[13]*See* the Sexual Offences Act of 2003, sections 2(1)(a) and 3(1)(a), https://www.legislation.gov.uk/ukpga/2003/42/contents (Eng.).

[14]Art. 215-A of the Brazilian Criminal Code prohibits the practice of "a sexual act against a person without her consent in order to satisfy one's own or a third person's lust."

[15]Also § 205a, section 2, of the Austrian Criminal Code contains such kind of sexual intent by the prohibition of sexual assault: "[A]lso shall be punished anyone who induces a person in the way described in section 1 to engage in or allow sexual intercourse or a sexual act equivalent to intercourse with another person, or, to sexually arouse or satisfy themselves or a third person, induces that person to involuntarily perform a sexual act equivalent to intercourse on themselves."

[16]Edgard Magalhães Noronha, 3 Direito penal: parte especial 158 (2d ed. 1964). In this sense for example, BT-Drs. 18/9097, 29 (regarding § 184i StGB – "Sexuelle Belästigung").

[17]Javier Guardiola García, *Especiales elementos subjetivos del tipo den derecho penal: aproximación conceptual y contribución a su teoría general*, 6 Revista Aranzadi de derecho y proceso penal 39, 86–87 (2001); Fernando Molina Fernández, Antijuridicidad penal y sistema del delito 737 (2001). The element "harassing" in § 184i StGB seems to be based on such an assumption. Regarding this matter, see Thomas Fischer, Strafgesetzbuch: StGB mit Nebengesetzen, § 184i section 7 (67th ed. 2020).

[18]Presumably the predominant legal opinion in Germany. For a comparison, *see e.g.* Jörg Eisele, in Kommentar zum Strafgesetzbuch, § 184h section 6 (Adolf Schönke & Horst Schröder et al. eds., 30th ed. 2019) with further sources. *See also* Ramón Ragués i Vallès, *Los elementos subjetivos no escritos: ¿hacia su definitiva desaparición?*, *in* Estudios de Derecho Penal, Homenaje al profesor Santiago Mir Puig 826–28 (Silva Sánchez et al. eds., 2017).

[19]*See, e.g.*, Tatjana Hörnle, *in* 3 Münchener Kommentar zum Strafgesetzbuch (MüKo), § 184h § 3 (Wolfgang Joecks & Klaus Miebach eds., 3d ed. 2017); Damásio Evangelista de Jesus, 3 Direito penal: parte especial 131 (21st ed. 2013); Francisco Muñoz Conde, Derecho Penal: Parte Especial 207–10 (22d ed. 2019).

[20]Ragués i Vallès, *supra* note 18, at 815.

as commonly understood because we do not reduce the relevant criterion to the purpose of sexual gratification. Rather, the aim of this Article is to show that a sexual act is an act of communication. In other words, it is about the language of sexuality. Following this, an act of a sexual nature as a legal term must always be understood in the framework of an objective-subjective perspective—just like communication in a certain language depends on the partners in the conversation understanding the meaning of the words used. Following this, the legal definition of a "sexual act" conforms, to a large degree, with the general understanding of sexual behavior. However, it is not identical with that because for criminal law, not all sexual behavior is per se relevant, but only those acts that are defined by a certain offense type as a gross violation of another person's sexual autonomy.

B. Subjective and Objective Perspectives on the Definition of a Sexual Act

I. Objective Approaches

Putting together a concrete definition of the sexual meaning of an act is by no means easy, although its meaning in the individual case seems to be obvious. This explains the convenience of a solution based on the formula "I know it when I see it," as the American Supreme Court Justice Potter Stewart expressed with regard to the definition of pornography.[21] The large casuistry characterizing the common discussion on the definition of the "sexual act" in the criminal law context is, therefore, not surprising.

The most clear-cut solution seems to be provided by an exclusively objective perspective. According to this theory, the sexual meaning of an act should be determined by its "outward appearance" (*äußeres Erscheinungsbild*).[22] Following the premise of the objective theory, the "objective frame conditions from the perspective of the observer who perceives all details of the event" are the decisive criterion.[23] The issue with this explanation is, however, the fact that it determines neither the exact outward appearance of a sexual act nor the content of such objective frame conditions. Tatjana Hörnle, for instance, considers sensory perceptions to be the basic foundation for recognizing a sexual act. These include visual, but also acoustic, haptic, and olfactory perceptions.[24] Besides, some acts are considered obviously sexual, such as, for example, the vaginal or anal penetration by the penis or any other object.[25] The difficulties of an exclusively objective attempt at a solution become clear in the above-mentioned case of Kargar and his son: The image of the father's mouth on his child's penis indicates a sexual meaning and yet has no sexual meaning at all.

In addition, the objective approach has certain limitations in particular situations. These are the so-called "ambivalent actions." In such cases, the sexual connotation cannot be concluded with certainty from their outward appearance, as for instance, in the case of physical examinations or violent actions affecting the genital area. The classic textbook example, in which this controversy leads to difficulties, is the case of the gynecologist who allows himself to be aroused during a physical examination of his patient and exploits this for his sexual gratification. In debating this case,

[21]*See* Ulrike Lembke, *Sexualität und Recht: eine Einführung, in* Regulierung des Intimen, Sexualität und Recht im modernen Staat 13 (2017).

[22]Heinrich-Wilhelm Laufhütte & Ellen Roggenbuck, *in* 6 Leipziger Kommentar zum StGB, § 184g section 5 (Heinrich-Wilhelm Laufhütte el al. eds. 12th edition, 2009); Nora Scheidegger, Das Sexualstrafrecht der Schweiz Grundlagen und Reformbedarf 137 (2018).

[23]Scheidegger, *supra* note 22, at 7; On the same issue, see Jürgen Wolters, in 4 Systematischer Kommentar zum StGB (SK-StGB), § 184h section 3 (Mark Deiters et al. eds., 9th ed. 2017); Scheidegger, *supra* note 22, at 139.

[24]Hörnle, *supra* note 19, at § 184h section 2.

[25]*Id.* at 11; Nelson Hungria, 8 Comentários ao Código Penal, Arts. 197 at 249, 123 (5th ed. 1981); Ragués i Vallès, *supra* note 18, at 826; Scheidegger, *supra*, note 22, at 139. A similar opinion can be found in the jurisdiction of the International Criminal Court. *See* Alexander Schwarz, Das völkerrechtliche Sexualstrafrecht - Sexualisierte und geschlechtsbezogene Gewalt vor dem Internationalen Strafgerichtshof 281 (2019).

some scholars admit the impossibility of inferring the sexual meaning of the act exclusively from its external aspect and therefore argue that one should additionally take the doctor's sexual motivation into account in order to punish him. According to this partially subjective view, ambiguous courses of action could be considered sexual acts if the perpetrator acts with the intent to arouse or satisfy himself sexually.[26] However, the supporters of the objective theory oppose the punishment of the doctor in the case that he acts in accordance with the *lex artis*.[27] According to the objective perspective, the behavior of the physician can only be relevant for the criminal law if he or she gives an outward indication of his or her sexual experience during the examination. That would be the case, for example, by sexualized talk or moaning.[28]

II. Expansion of the Discussion through the Criminalization of Sexual Harassment

The criminalization of sexual harassment by means of touching rekindled an old discussion on whether actions, such as caressing an arm, have a sexual character. This could be the case, it is argued, if one person touches another with the intent of sexually arousing or satisfing herself. It is also argued that being touched in the arm could be criminally relevant if the victim feels sexually harassed by that.[29] In the 1950s, considering such touching of the arms as an act of a sexual nature was rejected in countries like Brazil and Italy not only because of the irrelevance of the act per se, but also because of the "abnormality" of the libido of the agent in such cases.[30] In the German criminal law of that time, the sexual nature of an act was also determined by the "healthy feeling" of a "normal" person, as opposed to the feelings of an "exaggeratedly prudish or an inured and lax person or group."[31]

Today in Germany, there is the proposal to evaluate less invasive bodily manipulation according to the criterion of "socially typical behavior" (*Sozialüblichkeit*). Especially regarding the sexual harassment ban, German scholars consider it important to objectively evaluate the sexual connotation of a physical contact and not to make the definition depend on the sexual intent of the person.[32] According to this view, one should not reach the false conclusion to criminalize a typical, everyday physical contact like the touching of an arm based on the contact seeker's sexual interest in the touched person. With this in mind, the final report of the German commission on the reform of sex crimes law emphasizes that "the sexual intention of the perpetrator" should not be relevant. Otherwise, every attempt at sexual intimacy through physical contact would be subject to punishment according to § 184i StGB. According to the commission's opinion, the mere

[26]*See* Fischer, *supra* note 17, at § 184h section 4a; Heger, *in* KOMMENTAR ZUM STRAFGESETZBUCH, § 184h section 2 (Karl Lackner & Kristian Kühl et al. eds., 29th ed. 2018); Eisele, *supra* note 18, at § 184h section 6; Orts Berenguer, *Delitos contra la libertad e indemnidad sexuales (I): agresiones sexuales, in* DERECHO PENAL: PARTE ESPECIAL 232 (José Luis González Cussac ed., 6th ed. 2019).

[27]Hörnle, *supra* note 19, at § 184h section 4; Laufhütte & Roggenbuck, *supra* note 22, at §184g section 6; Joachim Renzikowski, *Die böse Gesinnung macht die Tat. Zur aktuellen Debatte über die Kinderpornographie*, *in* EIN MENSCHENGERECHTES STRAFRECHT ALS LEBENSAUFGABE, FESTSCHRIFT FÜR WERNER BEULKE 524 (Christian Fahl et al. eds. 2015); Ragués i Vallès, *supra* note 18, at 822; SCHEIDEGGER, *supra* note 22, at 141.

[28]Hörnle, *supra* note 19, at § 184h section 5; Renzikowski, *supra,* note 27, at 524.

[29]*See* the discussion by Elisa Hoven & Thomas Weigend, *„Nein heißt Nein" - und viele Fragen offen. Zur Neugestaltung der Strafbarkeit sexueller Übergriffe*, 4 JURISTENZEITUNG (JZ) 182, 189 (2017); Fischer, *supra* note 17, at §184h section 7; FOREGGER/FABRIZY, KURZKOMMENTAR ZUM ÖSTERREICHISCHEN STGB, § 218 section 3 (11th ed. 2010).

[30]Hungria, *supra* note 25, at 123.

[31]Edmund Mezger, *in* 2 Leipziger Kommentar zum Strafgesetzbuch, vor §§173 section 2 (Ludwig Ebermayer et al. eds., 8th ed. 1958). The original passage states, "gesund Fühlenden, nicht das Gefühl des Einzelnen oder einzelner Kreise, insbesondere nicht das übertrieben prüde auf der einen oder das abgestumpft laxe Gefühl auf der anderen Seite."

[32]*See* Tatjana Hörnle, *Das Gesetz zur Verbesserung des Schutzes sexueller Selbstbestimmung,* 1 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStZ), 13, 20 (2017); Hoven & Weigend, *supra* note 29, at 189; critical Beatriz Corrêa Camargo, *Die Strafbarkeit der sexuellen Belästigung durch körperliche Berührung*, 3 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT (ZStW), 595, 611 (131st ed. 2019).

touching "with the aim of [having] a consensual sexual contact" should not be evaluated as sexually harassing conduct.[33]

However, the proposed criterion of social custom is problematic. According to the theory, physical contacts are to be considered socially customary if they occur out of the context of an intimate relationship.[34] But already, the starting point is somewhat confusing. Some people accept kisses on the cheek only from their sexual partners. In some cultures, however, a kiss is a common way of greeting. Manipulations of the naked body are common in medical examinations and therefore take place outside of intimate relationships as well.[35] In any case, it does not make sense to generally consider these types of physical contact and kisses as "non-sexual" just because they also occur during everyday social interaction.

In the end, the line between a socially customary and therefore non-sexual contact and a sexual one is drawn depending on the body part that is touched. According to authors such as Hörnle, Fischer, Noltenius, Hoven, and Weigend, contacts on the hand, arm, shoulders, leg, and foot, a slap on the clothed backside, kisses on the cheek, and embraces do not constitute sexual acts *a priori*, even if they sexually arouse the actor or if the recipient considers them to be transgressive.[36] However, if "moaning" and "sexualized talk" of the doctor during medical examinations can be relevant for the evaluation of the behavior as a sexual conduct, the same should also apply at least with regard to other kinds of physical contact.[37]

A degree of legal certainty is gained in legislations which, like the aforementioned Maine Criminal Code,[38] adopt a catalog of the relevant sexual acts, or like the Austrian sexual harassment prohibition which punishes especially the "intensive touch of a part of the body which is considered part of the sexual sphere." (§ 218 section 1a of the Austrian Criminal Code). However, it still remains doubtful in which way a line can be drawn using exclusively objective criteria.

III. Critique of the Subjective Approaches

Although the purely objective perspective runs into difficulties with borderline cases, the defense of objective criteria to define the sexual nature of an act is based on justified skepticism toward the previous subjective attempts at such a definition. Basically, the subjective approach is rejected with the argument that the sexual connotation of an action cannot depend on what happens inside the actor's head.[39] This argument recognizes primarily two problems.

On the one hand, the critics of the subjective perspective fear a too broad understanding of the term "sexual act" if the actor's motivation is taken into account. At first sight, this makes sense: To imagine sex with a person is different to having sex with her. As shown through the above mentioned textbook example of the gynecologist, the mere internal processes of a person must not be

[33] Bundesministerium der Justiz und für Verbraucherschutz (BMJV) (ed.), Abschlussbericht der Reformkommission zum Sexualstrafrecht 83, 309 (2017); for a corresponding proposition see Garonne Bezjak, *Reformüberlegungen für ein neues Sexualstrafrecht*, 2 ZStW, 303, 328 (130th ed. 2018). The complete final report of the commission for the reform of the laws regarding sexual crimes is available at: Bundesminister der Justiz und für Verbraucherschutz, *Abschlussbericht der Reformkommission zum Sexualstrafrecht*, http://www.bmjv.de/SharedDocs/Downloads/DE/Service/StudienUntersuchungenFachbuecher/Abschlussbericht_Reformkommission_Sexualstrafrecht.html (last visited Feb. 6, 2020).

[34] Hörnle, *supra* note 32, at 21; *see also* Noltenius, *in* 4 Systematischer Kommentar zum StGB (SK-StGB), § 184i section 5 (Mark Deiters et al. eds., 9th ed. 2017).

[35] Camargo, *supra* note 32, at 612.

[36] *See, e.g.*, Fischer, *supra* note 17, at § 184i section 5a; Hoven & Weigend, *supra* note 29, at 189; Hörnle, *supra* note 32, at 21; Noltenius, *supra* note 34, at § 184i section 5; more extensive, however Renzikowski *in* 3 Münchener Kommentar zum Strafgesetzbuch (MüKo), § 184i section 11 (Wolfgang Joecks& Klaus Miebach *eds.*, 3d ed. 2017).

[37] *See* Camargo, *supra* note 32, at 618.

[38] Me. Stat. tit. 17A, § 251 (1)(C) (2021).

[39] *See e.g.*, Hörnle, *supra*, note 32, at 21 (explaining that "the meaning of a touch" should "not be evaluated based on the actor's motives, but rather from an objective perspective."). Also in this sense, see Bezjak, *Der Straftatbestand des § 177 StGB (Sexuelle Nötigung; Vergewaltigung) im Fokus des Gesetzgebers*, 49 Kritische Justiz (KJ) 557, 568 (2016).

subjected to punishment.[40] This conclusion is particularly relevant for the punishment of child pornography. Pictures of children are not pornographic just because their owners intended to arouse themselves by taking a look at them.[41] A minimum of objectivity in the definition of a sexual act should avoid that the mere sexual preferences lead to a criminal charge.

On the other hand, critics complain that in certain cases, the subjective perspective does not go far enough, especially if one requires a specific "sexual intention", on the part of the actor, to arouse or sexually satisfy himself. In this sense, the jurisprudence of the former German Court of Justice (*Reichsgericht*) assumed that "the act itself needs to be internally pervaded by a libidinous intention of the perpetrator." With this subjective justification, in 1895 the court confirmed, for instance, the acquittal of a man who touched a nine-year-old girl's genitals under her clothes. According to the court, the acquittal was justified because it was not possible to evaluate if through his action, the defendant intended "to arouse or satisfy his sexual lust" or whether he was only joking.[42] A sexual intent of this kind was also promoted in the Brazilian literature for a long time.[43] In his commentary on the StGB, Edmund Mezger, on the basis of the older jurisprudence, was of the opinion that "acts meant as a joke, shameless beatings of the naked body with the undressing of the abused person out of rage, actions of superstition, curiosity, or even actions for diagnostic, therapeutic, or otherwise medicinal, scientific, or artistic purposes,"[44] should not count as sexual acts.

In short, if the sexual nature of an act can only be constituted by the intention of seeking sexual pleasure, many other courses of action would have to be excluded from the definition. However, there are courses of action that cannot be described as pursuits of sexual gratification, but are, or should be, recognized as sexual.[45] An especially drastic example is sexual violence in the context of armed conflicts. In international security matters, at the latest since the conflicts of Bosnia and Rwanda, the term "rape as a weapon of war"[46] expresses cases of violence perpetrated particularly against women and girls with the purpose "to humiliate, dominate, instil fear in, disperse, and/or forcibly relocate civilian members of a community or ethnic group."[47] These cases show that the recognition of an act as a violation of someone's sexual autonomy cannot depend on how the perpetrator feels or on whether his or her actions have other purposes as well, in addition to sexual gratification.

Nevertheless, there are good arguments in favor of a different understanding of the relevant intent to define an act of a sexual nature. As it will be discussed next, one should consider a definition that entails not only objective, but also subjective elements of the action under analysis. According to the objective-subjective perspective that we defend, the objective aspect of the action is a necessary, but not a sufficient condition for the evaluation of an act as being of a sexual nature. It also needs to be the case that the perpetrator himself or herself understands his or her conduct as having a sexual nature in the particular circumstances of his or her acting.

If this is correct, then the definition of a sexual crime by means of the purpose of sexual gratification of the actor is no other thing than a bad legislation technique. Such outcomes should rather be understood as a sign of the legislator's difficulty in finding a good definition of an act of "sexual nature" for the legislative scopes. Regarding this kind of problem, Binding already

[40]Laufhütte & Roggenbuck, *supra* note 22, at § 184g section 6; Renzikowski, *supra* note 27, at 524.

[41]Renzikowski, *supra*, note 27, at 524. To an opposite conclusion comes, however, in the case of a child licking a cucumber. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 16, 2011, NStZ, 2017, 570 (Ger.).

[42]Reichsgericht (RGSt) 28, 77–80. Sexual lust as a subjective element of action appears in the decision with two different meanings: the first, as the perpetrator's intent to satisfy himself, and the second, as the intention to sexually arouse the victim.

[43]Hungria, *supra* note 25, at 122. *See also* Oscar de Macedo Soares, Código penal da República dos Estados Unidos do Brasil 534 (7th ed. 1910).

[44]Mezger, *supra* note 31, at vor §§173 section 2.

[45]Hörnle, *supra* note 19, at § 184h section 7; Laufhütte & Roggenbuck, *supra* note 22, at § 184g section 7; Schwarz, *supra* note 25.

[46]Sabine Hirschauer, The Securitization of Rape, Women, War and Sexual Violence 2–4, 10 (2014).

[47]*See* S.C. Res. 1820 (June 19, 2008).

noted that "the legislator himself often does not know what he wants to prohibit, and therefore, binds the legal practice to the type of criminal intent, which he defined wrongly."[48] Such mistakes need to be avoided at latest by the law interpretation.

C. Sexual (Inter)action as Communication

I. Sexual Act as a "Natural" Action? From an Image-Based Towards a Scene-Based Understanding of Sexuality

As we have seen, an objective definition of a sexual act has to overcome two different limitations of the subjective theory. The first one is epistemic: How to recognize an act of a sexual nature. Here, there is a need for a more thorough clarification of the relations between general-objective and individual-subjective criteria for the qualification of a course of action as sexual. The second problem concerns the role sexual arousal or satisfaction can play in such a definition. This is not only relevant from an epistemic perspective, but also especially regarding the concrete protection of sexual autonomy.

Let us start with the idea that the sexual act is, in fact, an action. With this premise, the question that must be asked is which kind of action one is referring to when talking about sexual acts: Are they "natural" actions like, for example, the action of swimming, or does one need to make comparisons with other kinds of actions, like, for example, speaking a language? In fact, while both swimming and speaking actually imply that the agent follows rules,[49] human language only becomes possible by means of culture. John Searle explains this difference through the example of the football game: While a dog can perceive that people move on a field, only we humans can recognize that it is a game – and only those of us who know the rules of football can completely comprehend some course of action in the game.[50] To speak a language, it is not enough to utter words. Parrots do that, too. Foreigners do not understand an unknown language spontaneously by hearing native speakers talk.

Human sexuality is similar to language in this regard. The cultural and normative dimensions of the "sexual," however, often stay hidden. This is partly so because they are just trivial and partly because they are deeply rooted in the specific cultural, political, and economic orders of the societies.[51] Uncovering these hidden structures takes a large amount of social critique and self-reflection as demonstrated by the "critical sexual science" school in Germany since the 1970s.[52] Therefore, the relation between biological factors and processes of social learning in the explanation of sexual behavior is constantly controversial in sexual science, even if culture and biology do not have to be incompatible at an explanation attempt.[53]

This is the reason why some sexual scientists emphasize that the word "sexuality", which in the Western world, is about 200 years old,[54] does not refer to a specific thing in the world, but is rather

[48]Karl Binding, 2 Die Normen und ihre Übertretung – eine Untersuchung über die rechtmäßige Handlung und die Arten des Delikts 1139 (2d ed. 1916) ("... der Gesetzgeber öfter selbst nicht genau weiss, was er verbieten soll, und desshalb die Praxis auf den falsch von ihm bestimmten Deliktsvorsatz verpflichtet.").

[49]Joachim Hruschka, Strukturen der Zurechnung 12 (1976).

[50]John R. Searle, *What is an institution?,* 1 J. Inst'l Econ. 1, 3 (2005).

[51]*See e.g.*, the explanation of Pat Caplan, *Kulturen konstruieren Sexualitäten*, *in* Sexuelle Szenen: Inszenierungen von Geschlecht und Sexualität in modernen Gesellschaften 44 (Christiane Schmerl et al. eds., 2000).

[52]Christiane Schmerl, *Phallus in Wonderland. Bemerkungen über die kulturelle Konstruktion ‚Sex = Natur'*, *in* Sexuelle Szenen: Inszenierungen von Geschlecht und Sexualität in modernen Gesellschaften 147 (Christiane Schmerl et al. eds., 2000); Volkmar Sigusch, *Anfänge einer Sexualmedizin in Deutschland, ein persönlicher Rückblick,* 60 Bundesgesundheitsblatt, 932–36 (2017).

[53]On this issue briefly see, Volkmar Sigusch, Auf der Suche nach der sexuellen Freiheit: Über Sexualforschung und Politik, 42 (2011); Schmerl, *supra* note 52, at 147.

[54]Caplan, *supra* note 51, at 45; Martin Dannecker, *Sexualität als Gegenstand der Sexualforschung*, Zeitschrift für Sexualforschung, 282 (1991); *Brigitta Wrede*, Was ist Sexualität*?*, *in* Sexuelle Szenen: Inszenierungen von Geschlecht und Sexualität in modernen Gesellschaften 35 (Christiane Schmerl et al. eds., 2000); Volkmar Sigusch, Sexualitäten – eine kritische Theorie in 99 Fragmenten 33 (2013); Jasmin Khosravie & Rainer Banse, *Sexualität, in* Bonner Enzyklopädie der Globalität 289 (Lüdger Kühnhardt & Tilman Mayer eds., 2019).

used in numerous different contexts.[55] The idea that such a thing as "the" human sexuality really exists is in fact highly controversial. It would be more correct to speak of "sexualities" instead. A purely naturalistic understanding of human sexuality is not only wrong as an explanatory model, but it also covers up the power relations standing behind it and the influence of socialization and culture on sexual practices. The "birth" of sexuality in the modernity coincides with its terminological appropriation by several sciences and institutions, like, among others, the church and the medical science.[56] Sexuality was therefore reduced to reproduction. The only "healthy" sex was vaginal penetration; everything deviating from that was seen as unnatural. Morally correct was vaginal penetration solely for reproduction purposes inside the marriage. In the end, the disciplining of the body of workers served the profit logic of the early industrialization in the bourgeois society.[57]

But contrary to what was supposed in the 19th century, the adjective "sexual" cannot be translated into empirical vocabulary. There are no external attributes of an action which make it possible to always and without exception recognize it as "sexual" by its nature.[58] Sex is not a "natural" act like breathing or swimming.[59] For this reason, sexual acts cannot be unequivocally recognized by an "outward appearance." From a philosophical perspective, the idea is broadly accepted that identical body movements can indeed have different meanings and therefore count as different types of action. Manipulation of the genitals, for instance, is generally not an act of a sexual nature if it takes place in the context of a medical examination, but it will probably be if it takes place between a couple in the bedroom. As this example clarifies, the interpretation of a bodily movement as an action of a specific type demands embedding the behavior into a context of meaning, which itself is only possible by means of social conventions.[60] In both examples, social standards define, among other things, in which way a kind of touching is supposed to lead to sexual stimulation and which kind of physical contact is necessary for medical purposes. What is "sexual" about an action is therefore not only an attribute which needs to be described, but the attribution of a status valid in a cultural realm.

The attribution of a certain type of action to someone also depends on the interplay among situation, communication, and interaction with other persons. In the end, what is decisive are the reasons why one acts in a certain way.[61] As it is the case for any other social behavior, one behaves "sexually" according to her or his beliefs with regard to expectations of how one has to behave in a certain social role.[62] In the famous theory of *Sexual Scripts*, Simon and Gagnon propose the thesis that, just like the existence of a language is a precondition for speaking, human sexual behavior is only possible by means of a complex of predominant social paradigms.[63] According to the authors, such normative backgrounds, called "cultural scenarios," determine

[55]Wrede, *supra* note 54, at 34; Caplan, *supra* note 51, at 60.

[56]Khosravie & Rainer, *supra* note 54, at 289; SCHMERL, *supra* note 52, at 142.

[57]Wrede, *supra* note 54, at 35; Caplan, *supra* note 51, at 49; Dannecker, *supra* note 54, at 284.

[58]Marlene Stein-Hilbers, Stefanie Soine & Birgitta Wrede, *Einleitung: Sexualität, Identität und Begehren im Kontext kultureller Zweigeschlechtlichkeit, in* SEXUELLE SZENEN: INSZENIERUNGEN VON GESCHLECHT UND SEXUALITÄT IN MODERNEN GESELLSCHAFTEN 10 (Christiane Schmerl et al. eds., 2000); *see also* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 51 (1978).

[59]On the criticism of naturalism in the sexual science, see Leonore Tiefer, *Sex is Not A Natural Act*, ZEITSCHRIFT FÜR SEXUALFORSCHUNG 97, 37 (1994).

[60]Urs Kindhäuser, *Der Vorsatz als Zurechnungskriterium*, 96 ZStW 1, 8 (1984).

[61]On this issue, see Kindhäuser, *supra* note 60, at 8; Kindhäuser, *Zum strafrechtlichen Handlungsbegriff, in* STRAFRECHTSWISSENSCHAFT ALS ANALYSE UND KONSTRUKTION, FESTSCHRIFT FÜR INGEBORG PUPPE ZUM 70 GEBURTSTAG 43 (Hans-Ullrich Paeffgen et al. eds., 2011).

[62]SCHMERL, *supra* note 52, at 144.

[63]William Simon & John H. Gagnon, Sexual scripts, 22 SOCIETY 53, 53 (1984); Michael W. Wiederman, *Sexual Script Theory: Past, Present, and Future, in* HANDBOOK OF THE SOCIOLOGY OF SEXUALITIES 7 (John DeLamater & Rebecca F. Plante eds., 2015); more details on this issue Camargo, *supra* note 32, at 615.

> the appropriate objects, aims and desirable qualities of the relation between oneself and the others. They instruct as well about times, places, sequences of gestures and words as, almost the most important thing, about what the actor and the other (real or imagined) involved persons are supposed to feel.[64]

The metaphor of a sexual encounter as the creation of an "interpersonal script" by its actors emphasizes the modification of the learned paradigms in the concrete situation.[65] With the assistance of the standards of the relevant social scenarios, the actors enter in a complex action, whose carrying-out is mutually dependent on all the persons involved.[66] Interpersonal scripting therefore serves the simplification of a sexual encounter. Scripts reduce insecurity and legitimize the forms of interaction between the actors.[67] However, on an individual intra-psychical level, a sexual reaction will depend on the sequence of meanings of actions, body statures, objects, and gestures that a person values herself.[68] Therefore, so-called "intrapsychic scripts" contain wishes, fantasies, memories, and mental samples, which can form strategies for the carrying-out of interpersonal scripting.[69]

Following this theory, the idea of "typical social behavior" can be understood in different terms. The reference to the body part as a criterion for the attribution of the adjective "sexual" offers indeed an "image" for orientation. The use of this "image" alone is, however, arbitrary because the individual preferences of the persons, whose sexuality is being discussed, are not taken into account. Ultimately, the influence of social patterns on an individual's sexual needs and desires is only relative to her or his personal experiences, for example to her or his biography.[70] Therefore, it would be a narrow understanding of human sexuality to limit it to certain forms of contact and in particular to the touching of certain body areas because such an approach ignores the actual sexualities and hinders the punishment of a great variety of sexual abuse.[71]

Social conditions structure individual sexuality by defining rules for how, where, when, and towards whom sexual interests may be shown and experienced.[72] Empirical studies show that areas of touching established for social interaction do not only vary depending on the area of the body, but are also based on culture, gender, and the nature of the relationship among the persons involved. The types of physical contact that are common among daughters and mothers are different for example from those usually considered appropriate in the relationship between brothers and sisters.[73] Therefore, sexual actions cannot "exist in a vacuum," as Pat Caplan expresses it: "What people want and what they do, depends .. . in every society extensively on what they are recommended to want and are allowed to do. Therefore, it is clear that sexuality cannot flee its cultural connection."[74]

The question whether a certain form of touching has a sexual nature can thus only be answered by means of a reconstruction of the relevant cultural scenarios. But such an analysis would be incomplete without first acknowledging that the person concerned does indeed play a role in such

[64]William Simon & John H. Gagnon, *Wie funktionieren sexuelle Skripte?, in* Sexuelle Szenen: Inszenierungen von Geschlecht und Sexualität in modernen Gesellschaften 71 (Christiane Schmerl et al. eds., 2000).

[65]Simon & Gagnon, *supra* note 63, at 53; *See also* Schmerl, *supra* note 52, at 144.

[66]Simon & Gagnon, *supra* note 64, at 72.

[67]Simon & Gagnon, *supra* note 63, at 54.

[68]Simon & Gagnon, *supra* note 64, at 74, 85.

[69]Wiederman, *supra* note 63, at 8.

[70]*See* Wrede, *supra* note 54, at 30–32, 39.

[71]*See Id.* at 8.

[72]Wrede, *supra* note 54, at 40.

[73]Overall, the acceptance of physical contact is more restricted in areas with greater erogenous sensitivity. On this issue Julia Suvilehto, Enrico Glerean, Robin Dunbar, Ritta Hari, & Lari Nummenmaa, *Topography of social touching depends on emotional bonds between humans*, 112 Proceedings of the National Academy of Sciences 13811, 13811 (2015); Renzikowski, *supra* note 36, at § 184i section 9.

[74]Caplan, *supra* note 51, at 65.

a scenario. In this vein, a person's appropriation of sexual meaningfulness can be understood as a "performance" inside a scene. This explains why the recognition of a certain (inter)action as being of a sexual nature depends on general and objective criteria, but only to the extent that one takes into account the subjective perspective of the individual as well. In the words of Volkmar Sigusch:

> [A]lso in its social form, sexuality is only real individually, despite all factualization, mystification, norming. If sexuality was not as individual as it is general, we would be sexual machines, that would just execute automatically what is done in general, what the structure, the rules, the discourse, the code contain.[75]

In order to act sexually, the agent will ensure herself or himself of such paradigms and apply them in his or her way. The subjective aspect of the sexual act as an element of the criminal offense lies in the application and adaptation of such rules by the individual. These paradigms, as well as limits and social standards, exist in reality and are not just the products of the actor's own imagination.[76] This is also a reason why one should not easily take for granted a defendant's claim that she or he did not mean for a contact to have a sexual meaning.

II. Specific Intent by Sex Crimes and the Intention of Sexual Gratification

As we have argued, sexual acts are cultural constructs. Every culture contains uncountable factors by which a certain act is assigned with a sexual meaning: The place of action, the sort of behavior, the sequencing of gestures, the content and ways of speaking, but also the relationship between the actors as well as the kind of interaction among them, their age, and their gender. The assumption of an act as sexual under the existing paradigms can be confirmed or refuted with the actors' actual reasons for action.

At this stage, we would like to illustrate our point through the analysis of some cases. For this, we also need to return to the criticism of the traditional subjective theory, according to which the consideration of specific intents, on the one hand, does not go far enough while, on the other hand, it goes too far. In defending a communicative account of sexual acts, it is undeniable that a critical examination of the role played by the purposes of the actors is both necessary and legitimate. It should just not lead to the conclusion that the reasons which makes an action understandable in the first place could actually be irrelevant for its interpretation.

Let us, once more, take a look at the case of the Afghan refugee Kargar. Not only in the USA, but across many cultures, oral contact with the genitals is seen as a sexual practice. This fact justifies prima facie the preliminary assumption that the contact-seeker wants to engage in a sexual act. However, the circumstance that Kargar belongs to a cultural realm where the contact between the father's mouth and the son's penis is not considered sexual can refute this assumption. According to our communicative account, the kiss will not count as sexual if the circumstances and the manner of the contact conform to the cultural tradition of the cultural realm the people involved belong to. In this specific case, such conformity becomes particularly clear by the fact that Kargar let himself be photographed in this pose for the family album.

In Germany, the Oldenburg Higher Regional Court also had to decide a case about intimate contact between a parent and her child. A mother who was not breastfeeding any more allowed

[75]Volkmar Sigusch & Georg Neubauer, *Sexualität in der (Post-)Moderne*, *in* 25. Deutscher Soziologentag 1990. Die Modernisierung moderner Gesellschaften 758 (Wolfgang Glatzer ed., 1991) ("Auch als gesellschaftliche Form ist Sexualität nur individuell wirklich, trotz aller Versachlichung, Mystifikation, Normierung. Wäre die Sexualität nicht ebenso individuell wie allgemein, wären wir Sexualmaschinen, die nur das automatisch ausführten, was das Allgemeine, die Struktur, das System, die Regeln, der Diskurs, der Code vorsieht."),

[76]There is definitely a certain social standard for flirts or relationship behavior. Pinching random people's or workplace colleagues' backsides is definitely not a part of it. *See* Renzikowski, *supra* note 36, at § 184i section 9 with additional sources. *See also* Fischer, *supra* note 17, at § 184i section 9.

her six-year-old son to suck on her naked breast several times. In at least three cases, her nine-year-old niece watched this and immediately afterwards did the same. Before the court, the defendant made the statement that she allowed the behavior of the children out of love for them. In the end, the mother was acquitted of the charge of child sexual abuse, because in the court's view, the contact with the children was not sexual in its nature.[77] As a matter of fact, the children's pursuit of breastfeeding can be psychologically explained as a search for motherly security. This understanding of the case is supported by the fact that not the mother, but rather the children have initiated the contact. From the children's point of view, the kind of behavior was not of the type which is characteristic of "children´s sexuality."[78] In the age of seven or nine, children are not socially recognized as actors of a sexual interaction because they do not have the sexual scripts and meaning attributions for such acts as adults have.[79] That is a language they do not yet speak. All these circumstances give plausibility to the thesis that by the symbolism of breastfeeding, what was sought by the children, and in fact provided by the mother was actually a sense of emotional security within the family.[80]

Of course, the symbolism of breastfeeding can also come up in a sexual script among adults. An adult woman can use the resemblance of the then sexualized symbol with a child, sexually abusing the child in this way. However, in that case, one would need more elements for the recognition of a sexual connotation than the mere contact with the intimate parts of the mother with the child. In such situation, the breastfeeding would be just one fragment of the mother´s intrapsychic sexual scripting with her son. In the sexual abuse hypothesis, the woman's allowance for the child to suck her breast would be part of her seeking the same kind of bodily pleasure that she could have in a real interaction with an adult sexual partner, which could be possible if it fits her fantasies. In fact, in order to understand one contact type as sexual, the behavior should never be evaluated as isolated as a picture, but rather with other courses of action before, during, and after the bodily contact, as a wider scene. In this sense, the sustenance of sexual arousal by means of using someone else´s body or stimulus also constitutes the range of performances in a sexual scripting. The question, for the protection of sexual autonomy through criminal law, is how much of the sexual arousal performance actually needs to come out in the concrete situation in order to bind the other person in the actors own sexual experience, just as in the gynecologist's case as we will discuss later.

In Switzerland, for instance, the Federal Supreme Court convicted a woman for child sexual abuse of her seven-year-old boy because she allowed him to suck her breast. Differently to the German case, though, in the Swiss case, the mother also used to touch the boy´s penis during the breast suction.[81] In this variation, the mother's behavior indicates a contact performed for sexual gratification purposes. The latter can be inferred first, from the contact area, where someone is being touched, and, second, from the form of the physical contact itself, how someone is being touched. In addition, it is also very important to ask the question whether the parent has sought himself or herself the physical contact with the intimate parts or if there was a spontaneous

[77]Oberlandesgericht [OLG] [Higher Regional Court] Oldenburg, Dec. 12, 2009, Neue Zeitschrift für Strafrecht Rechtsprechungsreport (NStZ-RR) 240, 240 (Ger.).

[78]Christa Wanzeck-Sielert, *Sexualität im Kindesalter, in* Handbuch Selxualpädagogik und sexuelle Bildung, 355–363 (Renate-Berenike Schmidt & Uwe Sielert eds., 2008); Karla Etschenberg, Sexualerziehung: Kritisch Hinterfragt, 127–33 (2019); Uwe Sielert, Einführung in die Sexualpädagogik 97–117 (2015).

[79]From a Freudian theoretical perspective, the breastfeeding has a sexual nature for the baby itself. However, such a broad understanding of sexuality is not what counts for the constitution of a sex crime. On the subject, see Ilka Quindeau, *Die infantile Sexualität, in* Kindliche Sexualität 24–42 (Ilka Quindeau & Micha Brumlik eds., 2012); Gunter Schmidt, *Kindersexualität - Konturen eines dunklen Kontinents, in* Kindliche Sexualität 60–69. (Ilka Quindeau & Micha Brumlik eds., 2012).

[80]*See* Hörnle, *supra* note 19, at § 184h section 3; Renzikowski, *supra* note 27, at 524; Camargo, *supra* note 32, at 616.

[81]Bundesgericht, 6B_103/2011 vom June 6, 2011, https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F06-06-2011-6B_103-2011&lang=de&type=show_document&zoom=YES& (last visited Sept. 9, 2020). About the case, see Scheidegger, *supra* note 22, at 143.

request from the child. In such cases, the contact with intimate parts can be interpreted as sexual if there was no other reason to explain the behavior of the adult with the child.

An act of a sexual nature is performed, in other words, if a typical interaction between adults have been enacted by the parent with the child. The children then may be seeking affection, and the adults, sex.[82] In such situations, the persons involved are simply not speaking the same language.

According to the theory supported here, the consideration of the actor's intention has at first a decriminalizing effect in the cases mentioned. Instead of assuming the existence of a sexual contact in every contact by the parents with their children's genitals or by the children with the mother's breast, our account recognizes the performance of an act of a sexual nature only under two conditions. First, it needs to be a behavior that objectively fits or resembles a sexual practice. One can think here on the act of penetration with an anal suppository. Second, the behavior cannot be explained by other reasons for acting that counts as mere expression of care and love in their family. For example, one parent cares for the child by applying the anal suppository for health purposes, independently of how she or he particularly feels by doing so.

As a further example of a sexual act with children, one can imagine the case of a babysitter who often rubs medical ointment for a couple of minutes into a seven-year-old girl's vagina, although the girl's skin is not sore. That is done in secret and against the girl's will. In such a case, one needs to find another explanation for the babysitter's behavior because the ground for a health care is absent in the concrete situation. The ointment use is therefore obviously serving other purposes than healing. In our view, the sexual connotation derives from many features of the case. One point for consideration is the way and the duration of the contact with the intimate part of the child, which constitutes or at least evokes the stimulus of the clitoris. Using the ointment for this kind of stimulus is a strategy of hiding the sexual intent even from the child—probably for shame of her own sexuality or just for fear of the consequences. The particular motivation of the babysitter could be simply her own sexual gratification, but one can also imagine other kinds of psychological need for sexual staging with a child, as, for instance, an own unsolved past of sexual abuse.

This takes us to the first possible point of criticism against the thesis defended here. It is namely the idea that considering the actor's intention to sexually gratify himself or herself would lead to an unfeasible extension of the punishable cases. At this point, it becomes clear how important it actually is to distinguish between a sexual act in the legal sense as opposed to a sexual behavior in everyday understanding. Nobody would doubt seriously that gynecologists behave in a sexual way if they derive a special pleasure from the intimate examinations of their patients because they are aroused and sexually gratified by it. Should, however, the fact that physicians allow themselves to be aroused change the evaluation of the physical manipulations the physician performs during the examination? In conclusion, one could say no. If the physician experiences sexual arousal inwardly, the examination remains, at first, only an examination. The object of deception of the patient is not the nature of the act, which in this case, is in fact a part of the medical method. The physician instead deceives the patient about her or his personal attitude towards the patient's treatment. If, however, the physician's sexual experience becomes evident, for instance through sexualized talk, the physician is not performing an examination anymore. The physician then forces the patient into the role of a sexual object by touching the patient's body. The latter alone would constitute the case of a sexual contact relevant for criminal law purposes, particularly for the prohibition of non-consensual sexual acts such as the crimes of rape, sexual assault, and sexual harassment.[83]

[82] *See* DANNECKER, *supra* note 1, at 83; Volkmar Sigusch, *Sexualwissenschaftliche Thesen zur Missbrauchsdebatte, in* KINDLICHE SEXUALITÄT 211 (Ilka Quindeau & Micha Brumlik eds., 2012).

[83] Punishable in Germany under respectively § 177 section 1 and §184i StGB and in Brazil under respectively Art. 213 and 215-A of the Brazilian Criminal Code.

Nevertheless, the recognition of the individual pursuit of sexual pleasure as an element in the scenario of a performed sexual act does not mean that this kind of intention is the only possible case of a sexual intent. This distinction is important because it distinguishes the communicative approach from an exclusively subjective perspective in a crucial point. Unlike the subjective theory, the model proposed here is consistent with the existence of several purposes of action by the performance of sexual acts. As a consequence, the traditional criticism that the specific intent requirement is inappropriate does not apply to our approach because such criticism is based on the sole argument that many relevant cases of sexual abuse do not involve the intention of sexual gratification. The reduction of sexual intent to the pursuit of sexual gratification is the assumption of the traditional subjective theory, but not of our explanation model. In our view, any conscientious reference by the actor regarding the sexual connotation of his or her act constitutes the specific intent of a sexual act, regardless of the sexual gratification being one of the aims of his action or not being intentioned at all. But in any case, the recognition of one type of action as being an act of a sexual nature will depend on the motives of the actor for his course of action. It needs to have some relation to the individual sexuality of the persons involved, even if it is done for non-sexual purposes. The comprehension of such a specific intent of sexual nature shall be made clear in a last example.

In the Brazilian military dictatorship, certain torture practices on political prisoners were a part of the security guards' routine. This included especially the forced insertion of objects into men's anuses or women's vaginas, the feeling up of women's naked bodies, or the submission of men's or women's sexual organs to electric shocks.[84] As the victims' reports explain, sexual gratification was not the purpose of these acts. Following an exclusively objective approach, one could argue that nevertheless, such practices constitute recognized sexual violence because they involve penetration and the physical contact with genitals. However, a strike to a man's testicles, for instance, does not constitute an act of a sexual nature simply because there is a contact with the genitals of the victim. With particular regard to torture, it could be argued as well that the main point at stake is to cause physical pain, which is most effective on sensitive parts of the body, including penetration. Forced nudity does not necessarily have a sexual connotation because it can be imposed for very specific practical reasons, like the, surely humiliating, inspections that still goes on in many prisons in order to check the carrying of illegal objects. Therefore, the description of torture as being actions of a sexual nature is certainly not obvious. An explanation for such qualification was offered by the final report of the Brazilian National Commission of Truth. For that, one act is never considered in an isolated manner, but instead in regard to the sequences of gestures, acting before and after, reactions and expectations. So at least some resemblance with sexual interactions needs to be established and the particular motivation of the actor makes sense of such resemblance.

As the Commission correctly points out, the military agents' symbolic reference to the sexual domain distinguishes their acts as special forms of humiliation and submission of the victims. This particular effect also explains why sexual violence was a usual method of torture. Commonly, rapists use the social meaning of sexually intimate touching and penetration of their victims precisely by perverting that meaning against their victim's detriment.[85] In the basements of the military dictatorship, this was particularly the case against women. The women prisoners had their bodies subjected to the kind of exposition that they would only have allowed by sexual intimacy with their partners. By forcing them to such situations, the military officers could demonstrate the irrelevance of the prisoners' self-determination rights in an especially drastic manner. They were reduced to the status of objects to which they could literally do anything they pleased. While being

[84]*See* Comissão Nacional da Verdade - Brasil. 1 Relatório, Reports of the Brazilian National Truth Commission, parte 3, p. 400–35 (2014), http://cnv.memoriasreveladas.gov.br/images/documentos/Capitulo10/Capitulo%2010.pdf (last visited June 2, 2020).

[85]*See* John Gardner & Stephen Shute, *The wrongness of rape, in* 4 Oxford Essays in Jurisprudence 210 (Jeremy Horder ed. 2000).

forced to nudity, being penetrated, touched, or electroshocked in their genitals, verbal offenses by the military guards confined these women to spaces of female identity which counted as deeply immoral from the perspective of the sexual order of the time: They were called prostitutes, adulterers, and perverts.[86] Men, on the other hand, could be "feminized" by sexual penetration in a strongly sexist environment. Under these circumstances, men could also be rendered powerless by being forced to watch the rape and other kinds of sexual abuse of their partners and members of their political group. Often, the military guards "joked" during the torture by saying that the prisoners would become sexually inhibited by torture.[87] In acting like that the agents did not only knew that some body parts are socially related to sexuality, like the genitals, or some kinds of exposure, like nudity. Instead, they intentionally refer to this social attribution as a particular form of trauma and humiliation for their victims. The combination of stimuli for sexual arousal of the victims with painful aggressions at the same time is a strategy of changing the relationship of the victims with their own bodies, altering their identities. The body is no more a source of pleasure, but of pain. For the victims, sex is then permanently related to suffering.[88]

In short, we can conclude that, for criminal law purposes, a person performs an act of a sexual nature not simply by knowing that a certain gesture counts as a sexual practice in certain contexts, like in Kargar's case, but instead by actually wanting to make use of this meaning, possibly in order to satisfy herself or himself sexually with it, to especially humiliate another person, or even to dominate someone else. The approach we defend is also consistent with the definition of sexual crimes as crimes of violence and aggression.[89] The required specific "sexual intent" is therefore every intention that can explain the act as the deliberate use of a sexual pattern of behavior.

D. Conclusion and Final Remarks

According to the perspective proposed here, an act of a sexual nature is every action which, conforming to a certain cultural realm, belongs to the domain of sexual interactions and which is conscientiously performed by the actor because of such a meaning. The so-called "objective frame conditions" of sexual acts, as we conclude, are related to the societal paradigms which can be assigned to the sexual domain. Among other things, the conditions that allow someone to perform in a sexual manner refers to times, places, sequences of gestures, uttered words, expected feelings, and the person of the partner(s) and the kind of interaction or relationship between them. Reasons for the use of sexual symbolism is also varied and can include, for instance, the pursuit of sexual arousal and orgasm, joking at the expense of other people's sexuality, self-reassurance, reassurance of belonging to a group, subjugation of the members of another group, denial of another person's sexual self-determination, and humiliation. A person does not perform sexually if despite of the presence of circumstances that allow the inference of a sexual connotation other circumstances and actual reason of the person embed the action as well into a non-sexual context.

This Article attempted to bring the criminal law theory closer to contemporary studies on Western sexuality. For the criminal law, and especially for its scientific discourse, the world of the "old sexual morals" was much simpler. These, as Gunther Schmidt describes, were essentialist and focused on the prohibition of individual actions like homosexual contacts, non-marital sexual intercourse, masturbation, and oral intercourse. Today, a morality of consent applies. In this new order, it does not matter what is done with whom, but only the "manner by which" such practices

[86]Comissão Nacional da Verdade – Brasil, *supra* note 84, at 402.

[87]*Id.* at 402–404, 407.

[88]Rodríguez Grisales Natalia. *Cuerpo, sexualidad y violencia simbólica en la tortura sexual.* 54 Revista de Estudios Sociales 81 (2015).

[89]*See* Isabel Kratzer-Ceylan, Finalität, Widerstand, "Bescholtenheit". Zur Revision der Schlüsselbegriffe des § 177 StGB 38 (2015).

come into existence, in the sense that they must be the result of an agreement.[90] The morality of consent marks the paradigm shift in the recent reforms of sex crimes worldwide, away from a purely coercion-based towards a consent-based understanding of sexuality. Particularly in Europe, the Istanbul Convention of 2011 sets high standards in relation to criminalization of engaging in non-consensual acts of a sexual nature with another person. Partly as a result of this international politics, in countries like Portugal and Germany, the law now focuses on the reconstruction of the communication and the context of the sexual relation in the definition of sexual assault. It also extends punishment to more wider forms of sexual contact through the ban on sexual harassment.[91]

About the established sexual morals, Schmidt delineates a quick transition to the "late modern sexual relations" of today. It finds its origin at first in the discourse of sexual liberalization of the 1960s and 1970s, which was essentially directed against the religious tabooing of sexuality. Afterward, the self-determination discourse of the women's movement from the 1980s led to a democratization of sexual relations by questioning the basic sexist dominance of the patriarchy. Nowadays, one notes a de-dramatization of sexuality by the welfare imperative, which has made sexual relations more authentic, but also more "fluid."[92] Paradoxically, if now there is more space for a variety of sexual practices, nudity, and physical contact, at the same time, the individual's greater liberty of sexual self-determination also creates more space for non-sexual interactions.

The three waves that Western sexual morality has experienced and survived have contributed to expand the variety of actions and contexts to be considered by the criminal law, while, at the same time, have definitely made that variety more complex.

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[90]Gunther Schmidt, *Spätmoderne Sexualverhältnisse, in* Sexuelle Szenen: Inszenierungen von Geschlecht und Sexualität in modernen Gesellschaften 269 (Christiane Schmerl et al. eds., 2000).

[91]Hörnle, *supra* note 32, at 15; Fischer, *supra* note 17, at § 177 section 12; Pedro Caeiro & José Miguel Figueiredo, *Ainda dizem que as leis não andam: reflexões sobre o crime de importunação sexual em Portugal e em Macau*, 26 Revista Portuguesa de Ciência Criminal 233 (2016); Pedro Caeiro, *Observações sobre a projectada reforma do regime dos crimes sexuais e do crime de violência doméstica*, 29 Revista Portuguesa de Ciência Criminal 631 (2019).

[92]Schmidt, *supra* note 90, at 268, 271.

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