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Is a unified theory of sexual offenses conceivable? About *Criminalizing Sex: A Unified Liberal Theory*¹

In his latest book, *Criminalizing Sex* (2020), Stuart P. Green, professor of philosophy of law at Rutgers and author of *Lying, Cheating, and Stealing. A Moral Theory of White-Collar Crime* (2007²), develops a unified liberal theory of the criminalization of sexual offenses. The exercise he undertakes is not an easy one since, as he states, "*there is probably no area of criminal law that presents more controversial issues than sexual offenses*". Nevertheless, through the use of accessible language, rigorous reasoning and sometimes amusing and humorous examples, Green succeeds in offering both a state of the art of knowledge on the subject and in elaborating a legal system that allows for the advancement of thinking in the area of sexual offenses according to the liberal ethics of *harms* and *wrongs*. The author starts from the observation that in recent years, criminal legislation on sexual offenses has undergone profound transformations: it has generally become more repressive with regard to non-consensual relationships (rape, sexual assault, etc.) but also more flexible with regard to mutually consensual relationships (homosexuality, adultery, etc.). This apparent double movement invites the author to explore the conceptual and normative implications of these divergent tendencies, starting from the premise that an ideal liberal criminal justice system should only punish situations where a perpetrator would impose a non-consensual sexual relationship on another. Such a vision of law, which emphasizes individual autonomy while preventing harm to others, follows in the footsteps of those promoted by John Stuart Mill (*On Liberty*), Herbert L.A. Hart (*The Morality of the Criminal Law*), and Joel Feinberg (*The Moral Limits of the Criminal Law*, 4 vols.)³. It can be described as unified, in that it seeks to take into account all possible sexual offenses. *Criminalizing Sex* is therefore a stimulating read for several reasons. First, because the author (almost) always takes into account other moral perspectives (legal moralism, paternalism, sexual positivism, queer theory, feminist perspectives) alongside the one he is defending. Second, because it covers a very wide range of sexual offenses that are not always thought of together in legal philosophy or special criminal law. Finally, because the cases discussed echo the global news of the moment (#MeToo movement) and because they renew the way consent can be thought of. Finally, Green also covers sexual practices beyond the human gender, including interspecies sex, which echoes the rise of antispeciesism.

Formally, *Criminalizing Sex* consists of four parts. The first is a conceptual "toolkit" (Chapters 1-4) that defines what a sexual offense is, what distinguishes it from sexual conduct, how sexual autonomy relates to consent, and what a liberal conception of criminal law stands for. The second part, which is certainly the most extensive, examines non-

¹ Stuart P. GREEN, *Criminalizing sex: A unified liberal theory*, New York, Oxford University Press, 2020, 382 p.

² In French "Mentir, tricher et voler. Une théorie moral du crimes en col blanc". A review of the book was published in *Champ Pénal/ Penal Field*, Vol. X, 2013. Online: <https://doi.org/10.4000/champpenal.8464>

³ Feinberg (1985, 1989, 1990a, 1990b), Hart (2007), Mill (2002).

consensual and/or unwanted sexual relations. Green distinguishes four typical situations: the classic one where the sexual relationship is clearly non-consensual (*i.e.* rape); those where non-consent is presumed (because of an inability to consent or a subordinate relationship); those where the sexual relationship is unwanted (harassment); and finally those where the question arises according to another paradigm (exhibitionism and voyeurism). The third part of the book is dedicated to sexual relations where consent can be presumed (incest, sadomasochism/BDSM, prostitution or sex work). Finally, the last part questions the *a-consented* (a privative) sexual relations: bestiality and necrophilia.

According to Green, the issue of sexual offenses has been too little addressed in legal theory to date, which has focused on questions such as what is "normal," "natural," or legally "valid" in relation to sexuality. *Sexual offenses* have therefore rarely been defined in a comprehensive way. They can be either (1) directly sexual conduct (rape, assault), (2) conduct preparatory to the commission of a sexual offense (solicitation, seduction), or (3) conduct that violates another's right to sexual autonomy (indecent assault, sexual mutilation). According to this definition, an offense will be considered sexual if and only if sex plays a role in it. Therefore, stealing a sex toy or a box of Viagra would not fall into this category.

Second, the issue of consent is seen as central to the liberal approach. It allows for the consideration of penalization and is linked to the concept of *sexual autonomy*, which refers either to "the right to" or "the ability to" (positive autonomy) or to "the right not to engage in" or "not to be subjected to" sexual conduct. "(positive autonomy) or "the right not to engage in" or "not to be subjected to" sexual conduct (negative autonomy). In defining sexual autonomy in this way, Green includes asexuality as a right not to engage in sexual activity (cf. Gupta, 2015). However, as such, the law plays a minor role in sexual autonomy. Rather, it limits positive sexual autonomy, notably through "moral offenses" often inspired by religious precepts (prohibition of adultery, homosexuality, incest, sadomasochism, bestiality, necrophilia, etc.). An individual's sexual autonomy is violated when he or she is subjected to non-consensual sex or when he or she is prohibited from having mutually consensual sex. *Consent* can be expressed through speech, attitude or capacity. For this reason, a person who is comatose, drugged or severely mentally disabled is generally considered to be incapable of giving consent. In addition, consent can have different intensities (a small yes does not equal a definite yes). Finally, it requires two moral agents (p. 33). Thus, the question does not make sense regarding self-stimulation.

The study of non-consensual and/or unwanted sex occupies the bulk of the book. Green first examines the classic case of rape as a non-consensual penetrative sexual act (Ch. 5) depending on whether there is force, refusal, or lack of affirmed consent. Chapter 6 then explores rape by deception, *i.e.*, when sexual intercourse is obtained through fraudulent medical procedures, impersonation, or misrepresentation. Finally, Green explores the issue of forcible rape (Ch. 7). Typically, this is the case where A obtains sex from B by threatening him (or her) without resorting to physical violence (threat or promise of gratification in exchange, promotion, etc.). Situations like this were made visible at the turn of the 2020s by the #MeToo movement by highlighting and publicly denouncing forms of coercion of women by politicians, entrepreneurs, film directors, etc. This allows Green to discuss the exercise of coercion in sexual matters and to remind us that certain ways of doing things remain morally acceptable and legal (a romantic candlelit dinner, an intimate pillow talk) before "getting" sex. From this, two central issues arise regarding non-violent coercion rape: first, when should

coerced sex be considered non-consensual (p. 123)? Second, assuming that such an act is non-consensual, does this mean that it should be treated as a crime?

Second, Green examines various situations where non-consent is presumed. Either because there is an incapacity to consent, or because there is a minor child, or because there is a subordinate relationship. Chapter 8 explores the incapacity to consent depending on whether the victim is asleep, unconscious, in a persistent vegetative state, physically or mentally handicapped or drugged. He finds that virtually all jurisdictions make it a crime to have sex with a person who is incapable of consenting - regardless of whether there was a pre-existing relationship. Then, in Chapter 9, Green examines the issue of statutory rape, which first gained attention in the nineteenth century, particularly through the child welfare movements. He then observes that in the twenty-first century, statutory rape laws remain problematic in some respects in many jurisdictions. Part of the problem, according to him, is the singular way in which "statutory rape" is formulated by the law and interpreted. It is easy to understand that there is statutory rape in the case of a young child, but is it possible to set a reasonable age limit at which a minor would be capable of consenting? Following this question without a firm and definitive answer, Green explores date rape in Chapter 10. He then turns to unwanted sexual conduct (sexual harassment) and discusses the recent evolution of various laws in this area. Belgium, France, and Israel have a broad approach to sexual harassment, notably through the recognition of sexist offenses in the public space (p. 123).

The last part of the second part, entitled "risk-taking" (Ch. 12 and 13), explores voyeurism and exhibitionism. These two chapters provide a face-to-face look at conduct that is not often addressed by criminal sexual law. According to a study by Långström and Seto (2006), 7.7% of the Swedish population has been the victim of an "exhibitionist" or "voyeurist" incident. As for the perpetrators, 12% of voyeurs are said to be men and 4% are women. The same gender prevalence is observed for exhibitionism: 4% versus 2%. However, these behaviors are far from being limited to individuals suffering from psychological disorders. Many people enjoy seeing other people naked or engaged in sexual activity (which is why pornographic videos are popular on the Internet). Moreover, many people engage in practices that can be described as exhibitionist: diving naked into a lake, sunbathing, urinating at the foot of a tree. In sum, whether it is exhibitionism or voyeurism, the difference between norm and deviance is largely a matter of degree, intentionality and context. With respect to voyeurism as an offense, Green notes that: (1) most of the time, this conduct, especially as it appears on television or the Internet, appears to be consensual from the perspective of both the exhibitor and the exhibited; and (2) it is difficult to distinguish clearly between what appears to be morally acceptable and what is not. Moreover, the literature justifying why voyeurism should be punished is almost non-existent (even Feinberg is not very prolix on the issue). Perhaps one of the only valid justifications would be the right to privacy.

To voyeurism, we can therefore "oppose" exhibitionism (Ch. 13). This subject is highly complex because the negative right of a person (not to be exposed to the naked body of others) conflicts with the positive right (to engage in such exposure). Currently, there are laws that criminalize: (1) being naked or engaging in sexual activity in a public place (some states include women's breasts, but exclude men's); (2) displaying certain body parts or sexual acts in front of non-consenting observers while allowing it in front of consenting observers (live sex shows, swingers' clubs, nudist camps); and (3) certain motivations of the offender (while others ignore culpable intent). To this, Green articulates another interesting criterion for this offense (as with voyeurism): the lack of physical contact with the victim(s). There are a

number of arguments in favor of the legality of public nudity: its practitioners claim that naturism allows communion with nature, promotes good health, reduces or eliminates social barriers, etc. Some even argue that having a relationship with nature is a good way to protect oneself. Some even argue that having sex in the public space is a way to reconnect with humanity and expand one's erotic horizons. Finally, historically, laws against public nudity have often been directed at certain social groups and have served to entrench male domination over women. With the arguments for and against laid out, Green proposes to consider four factors in determining whether exhibitionism is a "good candidate" for criminalization (p. 234): 1° the conduct of the potential victim: did the victim consent to or assume the risk of witnessing the offender's conduct and being offended in the process? 2° Did the offender wish to shock, hurt, disgust? 3° Does his or her action have value for him or her or for society? 4° Did the offender have a serious alternative in terms of time and place to offend less? In distinguishing between direct and indirect offenses, Green suggests, following Feinberg, that in a liberal legal system, cases involving indirect offenses, and thus a form of legal moralism, should not be prosecuted. Only acts intended to shock, disgust or provoke should be prosecuted as they infringe on the sexual autonomy of witnesses (p. 239).

The third part of *Criminalizing Sex* explores relationships where consent is presumed: incest between consenting adults, S&M, and prostitution. Such behaviors have traditionally been prosecuted according to a moralistic logic. One may therefore ask whether such prohibitions are reconcilable with liberal principles? With regard to incest (Ch. 14), four main approaches coexist, depending on whether they penalize incest between adults and incest between an adult and a consenting minor, or only incestuous assault and rape of minors (Iceland). Strangely, Green does not explore in this chapter incest between consenting minors (which he admits to voluntarily leaving out without further explanation), nor homosexual or LGBT incest. With these limitations in mind, three rational justifications for criminalizing incest, according to Green, are: (1) that it may induce birth defects in the event of pregnancy; (2) that it disrupts established family roles and generates intrafamily conflict; and (3) that the presumption of consent is often illusory (especially when the incestuous relationship began when one of the partners was a minor). Nevertheless, penalizing incest also has the limitation of undermining the freedom to choose one's sexual partners freely.

Another challenge to the presumption of consent is sadomasochism (Ch. 15). SM can be defined as a practice of giving or receiving pleasure or gratification, usually sexual, by inflicting pain or subjecting another to some form of humiliation. BDSM (bondage, discipline, submission and domination) encompasses broader practices than SM and can also refer to the exercise of psychological pain. Finally, SM/BDSM assume a context of mutual consent. Although there is no specific offense against it, some commentators consider it to be a degrading practice, while others believe that it provides a different and fulfilling meaning to sexual activity. A *liberal view* considers that the right to inflict or be inflicted pain as a means of sexual pleasure should be seen as a central part of the bundle of rights to sexual autonomy. In contrast, a *legal moralist* view considers that the criminal law has a moral role to play beyond the mere prevention of harm to individuals (Devlin, 2009 [1965]): society as a whole can be harmed by SM practices. A *paternalistic* view also considers that the law has a protective role to play: it even has the right to protect individuals from themselves (Dworkin, 1972). In the case of S&M, the consent given should be considered invalid because no sane person would voluntarily allow another person to beat or burn him. In *contrast*, the

*sexpositivist*⁴ and *queer* views see S&M not as a harmful activity that we should tolerate in the name of liberal values, but rather as a positive practice that should be celebrated and promoted within society (p. 285). Finally, a *dominant feminist* view sees S&M as dehumanizing and profoundly wrong. According to Catherine McKinnon (1991: 142), "the relational dynamics of SM do not negate the paradigm of male dominance, but rather conform to it precisely ... »

A final and important aspect of the third part of the book is the issue of prostitution (Ch. 16). Until now, many countries have penalized both the sale and the purchase of sexual services. But nowadays, notably under the impetus of certain bangs of the contemporary feminist movement, several states (including Sweden, Finland, Norway, Canada and France) penalize only the purchase. Some others, including Germany and the Netherlands, have decriminalized the purchase and sale of this type of service (p. 295). In addition, depending on the legislation, prostitution is authorized in closed places (brothels) or on the sidewalk (United Kingdom). With regard to the way in which "sex work" is punished, there are three approaches. According to the "traditional" approach, prostitution is a crime or misdemeanor, as is engaging in or paying for prostitution. According to the "modern" approach, the law punishes the sale or purchase of "sexual activities", "sexual services" or "sexual contact". A third approach lists exactly what acts are prohibited. According to the Hawaii Supreme Court, prostitution can be defined as sexual conduct with another person such as sexual penetration or sexual contact or touching ... of sexual or intimate parts for compensation). According to this approach, lap-dancing or a massage with *happy-ending* would fall under prostitution. In cases that do not involve physical contact between seller and buyer or involve a third party, such as when a customer pays to see a striptease or self-masturbation, it is difficult to decide (p. 303). Similarly, when the seller has a relationship with someone other than the person paying (e.g., if the buyer wants to gratify a third party or because he or she is paying the seller to engage in a sexual relationship with a third party). In such situations it is not a question of pimping either, because the buyer does not profit directly from the contract. Taking this line of reasoning further, Green recognizes that it is customary to consider prostitution as involving sex for money. So are dinner invitations, gifts, or *sugar-dating* forms of prostitution? Some critics, including Nussbaum (2000), consider that there is no morally significant difference between ordinary prostitution and a marriage of convenience (p. 309). Finally, what about therapeutic sex (or sexual assistance) as depicted in Ben Lewin's (2012) film *The Sessions*? In France, these practices are considered an "unacceptable attack on the rights and dignity of human beings." In the end, five arguments can be made for banning prostitution: 1° to protect religious values or family integrity, 2° to protect the health of sex workers and clients, 3° to prevent violence against sex workers, 4° to prevent the commodification of sex workers who are mainly women, 5° to prevent the economic exploitation of sex workers.

The fourth and last part of the book raises the question of *a-consensual* sexuality. This refers to situations that are neither consensual nor can be described as non-consensual (typically bestiality and necrophilia). Bestiality refers to physical sexual contact between humans and animals. It is distinguished from zoophilia, which refers to the attraction experienced by human beings towards non-human animals (p. 328). Following Judaism, Christian ethics

⁴ Sexpositivism promotes "an attitude toward human sexuality that views all consensual sexual activity as fundamentally healthy and pleasurable, and that encourages sexual pleasure and experimentation". Source: https://fr.wikipedia.org/wiki/Mouvement_sexpositif.

considers bestiality an abomination. On a different note, some recent research points to "species dysphoria," a term that refers to people who consider themselves to have been mistakenly embodied in a human rather than an animal body (Earls and Lalumière, 2009). With regard to the laws on bestiality, a distinction is made between a traditional-moralistic approach of the bestiality = "crime against nature" type and the so-called modern ones (in force in Germany, Denmark, Sweden, etc.) which consider that it is a question of cruelty towards an animal. This raises the question of the moral status of animals, which is highly complex and depends on the ethics that underlie it (p. 334). One may consider that animal suffering and welfare must be factored into any utilitarian calculus (Singer and Rouselle, 2018), that some animals have moral rights (Regan, 2004), or (eco-feminist positioning) that animals have the right to be treated well (Adanls and Donovan, 1995) based on the argument that the ideological justification for women's alleged inferiority would have been made by equating them with animals. These approaches all seem to recognize that sentient organisms are worthy of some form of moral consideration. On this point, neither John Stuart Mill, nor H. L. A. Hart, nor even Joel Feinberg have asked whether nonhuman animals fall within the liberal principle of harms and wrongs. In this sense, the questions Green asks here and his proposed answers are inspiring. On the side of potential harms, the author observes, following Beirne (1997), that: (1) some animals, such as eels or chickens, are clearly unwilling to accept human sexual advances. They are afraid and the act of material penetration leads to physical damage or even death. 2° Other animals, including certain species of dogs, seem to appreciate this type of human attention. 3° Finally, some species, such as horses or cows, react rather indifferently. Does bestiality then constitute a form of unconscious sexuality? Some authors consider that animals cannot indeed consent to a sexual relationship with a human; others consider that they lack the mental skills to do so. This question remains complicated to determine because, for example, dogs (who are often victims of bestiality) can acquiesce to certain proposed activities (e.g., by wagging their tails) but can also signify their refusal (e.g., by sitting still). For Green, this *non-verbal consent* is not valid even if the animal shows enthusiasm! The subject is all the more complex if we admit that pets are castrated or sterilized without their consent. However, sexual mutilation is a sexual crime (even if it is only touched upon in the book). Knowing this, we can distinguish situations where a human forces an animal from those where he pretends to consider the animal as a consenting partner in a relationship involving feelings and mutual gratification (notably the zoophiles⁵ of the Zeta collective, p. 345). Is bestiality therefore an *a-consensual* offense? There are two opposing views. One accepts that such a relationship does not harm anyone (the zoophile argument); the other, defended by animal welfare advocates, considers that animals are akin to people who are severely mentally disturbed and therefore incapable of consent. According to Green, neither of these arguments holds water. An animal is not "disabled" and the zoophilic argument is similar to the pedophilic argument that sexual relations between adults and children can be mutually beneficial. So, is bestiality cruelty to animals⁶? Before attempting to answer this question, it is important to keep in mind that many practices that cause pain and suffering to animals are permitted: hunting, the slaughter of farm animals for food, scientific

⁵ <https://www.zeta-verein.de/en/animal-protection/bestiality-and-animal-welfare-a-contradiction/>

⁶ In France, Article 521-1 of the Penal Code, amended in 2006, states that "*the fact, publicly or not, of exercising serious abuse, or of a sexual nature, or of committing an act of cruelty towards a domestic animal, or tamed, or held in captivity, is punishable by two years imprisonment and a fine of 30,000 euros.* »

experiments, circuses and zoos, etc. In addition, animals can be castrated in a variety of ways. In addition, animals can be legally castrated, sterilized and inseminated. Green therefore believes that animal rights laws currently lack uniqueness in liberal democracies. In contrast, laws regarding corpses seem less equivocal. Necrophilia (Ch. 18), which refers to (1) a person who fantasizes about having sex with a corpse, or (2) has sex with the dead, or (3) kills his or her victim in order to have sex with him or her (Rosman and Resnick, 1989), does, however, push the harm principle to its limits, since it presupposes the existence of posthumous harm and raises the question of the *missing subject*. From a psychological point of view, the most common motive for necrophilia is the desire to possess a partner who does not resist or refuse sex. Necrophiliacs preferentially choose professions that bring them into contact with corpses (and are 92% male). Depending on the jurisdiction, necrophilia is punished because it is 1° equated with rape, 2° a "crime against nature", 3° "desecration" or 4° because the law prohibits sex with corpses. In a liberal system, there are three rational arguments for penalizing necrophilia (p. 354). For, 1° it causes harm or offense to third parties (parents or relatives of the deceased, or even society in general); 2° it causes harm to the deceased whose corpse is "abused"; 3° it may cause direct harm to the perpetrator: risk of disease or infection. Even if necrophilia is generally considered disgusting in that it touches on a taboo rooted in most of our societies, should it nevertheless be punished by law? According to Epicurus, neither death itself nor what happens after death can harm the dead because they do not suffer. According to this view, a corpse is therefore an inanimate object; it cannot therefore constitute an "other" (p. 357). However, according to Pitcher(1984), it can also be argued that an individual's biographical life is longer than his physical life. Therefore, we all have interests that extend beyond our death that could be harmed *postmortem*. One might therefore consider that necrophilia should be a punishable offense, but less severely than rape according to Green. However, there may be exceptions. Suppose a person indicates in his last will and testament his wish to be used sexually after his death. According to the author, such a situation could be likened to a situation where a conscious person gives consent for sexual intercourse before falling asleep or being drugged. The Canadian Supreme Court (2011), however, sees this as an obstacle, since the person could not, at any point in the act, say stop. But for Green, this irrevocable consent can be considered valid, as odd as it may seem at first glance (p. 360).

In conclusion, *Criminalizing Sex* is a particularly challenging book. First, because it addresses issues that Green's predecessors had neglected, including the sexual rights of animals. Second, because in less than 400 pages (which are easy to read) it proposes a unified system of reasoning (liberal in this case) while being attentive to other ethics. Finally, because it points out certain moral limits in sexual matters in democracies claiming to be liberal. Despite these many qualities, the book could have been even more accomplished if it had, for example, addressed the question of circumcision in non-consensual sexual practices (debated in Iceland in 2018), that of incest between minors and between persons of the same sex, or even deepened the reflection on the moral limits posed by the penalization of sexual services that are nevertheless legally marketable. A final regret might be the absence of a conclusion supporting the whole theoretical system deployed throughout the book. Nevertheless, by discussing, at each turn, the divergent approaches and the arguments justifying the point of view defended by the advocates of legal liberalism, Green masterfully extends the reflection initiated by Feinberg and his predecessors, which can be summarized as follows: in a liberal democracy, consensual sexual relations should be legal.

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