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Protecting Argentina:
Lawmaking, Children and Sexual Crimes in Buenos Aires, 1853-1921

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Protecting Argentina:
Lawmaking, Children and Sexual Crimes in Buenos Aires, 1853-1921

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Dedication

For my man,

whose perpetual calm perfectly balances my mania.

And for my grandpa, Harves Rahe,

who unwittingly set my path in 1932, when he started his academic journey in Terre Haute, Indiana. His achievements are a source of inspiration.

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Abstract

Protecting Argentina:
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"Protecting Argentina" explores how the definitions of sexual crimes (rape, seduction, abduction and the corruption of minors) changed in Argentine penal law during the process of congressional codification between 1853 and 1921. It contextualizes an in-depth analysis of legal definitions within the legislative process and the shifting ideologies of criminology that influenced it. It argues that, as nineteenth-century positivist criminology replaced Enlightenment-inspired "Classical" criminology, the meaning and foundational presupposition of these crimes shifted from those of their colonial predecessors. Where in colonial times "Acts of Lechery" were criminal when committed against chaste women, in the republican era, the law punished "Crimes against Honesty" when the victims were children. Liberal lawmakers defined these sexual acts

primarily by the age of the victim and secondarily by the violence used in their perpetration. The year 1903 was a watershed in this process, as it marked Positivism's displacement of "Classical" criminology as the guiding ideology of criminal law.

These conclusions suggest there were substantive correlations between elite campaigns to ensure the future of the nation by saving children and the codification of national criminal law undertaken by Congress. As argentine elites began to witness what they perceived to be the negative effects of modernization, rapid population growth, industrialization and the accompanying increase in crime, they sought to ensure the future of the nation through "child saving" campaigns. The increasingly age-based definitions of sexual crimes, which aimed to protect young victims, fit within the broader state-led campaign to protect future citizens. "Protecting Argentina" therefore suggests that historians should consider legislative processes of state building as forming an integral part of turn-of-the-century nationalist projects in Latin America. Tying together positivist penology, nationalist discourse, and congressional codification, this report places children at the center of Argentine elites' attempts to ensure the future of the nation through the protection of children.

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Introduction

In 1890, Argentine jurist, Rodolfo Rivarola, mused over whether a man who raped a married woman should receive the same punishment as one who raped a girl younger than twelve. He concluded that since "infancy always merits the greatest respect, whatever its condition," a crime committed against young females was more deleterious and therefore required greater censure. He also asserted that by "general rule," a woman older than fifteen knew how to protect her own honesty, if she was truly honest, and that there was no case in which a minor under twelve could "be assumed to consent" to sex.[1]

Rivarola's philosophizing over female consent, youth and deviant sexual behavior in his three-volume critique of the Argentina's first penal code exemplifies three parallel movements occurring in late-nineteenth and early-twentieth-century Argentina. First, it highlights the seventy-year-long congressional process of drafting national penal legislation. Second, it marks the start of the increasing influence of Positivism, the new "scientific" approach to criminality and punishment, on criminal law in Argentina. Third, it sheds light on an understudied legal aspect of nationalist projects, which sought to ensure the security of the nation state through the protection of children. Underlying all three of these trends were changing assumptions about childhood, adulthood, and appropriate social gender norms. As elites and lawmakers codified penal law, they

[1] Rodolfo Rivarola, *Exposición y crítica del código penal de la República Argentina*, Tomo Segundo (Buenos Aires: Félix Lajouane, editor, 1890), 140 and 162.

simultaneously molded new cultural understandings of children, their sexuality, and their place in society.

During the second half of the nineteenth century, elites in Argentina attempted to systematize and rationalize law as a basis for the new nation state. A national penal code was an essential component of this movement. While Congress produced a civil code with little debate in 1871, the process of criminal codification was tortuous and prolonged. Between the Constitution of 1853, which mandated the drafting of national codes, and the official penal code sanctioned on September 30, 1921, such legislation underwent constant congressional review. In the introduction to an exposition of the 1921 code, its author, Rodolfo Moreno, commented, "we have lived within a provisional regime until now."[2] While Congress continued to change the law after the 1920s, the seventy years between the Constitution of 1853 and the code of 1921 mark the period of systematizing law as a basis for the nation.

Codifying penal law was a perplexing, difficult process. Two commentaries by jurist and Argentine president, Manuel Quintana, made nearly fifty years apart, capture its problematic nature. Quintana lamented the state of the law for the first time in 1859:

> Absolutely inapplicable in their majority, our penal laws often sanction barbarous punishments, ridiculous and almost immoral, that, putting the magistrate between the extremes of duty and conscience, cause the administration of criminal justice to unfold in our sight as a scene faithful only to arbitrariness and uncertainty.[3]

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[2] Rodolfo Moreno, *La ley penal Argentina, estudio crítico* (La Plata: Editores, Sesé y Carrañaga, 1903), xiii.

[3] Manuel Quintana, "Necesidad de un nuevo código criminal," in *El Floro*, Revista de Legislación y Jurisprudencia (Buenos Aires: 1859), 254, quoted in Abelardo Levaggi, *Historia del derecho penal argentino* (Buenos Aires: Editorial Emilio Perrot, 1978), 182.

Complaints like this one were common among liberal elites at mid century. Little had changed fifty years later. In 1904, as newly elected President, Quintana once again bemoaned the condition of criminal legislation in Argentina. This time he criticized the multiplicity of "loose and incoherent" laws, which "after frequent general or partial reforms, [had] not managed to satisfy the unanimous desires of an equitable, equilibrated and concordant justice." Such plurality caused a "grave disturbance…to the good administration of justice," and made "ever more difficult the exercise and enjoyment of the civil condition assured by the constitution for all inhabitants of the republic."[4] A plurality of laws and arbitrary justice were among a multitude of issues that hampered legal codification.

Shifting ideas of penology and criminology were also partially responsible for the perplexing nature of the legislative process. In the latter half of the century, liberals who adhered to eighteenth-century Enlightenment philosophy that regarded free will as the wellspring of all human action, clashed with those influenced by Positivism, who believed that innate proclivities and environmental factors lay behind criminal behavior. These two groups disagreed over the causes of crime and the best way to punish socially deviant behavior. When the provinces of Río de la Plata united into modern day Argentine in the 1850s, liberalism had emerged as the dominant political ideology. Philosophical ideas from the Enlightenment such as equality, individual rights and free will influenced the drafting of the first penal code in 1887. In the final quarter of the

[4] *Decreto del Poder Ejecutivo nombrando una comisión encargada de proyectar diversas reformas legislativas*, Buenos Aires, Diciember 19 de 1904, reprinted in *Proyecto de código penal para la República Argentina redactado por la Comisión de Reformas Legislativas constituida por decreto del Poder Ejecutivo de fecha 19 de diciembre de 1904* (Buenos Aires: Tipografía de la Cárcel de Encausados, 1906), vii-ix.

nineteenth century, the positivist philosophy of Auguste Comte, based upon the scientific study of man, began to appear in the political, medical and legal discourses of Argentine elites. Rodolfo Rivarola's 1890 critique marks the beginning of Positivism's increasing influence on the process of congressional codification. The Reform Law of 1903, which legally changed the 1887 code for the first time, inaugurated Positivism as the reigning philosophy of Argentine criminal law.

Positivism not only influenced the legislative process. At the turn of the twentieth century, it also played an increasingly important role throughout Latin America in elite attempts to protect nations against the negative effects of European immigration, industrialization, and rapid urban growth.[5] In order to combat threats to the future of Latin American nation states, governments attempted to protect their populations by "saving" poor, abandoned youth.[6] Through health and education campaigns that aimed to lower infant mortality rates, educate children, and remove parentless boys and girls from city streets, elites sought to civilize and defend society from disorder and immorality.

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[5] Positivism was closely linked to Social Darwinism, also *en mode* in Europe at the turn of the twentieth century. Social Darwinism refers to Herbert Spencer's application of Charles Darwin's theories to society. He linked biology to the idea of progress, arguing that human societies develop according to the same rules of differentiation and organization as living organisms. Just as the animal world struggled for existence, so too did "social organisms." Policy makers and politicians throughout Latin America used Spencer's theories to justify social policies that discriminated against different groups based upon race, ethnicity and gender. While Social Darwinism played a significant role in elite projects to save children as future citizens of the nation, it was less influential in the lawmaking process. The drafters of the penal code were more influenced by the advances in "scientific" criminology of the Italian positivist, Cesare Lombroso.

[6] Studies on this movement in various Latin American countries demonstrate the relative ubiquity of late nineteenth-century nationalist movements. For the "Child Saving Movement" in Brazil see Irene Rizzini, "The Child-Saving Movement in Brazil: Ideology in the Late Nineteenth and Early Twentieth Centuries," For hygiene campaigns in Argentina see Sandra Carreras, " 'Hay que salvar en la cuna el porvenir de la patria en peligro…': Infancia y cuestión social en Argentina (1870-1920)," in Barbara Potthast and Sandra Carreras editors, *Entre la familia, la sociedad y el estado* (Biblioteca Ibero-Américana, 2005), 143-172; for the rest of Latin America, see Donna Guy, "The State, the Family and Marginal Children in Latin America."

Paradoxically, positivist ideology, which construed poor children as especially susceptible to corruption due to innate proclivities and harmful environments, often resulted in the criminalization and incarceration of juveniles. "Morally abandoned" by their parents, the state viewed these youth simultaneously as helpless victims and as pernicious threats to the social good.[7]

While most child-focused nationalist campaigns unfolded in the social arena, Rodolfo Rivarola's critique highlights another side of these projects. Instead of state criminalization of young urban inhabitants, it reveals how elites and lawmakers tried to protect youth through penal law. As Rivarola's commentary on young girls' sexuality suggests, the romanticization of infancy, the sanctity of youth, and the need to protect children from corruption indirectly influenced how lawmakers defined crimes and punishments.

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This Master's Report explores the link between these late-nineteenth-century trends—the process of congressional codification and nationalist campaigns to protect children. It highlights as their common ground, the positivist philosophy underlying both. In an examination of nine pieces of Argentine penal legislation, including plans presented to Congress, official codes and critiques of the law, it traces what historian Osvaldo Barreneche called the "legal architecture" of sexual crimes.[8] These acts, which comprised

[7] "Moral abandonment" is a late-nineteenth century French legal term used to refer to children whose parents were believed to have abandoned them. It was often used for children not at home or in school.

[8] "Legal architecture" refers to the abstract framework of the legal system. Barreneche juxtaposes this idea to the penal system, which includes the way local authorities interpreted laws, and how courts functioned.

the section of the penal code entitled "Crimes against Honesty" (*Crimenes contra la honestidad*), included *violación* (rape), *estupro* (seduction), *rapto* (abduction) and the corruption or prostitution of minors. It asks how elites and lawmakers defined these criminal actions and how their views changed between 1853 and 1921. In the process of codification, 1903 proved to be a watershed year in which Positivism replaced enlightened Liberalism as the reigning philosophy of criminal law.

To balance broad trends of codification and ideology with an in-depth analysis of legislation, this paper divides into two chapters. The first sets the scene of nineteenth-century congressional codification. It links the story of the legislative process between 1853 and 1921 to the shifting ideological roots of penology and criminology that influenced it. After establishing the physical and theoretical context in which lawmaking unfolded, the second chapter explores shifting legal definitions of sexual crimes. It explains how fundamental Spanish codes from the colonial period, namely the *Siete Partidas*, defined these acts and then traces their development through the constantly shifting laws of the second half of the nineteenth century. This Report argues that in the republican period, popular perception of these crimes underwent a fundamental change in meaning from their colonial predecessors—they shifted from a focus on the virginal innocence of the victim to her young age. While in colonial law the assumed chastity of the victims made these acts criminal, in the republican period the victim's young age replaced moral character as the underlying variable that defined the crime. Republican

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See Osvaldo Barreneche, *Crime and the Administration of Justice in Buenos Aires, 1785-1853* (Lincoln: University of Nebraska Press, 2006), introduction.

law predicated sexual crimes primarily upon the youth of the victim, and secondarily upon the violent nature of the act.

This conclusion suggests there were substantive correlations between elite campaigns to ensure the future of the nation by saving children and the codification of national criminal law undertaken by Congress. It reveals the imperative to consider legislative processes of state building as forming an integral part of turn-of-the-century nationalist projects in Latin America. Tying together positivist penology, nationalist discourse, and congressional codification, this paper places children at the center of Argentine elites' attempts to ensure the future of the nation through the protection of children.

Historiography

An analysis of changing definitions of sexual crimes in Argentine penal law reveals the intersection of positivist ideas, children and the nationalism in turn-of-the-century Latin America. It speaks directly to three historiographical fields. First, it contributes to the investigation of the role of the law in Argentine state building projects. Second, it builds upon studies of how Positivism influenced state-led nationalist campaigns throughout Latin America. Finally, it dialogues with a small, yet growing historiography of children and crime in Latin America.

In contrast to the amazingly rich historiography of legal institutions in the colonial period, analysis of how law legitimates power in modern Latin American nation states remains underdeveloped. This is due, in part, to a lack of understanding of the process of

congressional codification that occurred in the second half of the nineteenth century. It is also the result of the types of scholars interested in the law and their reasons for studying the formation of legal institutions. It has been lawyers and students of law, rather than historians, who have analyzed legal development in Argentina in a significant way. Included among these are Carlos Fontán Balestra, whose treatise, *Derecho Penal*, is an exhaustive study of the nuances of criminal law, and Abelardo Levaggi who has written extensively on the process of codification.[9] However, these scholars' interests lie in the state of legal institutions today, not in the role of the law in historical processes.

In contrast to legal scholars, social historians have investigated the cultural and social implications of the law in history without studying how legal definitions developed and changed over time. In the 1980s, historians began to investigate the law as a site of conflictive negotiation between states and social groups, focusing on courts and criminal justice systems.[10] For Argentina, Osvaldo Barreneche conducted a pioneering attempt to illuminate the "architecture," or abstract framework, of the legal system in Buenos Aires in the half-century after the region's independence from Spain.[11] He highlighted the

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[9] Carlos Fontán Balestra, *Derecho Penal* (Buenos Aires: Abeledo Perrot, 1974); and Levaggi, *Historia del derecho penal argentino*.

[10] This study often went hand in hand with illuminating the cultural and social construction of crime, and contested meanings of punishment. See Ricardo Salvatore, Carlos Aguirre and Joseph Gilbert, editors, *Crime and Punishment in Latin America: Law and Society since Late Colonial Times* (Durham: Duke University Press, 2001), and Carlos Aguirre and Robert Buffington, editors, *Reconstructing Criminality in Latin America* (Wilmington: Del Scholarly Resources, 2000).

[11] Barreneche, *Crime and the Administration of Justice in Buenos Aires*. For more on continuity between the colonial and republican periods, see Eduardo Zimmerman, editor, *Judicial Institutions in Nineteenth-Century Latin America* (London: Institute of Latin American Studies, 1999). For the role of the judiciary in establishing federal power in the provinces, Zimmerman, "El poder judicial, la construcción del estado, y el federalismo: Argentina, 1860-1880" in Eduardo Posada-Carbó, editor, *In Search of a New Order: Essays on the Politics and Society of Nineteenth-Century Latin America* (London: Institute of Latin American Studies, 1998), 131-52; and Juan Carlos Garavaglia, "La justicia rural de Buenos Aires durante la primera

continuity between the colonial and republican eras, arguing that adaptation of colonial state forms occurred simultaneously with institutional experimentation. Although no singular criminological discourse emerged in the first half of the nineteenth century, the ideas that percolated in elite circles in the 1820s and 1830s formed the basis for the process of codification that began in 1852. While Barreneche's work illuminated the circulation of ideas in the first half of the century, it did not explore the process of codification that began after the 1850s.

Historians who focus on the second half of the nineteenth century have investigated the influence of Positivism on nationalist projects beginning after 1880.[12] These studies illuminate state efforts to ensure the propagation of nations through their increasing interference in society.[13] Some scholars have shown how positivist penology and new discourses about crime and punishment influenced state attempts to curb criminal activity through increased social control, the scientific study of delinquents, and prison reform.[14] This historiography has greatly increased understanding of how

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mitad del siglo XIX" in *Poder, conflicto y relaciones sociales: El Río de la Plata, siglos XVIII-XIX* (Buenos Aires: Ediciones Homo Sapiens, 1999).

[12] Argentine historiography tends to focus either on the first half of the century to the 1850s or 1860s, or it picks up with the federalization of Buenos Aires, and the beginning of the nation's "golden era," in 1880. The final project, of which this paper is part, will attempt to illuminate the forgotten decades of the 1860s and 1870s in order to provide a more comprehensive understanding of the process of state formation.

[13] There is a very rich historiography on how states asserted themselves in societies throughout Latin America at the turn of the twentieth century. For state-led health campaigns in the first half of the twentieth century see Diego Armus, editor, *Disease in the History of Modern Latin America: From Malaria to Aids* (Durham: Duke University Press, 2003). In Argentina, Kristin Ruggiero demonstrated how Argentine politicians and professionals, in seeking to resolve social problems and modernize the nation through diagnosis and treatment of both individual bodies and population ills, used positivist discourse to maintain the social status quo. Kristin Ruggiero, *Modernity in the Flesh: Medicine, Law, and Society in Turn-of-the-Century Argentina* (Stanford: Stanford University Press, 2004).

[14] For social control and prison reform see Ricardo Salvatore and Carlos Aguirre, editors, *The Birth of the Penitentiary in Latin America: Essays on Criminology, Prison Reform and Social Control, 1830-1940*

Positivism influenced the development of medical practices and prison systems, but it is still unclear how it manifested in the legal process at the congressional level.

While some scholars have studied the intersection of positivist and nationalist discourses in relation to medicine and legal systems, others have illuminated how these ideologies affected children throughout Latin America. These investigations underline elites' attempts to educate future citizens, lower infant mortality rates and end child labor.[15] They posit that state-led education and hygiene campaigns aimed at youth were acts of patriotism carried out to correct the undesired effects of modernity, and in doing so, to protect the future of the country. While work on Positivism has shown its effects either through state efforts to protect society by curbing criminal activity or by controlling children's health and education, they have tended to overlook, in their majority, the link between youth and crime.

One exception to this trend is Eugenia Rodriguez Sáenz's examination of sexual abuse and juvenile delinquency in turn-of-the-century Costa Rica.[16] Tying nationalist

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(Austin: University of Texas Press, 1996), and Beatriz Ruibal, *Ideologia del control social: Buenos Aires, 1880-1920* (Buenos Aires: Centro Editor de América Latina, 1993); for criminals and prisoners see Lila Caimari, "Positivist Criminology and the Classification of Prisoners in Early Twentieth-Century Argentina." Paper submitted to the XX International Congress of LASA (Guadalajara, April 17-19); for social control in Mexico, see Pablo Piccato, *City of Suspects: Crime in Mexico City, 1900-1931* (Durham: Duke University Press, 2001).

[15] Much work has been done on this in Argentina. See Sandra Carreras, " 'Hay que salvar en la cuna el porvenir de la patria en peligro,'" and Mark Szuchman, *Order, Family and Community in Buenos Aires, 1810-1860* (Stanford: Stanford University Press, 1988). For the rest of Latin America, see Donna Guy, "The State, the Family and Marginal Children in Latin America"; Ann Blum, *Domestic Economies: Family, Work, and Welfare in Mexico City, 1884-1943* (Lincoln: University of Nebraska Press, 2009); Patience Schell, "Nationalizing Children through Schools and Hygiene: Porfirian and Revolutionary Mexico City," *The Americas* 40, no. 4 (2004): 559-87; and Rizzini "The Child-Saving Movement in Brazil."

[16] Eugenia Rodríguez Sáenz, "¿Víctimas inocentes o codelincuentes? Crimen juvenil y abuso sexual en Costa Rica en los siglos XIX y XX," in Barbara Potthast and Sandra Carreras, editors, *Entre la familia, la sociedad y el Estado* (Biblioteca Ibero-Américana, 2005), 173-201.

movements and childhood sexuality together, she argued that the simultaneous rise of the romanticization of childhood and ideas of juvenile delinquency at the end of the nineteenth century affected how courts viewed victims of sexual assault and determined whether they figured as victims or accomplices. The younger the victim, the more likely it was that her perceived innocence would exonerate her. Rodriguez Sáenz's conclusion draws a direct link between crime and youth—seduction was only criminal when perpetrated against young girls, and the younger the girl, the more deleterious the act. Gisela Sedeillán uncovered a similar connection in Argentina, Irene Findlay in Puerto Rico and Arlenne Diaz in Venezuela.[17] Although these investigations establish a relationship between juveniles and sexual crimes, they center on the administration of justice in courts as opposed to the definition of crime in law.

While various scholars have illuminated the effect of elite efforts to protect female victims of sexual crimes, Cristian Berco questioned the impact on young boys. In his examination of the treatment of sodomy in the 1887 Argentine penal code, Berco argued that republican law decriminalized consensual sex between grown males, making sodomy a crime against youth.[18] Lawmakers removed sodomy from the law as a crime when committed between consenting males, instead putting it as a subsection under the category of rape. They did this first to hide "aberrant" social behavior, and second to

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[17] Gisela Sedeillan, "Los delitos sexuales: la ley y la práctica judicial en la Provincia de Buenos Aires durante el período de codificación del derecho penal argentino (1877-1892)"; Eileen Findlay, "Courtroom tales of sex and honor: rapto and rape in late nineteenth-Century Puerto Rico," in Sueann Caulfield, Sarah C. Chambers and Lara Putnam, editors, *Honor Status and Law in Modern Latin America* (Durham: Duke University Press, 2005), 201-222; and Arlene Diaz, "Women, Order and Progress in Guzman Blanco's Venezuela, 1870-1888" in *Crime and Punishment in Latin America*.

[18] Cristian Berco, "Silencing the Unmentionable: Non-Reproductive Sex and the Creation of a Civilized Argentina, 1860-1900," *The Americas* 58, no. 3 (Jan., 2002): 419-441.

ensure the future of the nation by protecting the heterosexual family as the basis of society. The act of sodomy, then, came to reflect elite fears of devious men who could endanger the nation by corrupting Argentine children. While Berco shows how sodomy became a legal term that linked the corruption of young boys to the destruction of the nation, he fails to link his conclusions about sodomy to the larger movement of change in popular understandings of childhood, crime and nationalism in the late nineteenth century.

The illumination of the changing definitions of sexual crimes in republican law ties together three disparate strands of historical inquiry. It contributes to the study of congressional codification as a state building project by bridging the gap between legal scholars who investigate historical legislation for its contemporary implications, and that of historians, who focus on the practical use of law in criminal courts more than its theoretical underpinnings. Studying codification as a historical process provides a deeper understanding of the changing meanings of crime, criminal behavior and delinquency. Highlighting how criminology and philosophy influenced the codification process permits a deeper, more contextualized knowledge of the law in order to study its use in the courts.

The study of the codification process not only provides a fundamental knowledge for the practical use of legal definitions by judges and lawyers, it also sheds new light on the connection between Positivism and turn-of-the-century nationalist projects. Scholars have long established the influence of positivist philosophy on state-led social movements. Highlighting how positivist criminology affected congressional codification

reveals the connection between protecting children from moral corruption through the legal process and ensuring the propagation of future populations via health and education campaigns. The republican redefinition of colonial sexual crimes, which emphasized the primacy of youth, links the process of lawmaking to broader elite efforts to protect the nation.

The protection of the young from sexual assault in republican law not only ties congressional codification to nationalist movements, it also draws together the growing corpus of historical studies of sexual crimes in the nineteenth and twentieth centuries. Until now, scholars have treated rape, seduction and sodomy independently. Illuminating how the definitions of these crimes changed throughout the process of legal systemization exposes a clear trend: a comprehensive, unified movement among elites to protect children from moral corruption. A picture of how lawmakers conceptualized sexual crimes, defined its victims and perpetrators, and created new understandings of childhood and adulthood in the process lays the foundation for studying how judges, lawyers and jurists transformed their use of legal definitions in criminal tribunals. In the process, the changing legal system affected the lives of those who entered the courts seeking justice, influenced changing generational relationships and redefined social gender roles.

Chapter 1

Contexts:
Penal Codification and Shifting Criminological Paradigms

The codification of criminal law formed a fundamental process of Argentina's state building projects. This chapter, therefore, weaves together two simultaneous trends: It outlines the chronological history of congressional lawmaking that began after the Constitution of 1853, and it illuminates the changing frameworks of penology and criminology that influenced the process of drafting legislation.[19] The combination of these two histories establishes the contextual and theoretical foundations for understanding the shifting legal definitions of sexual crimes.

The development of Argentine penal law divides into four discernable epochs. The first encompasses the half-century after Independence when inter-regional war and the lack of a consolidated nation made the passage of laws virtually impossible. Conflict between conservatives, who supported the continuation of colonial Spanish law, and liberals, who expounded the Enlightenment philosophy of free will and rationalism, defined this half-century. The other three phases date to the congressional process of codification that began after liberals emerged victorious in 1852. Each stage corresponds to one of the three official laws passed during this time: the 1887 penal code ("1887

[19] There is a difference between "penology," the study of punishments and prisons, and "criminology," which focuses on the crime and the criminal. Due to the nature of Positivist principles, which combined these two studies in its focus on finding a suitable punishment for the particularities of the criminal, these words are used interchangeably in this paper.

code"), the 1903 "Reform Law" and the second code of 1921 ("1921 code"). In each case, the passage of new legislation marked the end of the phase.

The second period in the codification of law began officially in 1868, when jurist Carlos Tejedor presented a preliminary plan for a penal code to Congress. This phase also included a project that Congress rejected in 1881, and the 1887 code that largely replicated Tejedor's proposal. Rodolfo Rivarola's 1890 critical review of the 1887 code initiated the third phase, which included a plan drafted in 1891, and ended with the legal adoption of Rivarola's proposed changes in the 1903 Reform Law. The final stage also began with a critique, when professor and lawyer Rodolfo Moreno bitterly condemned the 1903 Reform Law later that year. This last phase included two more plans in 1906 and 1916, and terminated with the 1921 code. Despite the fact that the law only changed three times in seventy years, it is important to understand these interim legislative initiatives, as they form the basis of each official alteration to the code.

The years 1853 and 1903 marked watershed moments in the codification process. The 1853 Constitution signified the victory of liberal leaders' enlightened ideals of equality, individual rights and free will. It also marked the consolidation of the nation and initiated the process of national lawmaking. In 1903, the law and its ideological underpinnings changed for the first time. Starting with Rodolfo Rivarola's critique of the code in 1890, Positivism began to replace the classical, liberal paradigm as the defining theory of Argentine criminological thought. The 1903 Reform Law inaugurated into law the dominance of positivist criminology.

The process of codifying penal law in Argentina was anything but smooth. For seventy years, elite intellectuals, jurists and lawmakers continuously drafted, adopted, revised, rejected, criticized and returned again to adopt new legislation. Political instability, especially in the first half of the century, shifts in conflicting ideologies, and tension between the adoption of European norms and the need for law that suited the Argentine national character complicated the process of making national laws. In the end, positivist criminology replaced liberal penology as the underlying philosophy of penal law, and the process of legal codification became part of broader elite nationalist movements.

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In the first half of the nineteenth-century, the lack of a centralized government hindered the creation of coherent laws. After Buenos Aires threw off the yoke of colonial submission to Spain in 1810, it entered into an era of war with the surrounding regions that lasted for nearly forty years.[20] Unitarians in the old viceregal capital desired a consolidated country under their central control, and Federalists, often led by strong caudillo leaders from the interior provinces, fought for local autonomy. Political instability, along with demographic growth, increased the need for effective social control.

In order to meet the needs of the region in turmoil, elites and lawmakers in Buenos Aires searched for a postcolonial criminological paradigm. During the 1820s and

[20] Río de la Plata included all of the regions encompassing modern day Argentina, Uruguay, Paraguay, and Bolivia, which were incorporated into the Viceroyalty of Rio de la Plata in 1776 under the Bourbon Reforms. While Buenos Aires gained its independence from Spain in 1810 and never again fell to Spanish forces, it took Paraguay, Uruguay and Bolivia much longer to fully gain their independence.

1830s, lively debate took place in public forums such as the *Academia de Jurisprudencia* and the *Salon Literario*. Conservative lawyers, jurists and intellectuals, who advocated the continuation of repressive colonial precedents debated with those who expounded news ideas coming out of the Enlightenment. Liberal public figures such as Juan Bautista Alberdi called for changes in penology based upon equality and individual rights and guarantees.[21] This new paradigm included, among other things, the need to correct criminal behavior rather than merely repress it.

Conflict between conservatives and liberals hindered the emergence of an official criminological discourse in the first half of the century, and caused the failure of early attempts to draw up legislation. In 1821, president Bernadino Rivadavia provided government sanction for a penal code. A draft of a plan the following year never came to legal fruition. In 1824, another project also failed to manifest in law. When the conservative caudillo, Juan Manuel de Rosas, took power in 1829, he thwarted all discussion of liberal law and reform.[22]

Despite the lack of early consensus and Rosas's intervention, many of the subjects discussed in this early period shaped the emergence of the penal system in the second half of the century. These issues included the retention or abolition of the death penalty,

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[21] Levaggi, *Historia del derecho penal argentino*, 93.
Alberdi posited that the juridical mission of the state had the double goal of prescribing and sanctioning law; and that the sanctioning power of the state also had a double goal to remedy the ill of crime and to avoid its repetition.

[22] For a complete discussion of the development of ideas of penology in the first half of the nineteenth century, see Levaggi, *Historia del derecho penal argentino* and Barreneche, *Crime and the Administration of Justice in Buenos Aires*. A lot of work has been done on crime and punishment in rural settings during the Rosas Era. See, for example, Ariel de la Fuente, *Children of Facundo: Caudillo and Gaucho Insurgency during the Argentine State-Formation Process* (Durham: Duke University Press, 2000); and Ricardo Salvatore, *Wandering Paysanos: State Order and Subaltern Experience in Buenos Aires during the Rosas Era* (Durham: Duke University Press, 2003).

the proportionality of crimes and punishments, and *judicial arbitrio*. This latter colonial precept gave judges power to differentiate punishment based upon the circumstances of the crime, as well as the social status of the perpetrator and victim. General Urquiza's defeat of Juan Manuel de Rosas at the Battle of Caseros in 1852 finally re-opened the forum for debate. This time, advocates of both philosophies agreed on the overriding necessity of drafting an official penal code.

The national Constitution of 1853 marked a definitive shifting point in Argentina's legal development. It defined the roles of the executive, judicial and legislative branches, laid out the rights of Argentine inhabitants, and mandated the congressional drafting of national codes.[23] Two aborted attempts to draw up criminal legislation in 1854 and 1857 preceded the actual process that began in 1860, after the region finally unified under the central control of Buenos Aires. On June 6, 1863, congress authorized the president to appoint redactors of civil, commercial, penal and mining codes. In December of the following year, President Mitre commissioned Dr. Carlos Tejedor to draft a plan for a penal code.[24]

The submission of Tejedor's project to Congress in 1868 finally initiated the congressional process of drafting penal law. Upon its receipt, the president immediately appointed a commission of three lawyers to review it, revise it, and present it to

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[23] Article 67, subsection 11 of the Constitution mandated the drafting of national civil, commercial, penal and mining codes. Article 18 laid out inhabitants' rights in criminal trials. It stated that no inhabitant of the nation could be punished for something not stipulated in a law existing before the legal process, and that nobody could be forced to testify against himself.

[24] Carlos Tejedor was an active public political figure. He was a member of Asociación de Mayo, director of the public library, a legislator, he wrote manuals for judges of the peace in the countryside, and in 1857 he became the head of the Department of Criminal and Mercantile Law at the University of Buenos Aires.

Congress.[25] Thirteen years later, in May of 1881, the executively appointed commission finally provided congress with a *new* plan, rather than a revised version of Tejedor's original project. This thirteen-year lapse was partially due to constant changes in the membership of the committee, as it altered five times in thirteen years. One member died, a couple resigned and congress forcefully replaced another. This delay may also have been due to trends in the codification of foreign legislation. In the introduction to the 1881 plan, the commission commented that as soon as Tejedor finished his project, "a general movement of codification started throughout the world…especially in penal material."[26] In an attempt to keep up with European nations, the commission continually adapted the plan to the most recent scientific developments in Europe, thus hindering the process of codification in Argentina.

Like Tejedor's project, the 1881 plan underwent immediate revision. This time, instead of a president-appointed committee, the Code Commission of the House of Representatives examined the plan. Four years later, it unanimously rejected the 1881 project and agreed in favor of Tejedor's original proposal. The commission's reason was the completely different nature of the two pieces of legislation. Tejedor founded his project on the Bavarian Code of 1813 while the Spanish Code of 1850 formed the basis of the 1881 template. The commission concluded that the discrepancy between "two populations of distinct races, of different traditions and of distinctive customs" made the

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[25] While Tejedor's plan was under examination in Congress, the provinces, beginning with province of Buenos Aires, sanctioned it for local use under article 108 of the Constitution. For many years, his notes were a source of authentic interpretation of the code by judges in criminal courts.

[26] *Proyecto de Código Penal, presentado al Poder Ejecutivo nacional por la Comisión nombrado para examinar el proyecto redactado por el Dr. D. Carlos Tejedor* (Buenos Aires: Imprenta de El Nacional, 1881), vii-viii.

two plans incompatible.[27] Although discarded, the 1881 project foreshadowed many later changes to the code. With only slight revisions, Congress passed Tejedor's plan into law on November 1, 1886. It became effective throughout the country on March 1, 1887 and remained law for sixteen years. The ratification of the 1887 code marked the end of the first phase of codification.

The 1887 code caused immediate controversy. Some lawmakers, such as senator Manuel Pizarro, reasoned, "it is always better to have a solitary law that can be reformed tomorrow, than to have today diverse penal laws, to the end that the same act in the same country, can be punished in diverse ways."[28] Many, however, critiqued the code for precisely failing to unite the diverse pieces of criminal legislation in the country.[29] One of the most vociferous complaints came from jurist and intellectual, Rodolfo Rivarola, who published an exhaustive, three-volume analysis of law in 1890. Rivarola's critique initiated the second phase of the codification process.

Rivarola denounced the 1887 code for various reasons. First, the Constitution had mandated that the codes (civil, penal, mining and commercial) have national jurisdiction. Yet the penal code only applied to the ordinary jurisdiction of the capital and to the provinces, not to national tribunals. Second, Rivarola criticized the law for not incorporating new forms of criminal correction already tested and accepted in other

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[27] "Informe de la Comisión de Códigos de la Cámara de Diputados," 29 de septiembre de 1885, quoted in Levaggi, *Historia del derecho penal argentino*, 191.

[28] Ibid., 192.

[29] One example of a piece of rogue penal legislation was law 49, which dealt with crimes and judgments for federal tribunals. Congress sanctioned this law on August 25, 1863, considering that it could not wait until the passage of a penal code. There were also multiple laws still in existence that had been passed in an attempt to maintain order following the region's independence form Spain.

countries. These included prisons and penitentiaries that sought to reform delinquents rather than merely punish them. Third, the jurist deemed the code incomplete because it excluded certain actions that other countries considered criminal. Fourth, while the code *did* provide punishments that were proportional to crimes, it failed to decrease recidivism. Finally, and herein lies a key point, Rivarola criticized the code because it continued to embody what he considered to be outdated theories.[30]

What were these antiquated premises, and what were Rivarola's ideological underpinnings that opposed them? In order to grasp the changes that occurred during the process of codification, it is essential to understand the two different schools of penology that co-existed in the late-nineteenth and early-twentieth centuries. On the one hand, ideas of equality, individual rights, rationality, and free will, which came from eighteenth-century enlightened philosophy, informed the "Classical School." On the other hand, the "Positivist School" relied upon the discoveries of the nineteenth-century scientific study of man to produce material proof of delinquency.

Enlightenment philosophy formed the foundation of the Classical School of criminology. Spanish philosophers and jurists such as Manuel Lardizábal y Uribe and the Marqués de Beccaria combined the ideas of the European Enlightenment with Spanish Humanism and Catholicism to create *Iusnaturalismo*. The foundation of this theory was the concept that there exists, independent of the juridical order, a set of universal, natural rights of man. Central to such ideology is the belief in the human capacity for rational behavior and individual free will. Based upon these ideas, penal law had a tutelary end—

[30] Rivarola, *Exposición y crítica del código penal*, Introduction.

to teach man to see the tyranny of his own passion. It also aimed to reestablish public order. The Classical School also stressed the necessity of keeping the arbitrary power of lawmakers out of the criminal justice system and advocated punishments in direct proportion to crimes. This proportionality rejected arbitrary correction, and excluded, for many classical thinkers, the possibility of the death penalty.[31]

The Positivist School of criminology emerged in the latter half of the nineteenth century out of the development of the sciences of man—anthropology, psychology, medicine, and sociology. Largely influenced by the philosophy of Augusto Comte, Positivism exalted the investigation of the physical world by means of "scientific" observation and experimentation. It sought to "rationalize" criminology and jurisprudence, to scientifically dissect the motivations and sources behind criminal actions in order to eradicate crime. Positivist criminology rejected the Classical School's foundations of rationalism and free will, focusing instead on the delinquent's innate and socially influenced susceptibility to crime. According to Positivism, crime was the result of a complex set of anthropological, environmental and social factors that predisposed certain people to criminal activity. This meant that it was essential to individualize and adapt punishment to the personality of the delinquent. For positivists, the fight against crime should be preventative, aimed at the elimination of the causes of crime, and redemptive, seeking to reform criminal behavior. In order to achieve this, they touted the

[31] For a more complete discussion of Liberalism in Argentina see Nicolas Shumway, *The Invention of Argentina* (Berkeley: University of California Press, 1991); and chapter 2 in Barreneche, *Crime and Administration of Justice*.

fundamental importance of penitentiaries and reforming criminals through work and instruction.[32]

Rivarola's critique exemplifies the new direction of Argentine penology towards the integration of positivist philosophy. He rejected the 1887 code because of its liberal underpinnings. According to Rivarola, criminal law needed to protect individual rights as well as the social order, which meant investigating and eliminating the *causes* of crime. To pinpoint the roots of criminal activity, the law had to look beyond the singular and oversimplified conclusion that all human action results exclusively from free will. Instead, it was necessary to acknowledge that moral, material and legal elements propel human behavior. Some people have natural predispositions towards crime, and the social sphere also exerts influence on them. Because positivist ideology regarded criminals as the product of innate proclivities and material conditions, it was essential to account for the particularities of each delinquent and to individualize punishment based upon them.[33] Rivarola's critique marks the beginning of the dominance of Positivism in the codification of penal law.

As a result of Rivarola's exhaustive study, President Celman named a new commission to draw up another plan for a code. In June 1891, Rivarola, along with two other positivist jurists, Norberto Piñero and José Nicolás Matienzo, submitted their new proposal to the president. Most of the changes in the 1891 project exemplified the new

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[32] To learn more about Positivist criminology in the process of penal codification, see chapter 15 in Levaggi, *Historia del derecho penal argentino*; Oscar Terán, *Positivismo y nación en la Argentina* (Buenos Aires: Puntosur, 1987); and Julia Rodriguez, *Civilizing Argentina: Science, Medicine and the Modern State* (Chapel Hill: University of North Carolina Press, 2006): 202-207.

[33] Rivarola, *Exposición y crítica del código penal*, vol. I, xiv.

course of positivist law. It sought to ensure that the punishment fit the crime and that judges took into account the social and economic situation of both the offender and the offended.[34] While signifying a new trend in criminal law, in this one area, the stress on positivist discourse signified a return to the colonial practice of *arbitrio judicial*, for it gave judges extensive power to adjust punishments based upon the particular conditions of the crime and the character of the criminal.

As with the previous proposals, the 1891 project became bogged down in the slow moving cogs of Argentina's legislative machinery. The congressional commission reviewed the code until 1895, when it requested the collaboration of the plan's authors to help revise it. In 1900, the commission finally presented a completely new plan to Congress, which, once again, underwent review. After some debate, Congress approved slight reforms to the 1891 project, and passed them into law on August 22, 1903. Law number 4189, the "Reform Law," made the first legal changes to the penal code since 1887. This marked the end of the second phase of codification, which had begun with Rivarola's exposition in 1890.

Just as the 1887 code had received immediate criticism, so did the 1903 Reform Law. This time, the strongest judgment came from another positivist lawyer and professor, Rodolfo Moreno. Rather than censure all of the deficiencies of the previous legislation, Moreno focused instead on defining what penal law *should* be, and highlighting the benefits of recent advances in positivist criminology. Moreno called for

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[34] *Proyecto de código penal para la república argentina, redactado en cumplimiento del Decreto de 7 de junio de 1890 y precedido de una exposición de motivos* (Buenos Aires: Taller tipográfico de la Penitenciaría Nacional, 1898), Exposión de motivos.

changes based on principles that "modern science" had proven, and that foreign states had already consecrated into law.[35] This appraisal initiated the final stage of national codification.

Moreno's exposition focused on the discoveries of modern science, the individualization of punishment and the mandate of society to defend itself against pernicious internal threats. Scientific references drenched Moreno's language. He wrote of society as a living organism, repeatedly referencing the "social body" and the "social organism" that needed to defend itself. He also called the legislator the "surgeon" of society, who sought to cut out the cancer or gangrene of crime. Law needed to be, according to Moreno, a cold, reasoned machine, a precise mechanism that isolated and separated dangerous elements of the social body.

The society-as-body analogy was a common trope in medicine at the turn of the twentieth century. Historian Kristin Ruggiero highlighted this correlation in her investigation of the intersections of medicine, modernization and social control in turn-of-the-century Buenos Aires. "The nation itself," she wrote, "sustained all the flaws and idiosyncrasies of human flesh." [36] Elites described the state as being an emotional, or even passionate "body," and they described society as "wounded," spiritually "poisoned," "feverishly delirious," "demoralized,'' and "organically perverted." Moreno employed the same medical terminology in his legal treatise. This parallel between medicine and

[35] Moreno, *La ley penal argentina*, 25.
[36] Ruggiero, *Modernity in the Flesh*, 202.

law highlights not only the reliance upon scientific discovery in positivist penology but also the influence of the new criminology on the legal process.

Moreno argued that science had taught humans many lessons about the criminal that lawmakers needed to take into account when drafting legislation. He believed that psychology had revealed that free will was a subjective illusion. Criminal anthropology had proven that the delinquent was not a normal man but an organizational and physical anomaly. Statistics had shown that crime increased and decreased due to causes unrelated to state punishment. This last point highlighted the positivist notion that crime was both socially constructed and based upon innate characteristics.

In addition to scientific references, Moreno stressed the need to individualize punishment for each criminal. He proposed not only proportionality between crime and punishment (similar to the Classical School) but also a scale of penalties. Elasticity of sentencing would cater to the particularities of individual delinquents, helping reform them and ensuring that they did not repeat their crimes. The individualization of crime highlights an interesting paradox in the Positivist criminological paradigm. The law focused on the individual in the need to punish criminals according to their particularities. However, the final goal of punishment was society, as law sought to protect citizens from dangerous elements, not to fix the delinquent. While new penitentiary systems sought to "reform" delinquents, they did so in order to lower recidivism to better defend society.

This tension highlights the final emphasis in Moreno's text: the foundation of penal law was the need and right of society to defend itself. His principle critique of the 1903 Reform Law was its continued reliance upon the liberal presumption that

individuals *chose* to commit crime. Such a view could not ensure that the law fulfilled its main goal: to protect society by ensuring that criminals did not repeat their actions. If delinquents elected whether or not to transgress the law, the state could not reform them, and thereby reduce recidivism and protect the social good.[37]

In response to complaints such as Moreno's, President Quintana created another commission in December 1904 to right the "evident need…for the good administration of justice."[38] This committee presented its new proposal to the ministry of justice in March 1906. Similar to its predecessor, this plan sought to unify the multiple laws of the republic, to adopt modern penal institutions, to simplify the criminal justice system, to address deficiencies in the code and to order it in a more logical manner. Although the new plan was generally well received, it still instigated some criticism. As one opponent griped in 1917, "the 1906 project is very far from constituting a homogeneous and harmonious work of penal law…"[39]

The 1906 plan was not destined to endure. After ten years of more legislative churning, in 1916 Rodolfo Moreno presented yet another proposal to Congress, this time based upon the 1906 project. It underwent review in 1917, and Congress finally sanctioned it as law number 11.179 on October 29, 1921. While this was not the end of Argentina's search for a paradigm of penal law that would suit the ideological

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[37] Moreno, *La ley penal argentina*, prólogo.

[38] "Decreto del Poder Ejecutivo nombrando una comisión encargada de proyectar diversas reformas legislativas," Buenos Aires, Diciembre 19 de 1904 printed in *Proyecto de código penal para la república argentina* (1906).

[39] Juan Ramos, "La codificación penal argentina. El proyecto de 1906 ante las nuevas tendencias del derecho penal en formación," in an offprint of the *Revista de la Universidad de Buenos Aires*, XXXV (Buenos Aires, 1917), 6, quoted in Levaggi, *Historia del derecho penal argentino*, 199.

expectations of everybody involved, the 1921 code marks the end of the process of codification that had begun with the Constitution's mandate to draft national laws in 1853.

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The process of codifying criminal law in Argentina was long, tortuous and difficult. Competing philosophies of penology and criminology continually clashed in elite circles, making the formation of a coherent republican criminal paradigm virtually impossible. In the early decades after Independence, lawyers, jurists and intellectuals debated between the conservation of colonial laws, which maintained differentiation of punishment based upon individuals' social status, and the need for new, liberal legislation founded upon the natural, equal rights of man. Liberals prevailed with the defeat of Rosas in 1852 and the national Constitution of 1853.

In the second half of the century, debate over the drafting of a penal code transpired between advocates of the Classical School and supporters of the new ideas of Positivism. The prevailing liberal ideology influenced the first code. Carlos Tejedor's compilation was a product of *iusnaturalist* philosophy and incorporated the ideas of rationality and free will. Congress adopted Tejedor's plan in 1887 with few changes, officially incorporating the project's classical, liberal ideas into law.

In 1890, however, Liberalism began to lose its predominance in the lawmaking process. Rodolfo Rivarola's critique of the 1887 code initiated a new movement towards the increasing influence of Positivism. The shift to positivist criminology changed the focus from belief that individuals chose whether or not commit crime, to the assumption

that criminals were the result of both innate proclivities to delinquent behavior and their social circumstances. The 1903 Reform Law incorporated these scientifically based concepts of criminality into law. Rodolfo Moreno's condemnation of the Reform Law highlights, however, that even among Positivists there existed much dissention. Fissures among like-minded elites further stymied the codification process.

Certain structural issues also hampered the drafting of criminal legislation. The existence of disparate laws governing crime and punishment was one of the foremost concerns of elites, jurists and lawmakers. The need to create one code for the whole nation was a primary instigator of the prolonged process. Beginning with Rivarola's critique, every subsequent proposal called for the consolidation of disparate laws. Additionally, the drafters of legislation repeatedly echoed the need to simplify the code for practical use. The parallel drive to individualize punishments to fit criminals made simplification difficult, however, as it necessitated a broad scale of penalties and relied heavily upon the *arbitrio judicial* of judges.

Finally, the simultaneous attempts to incorporate the latest scientific findings from Europe and to adjust those discoveries to the particularities of the Argentine nation caused continual friction in the codification process. Many liberal elites admired European society, especially that of France and England, and sought to "civilize" Argentina in an attempt to join the ranks of those countries.[40] This admiration coexisted,

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[40] In all of their deliberation, elites and lawmakers never fully defined what Argentina's national character was. Their discussion also did not touch upon differences between rural and urban criminal patterns. In creating new "modern" laws, all of these drafters sought guidance in foreign countries' legislation. Carlos Tejedor modeled his plan principally after the penal code of Bavaria, which closely resembled the Napoleonic Code. He also referred to the penal laws of Brazil, Bolivia, Peru, Spain and Austria. The 1881

however, with the belief in the necessity of adapting European ideals to local circumstances. These competing exigencies first emerged in the 1830s due to the influence of Romantic thought in Buenos Aires. In 1837, one of the principle liberal leaders of the time, Juan Bautista Alberdi, had warned against importing European norms directly to Argentina.[41] By the 1850s, he vociferously criticized his contemporaries of the "Generation of 1837" who advocated the recreation of European conditions in Argentina as a panacea for all ills. Alberdi instead advocated for the improvement of Argentina through national resources and means.

By the turn of the twentieth century, this preoccupation was increasingly linked to the adaptation and application of new "scientific" findings in European criminology to Argentine institutions. Lawmaker after lawmaker repeated the need to conform what came from Europe to the particularities of Argentine society. The drafters of the 1891 plan made clear in their introduction that while they had used many European countries' laws as models, they did not borrow anything from the Code of Holland, which they called the "most perfect" of all codes, because of its incompatibility with the exigencies of Argentine culture.[42]

It was one thing to laud the importation and adaptation of European norms to Argentina, however, it was another to apply them in the lawmaking process. The next

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plan incorporated the legislation of European countries such as Denmark, Switzerland, Germany and Italy, the United States, and Latin American nations like Chile, Mexico and Venezuela. Each subsequent proposal continued to look to foreign precedents and, increasingly, the new scientific discoveries coming out of Europe.

[41] See Alberdi, *Fragmento Preliminar al estudio del derecho*, quoted in Barreneche, *Crime and the Administration of Justice*, 79.

[42] *Proyecto de código penal para la república argentina* (1898), 272.

chapter examines the changing definitions of sexual crimes to illustrate the complexities of codification and how shifting criminological paradigms influenced the process. The redefinition of these criminal actions from their colonial predecessors shows how, as Positivism increasingly dominated the thinking of elites, intellectuals and jurists, the lawmaking process became part of wider nationalist projects.

Chapter 2

From Lechery to Modesty: Sexual Crimes in Colonial and Republican Law

Within nineteenth-century discourse on penal law, sexual crimes proved less important to elites than more common transgressions such as homicide and robbery. They were less menacing to the new nation than more dangerous acts like treason, and they consumed less of lawmakers' mental energy than did more important issues such as the retention or abolition of capital punishment. The way in which the definitions of these crimes changed over time, however, illuminates from a distinct angle, the developing preoccupation in many Latin American countries with promoting the good of the nation.

This chapter traces alterations in definitions of sexual crimes, or "Crimes against honesty," through the era of legal systematization. It argues that republican law, influenced in turn by liberal and positivist ideas, transformed the fundamental meaning of colonial sexual crimes by shifting the principle underlying assumptions that made these acts criminal. In colonial law the key paradigms were the presumed moral character and conduct of victims; in republican law concepts shifted as the age of victims or the violence used in the perpetration of the act became paramount. The shift to young victims demonstrates elites' attempts to ensure the future of Argentina by protecting its children through penal law.

Although Carlos Tejedor made the first steps towards changing the meanings of sexual crimes, the year 1903 proved pivotal in their redefinition. The Reform Law legally

made youth the primary victims of sexual assault by replacing the moral character with age. By defining sexual crimes primarily by the age of the victim, and secondarily upon the violence used in the crime's perpetration, the law fundamentally altered the foundational premise that made sexual actions criminal. The Reform Law was also pivotal because the definitions of sexual crimes changed only negligibly in the 1921 code.

In order to understand shifting definitions of crime in Republican law, this chapter focuses on the crimes of abduction, rape, seduction, and the prostitution and corruption of minors, and it explores four key themes: violence, age, innocence, and gender. Such analysis necessitates understanding of colonial Spanish transgressions of lechery, outlined in the *Siete Partidas*. It also requires knowledge of how these crimes changed in the second half of the nineteenth century between Tejedor's original plan and the 1903 Reform Law.

It begins looking at articles on violence in the crime of abduction, arguing that these were the only clauses that aimed to shelter adult women rather than young children. It then shows how, as time passed, the redefinition of rape demonstrated that the age of the victim replaced chastity as the underlying assumption of sexual crimes. Another transformation occurred with the concept of innocence as it pertained to the crime of seduction. Constructions of ideas of female innocence changed between the colonial and republican eras from innocence founded in the victim's chastity to that based upon her youth. Consideration of the prostitution and corruption of minors reveals how elites' continually expanded the jurisdiction of the penal code to incorporate all minors under 22

in an effort to curb the perceived pernicious effects of prostitution on society. A final focus is on the gendered dynamics of sexual crimes, as lawmakers sought to protect innocent female victims to the legal detriment of young boys. All of these changes reflect the late-nineteenth-century focus on defending children in order to protect society.

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The *Siete Partidas* of Alfonso X contained the most complete discussion of crime and punishment in premodern Spanish law.[43] Although the Crown created legislation especially for the American colonies, namely the *Recopilación de leyes de Indias* (1680) and the *Novísima recopilación* (1806), the *Siete Partidas* remained a basic legal component of the colonial system.[44] Notably, it was the colonial document most often cited in late nineteenth-century Argentine criminal tribunals, attesting to its primacy in post-independence Spanish American penal law. The longevity of the *Partidas* was due in large part to the fact that later legislation did not change the prescriptions on crime established in the ancient Spanish law.

The seventh *partida* addressed "the bad things men do and…the charges and punishment they deserve for doing these things."[45] Punishment sought to repress crime. The Crown wanted simultaneously to castigate the guilty individual and to provide an example to others. In solemn public ceremonies, officials penalized transgressors through humiliation or the infliction of physical pain. In a highly stratified society, the principle

[43] The *Siete Partidas* was the first Spanish legal document that attempted to tame the erratic diversity of local *fueros* (such as the *Fuero Real*) from Celto-Iberian, Roman and Visigothic law, which composed the medieval Spanish judicial tradition.

[44] Barreneche, *Crime and the Administration of Justice*, 19.

[45] *Las Siete Partidas, glosadas por el licenciado Gregorio Lopez* (Madrid: Boletin Oficial del Estado, 2004), 1.

of *arbitrio judicial* gave judges ample faculties to make penalties fit the crime. They differed sentences according to various criteria: the age and social station (*calidad*) of both the victim and the defendant, and the time, place and means by which the perpetrator committed the act.[46]

The *Siete Partidas* defined six violations of lechery: adultery, incest, corruption of chaste women through seduction, violent assault and abduction of honest women, sodomy, and "mediators."[47] Two primary themes underlie these transgressions. The first is the correlation between sin and crime. This connotation was strongest with incest and sodomy. In the law, these were the only two acts that included male as well as female participants and victims. They were also the only two whose definitions contained stipulations about the age of those involved. The law exempted youth under the age of fourteen from guilt, based upon children's presumed ignorance about the wretchedness of their actions. The sin-crime parallel meant that the law punished acts deemed greater offenses to God more harshly than others. Sodomy was the most nefarious act, but the corruption of chaste women also greatly offended both God and society.

The second and more salient theme was the assumed moral character of female victims of lecherous crimes. The law sought to protect from degradation nuns, virgins, widows who lived honestly, and in the case of violent abduction, married women. With the exception of the latter, these women's moral chastity made sexual action against them criminal. In the case of married women, it was the violence employed in the act that

[46] Ley 8, tit. 31, Part. 7 lay out criteria for judges to consider when deciding punishment.
[47] Based upon the presumption of marriage and consent that underlie adultery, as opposed to victimization, it is excluded from this study.

criminalized it. With the descriptions of each crime, the *Siete Partidas* included instruction on who could report criminal activity to the authorities. In all cases, it prohibited women and minors under fourteen.

The crimes laid out in the *Siete Partidas* appeared in one form or another in Republican law. As liberal ideology broke down the connotation between sin and crime, lawmakers removed sodomy and incest from direct mention in legislation, subsuming them into the clauses on rape and seduction. Additionally, the legalization of prostitution made the colonial titles on pimping (*los alcahuetes*) an act committed exclusively against minors. Finally, age replaced female moral character as the primary requisite of sexual crimes. Although the fundamental contours of these criminal acts remained the same in the republican era, changing cultural ideas of youth, differences in treatment of victims by gender, and the reorganization of the codes reveal a fundamental shift from colonial understandings.

Protecting Women: Violence and Marriage in Republican Law

The definition of some sexual crimes by the violence employed in their perpetration highlights how republican law protected grown women from sexual attack. This defense is most evident in clauses on *rapto*, or abduction. In colonial law abduction involved both force and seduction. The *Siete Partidas* identified four types of females that men could abduct—nuns, virgins, widows who lived "honestly," and married women. In the first three cases, it was the victim's chastity that made the act criminal. In the latter case, it was the force or violence employed in the abduction that made it a

crime. In republican law, violence remained a key component of abduction, while age came to replace chastity as the defining characteristic of the victim. Clauses that identified the victim by her age made kidnapping a crime against youth, while those describing the forceful abduction of an individual made it a crime against grown women.[48] The law's punishment of violent kidnapping, then, sought to protect adult women from violent attack.[49] That the law attempted to protect grown females is evident in the definition of abduction by both age and violence, and in the treatment of married women.

The definition of abduction in republican law increasingly differentiated between younger and older victims. Each piece of legislation further distinguished between the two groups. In his original plan for a penal code, Carlos Tejedor reproduced colonial distinctions between women by differentiating punishment for abduction according to two criteria: whether the perpetrator used violence and the female victim's marital status and moral character.[50] Tejedor proposed different prison sentences depending upon

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[48] Punishment varied according to various criteria including violence, consent and the age and character of the victim. The 1887 code punished the abduction of a married woman and a young girl with the same term of three to six years in prison (*Código Penal de la República Argentina* (1888), L. II, tit. III, cap. IV, art. 133-134). The 1903 Reform Law punished violent abduction and that of a girl under twelve with three to six years, while only penalizing the kidnapping of a minor between twelve and fifteen with her consent with one to three years (*Código Penal de la República Argentina* (1903), L. II, "i," 1-2). Legally, abduction was a separate crime from rape and seduction. A clause regarded cases of abduction that ended in sex through either violent or deceptive means as a separate act and punished it according to the stipulations of crimes of *violación* and *estupro*.

[49] It is important to note that *violación*, or rape, even more than abduction, was a violent crime. Colonial law considered the most serious of all of the sexual crimes because of its inherent violence. This shows in the fact that the *Partidas* punished men who violently assaulted even a "vile" woman, while it did not punish men for nonviolently abducting or seducing unchaste women. The next section will discuss rape in more detail.

[50] *Proyecto de código penal para la República Argentina* (1868), Libro I, título III, capítulo IV, artículo 1 & 2.

whether a man forcefully kidnapped a moral woman (married women, virgins and honest widows) or whether he took a virgin nonviolently. The 1887 code replicated Tejedor's distinction between married women and honest widows, but took the first step to distinguishing between older and younger victims by introducing differing punishments based upon the victim's age and consent, and the violence used in committing the crime.[51] Age-based definitions distinguished between victims older and younger than fifteen.

The 1891 proposal made the distinction between grown woman and young girls even clearer by defining the abduction of adults by the use of violence and that of youth by consent. The first stipulation punished the man who "with dishonest intentions" took a woman "by means of force, intimidation or fraud."[52] The subsequent articles then laid out differing penalties based upon the age of the victim and whether or not she had consented to her abduction. If the victim were between fifteen and twelve, the penalty was less severe than if she were younger than twelve. The sub-articles did not mention violence. That the clauses containing stipulations on age sought to protect only girls younger than fifteen highlights that those describing violent abduction aimed to defend women older than fifteen.

While age-based definitions increasingly protected young victims of abduction, the removal of "married women" had the effect of extending legal protection to all females older than fifteen. This departed from colonial law, where married women were

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[51] *Código Penal de la República Argentina* (1888), L. II, tit. III, cap. IV, art. 133-135.
[52] *Proyecto de código penal para la República Argentina* (1891), L. II, tit. II, cap. III, art. 156.

the only group of females whose kidnapping was criminal due to the violent nature of their abduction rather than their chastity. Until 1903, the law followed the colonial legal tradition by defining "married women" as a special group. The Reform Law, however, took the step to guard all grown females by removing married women as a distinct group. In doing so, it brought all women older than fifteen under the protection of the penal code. While the subordinate clauses protected girls under fifteen, differentiating punishment based upon age and consent, the primary clause penalized any man who with "dishonest intent" took any woman by means of force, intimidation or fraud. By removing married women and defining abduction by violence, the law defended women over fifteen, and through stipulations of age, it protected girls younger than fifteen. This definition remained the same in the 1921 Code.

The removal of a clause on adultery accompanied the elimination of the category of married women from the law, further protecting all adult females. The 1887 code stated that in cases of abduction, if a man executed the act "with the consent of the woman, the punishment would be signaled by adultery."[53] If a judge concluded that a woman was an accomplice to her abduction, he could punish her as if she had committed an act of infidelity against her husband. This clause assumed that a woman who consented to abduction was married, which disallowed the punishment of the kidnapping of all unmarried women older than fifteen. By excluding unmarried adult females, this article exposed them to potential abduction without penalty. Its removal from the Reform

[53] *Código Penal de la República Argentina* (1888), L. II, tit. III, cap. IV, art. 133.

Law protected those unmarried women older than fifteen who may have previously been charged as accomplices to their kidnapping.

While the removal of married women from the clauses on abduction extended the protection of the law to all adult females, the addition of a clause that punished men who deceived married women ensured their continued protection under the law. The 1891 plan added a clause that penalized any man who took advantage of a woman's "error," by "pretending to be her husband and having physical exchange (*comercio carnal*) with her."[54] The official commentary of the project constituted this as a serious attack on honesty and an offense against both married individuals. This clause assumed innocence on the part of the woman as opposed to her complicity, and left room for women to bring charges against perpetrators with less fear of being charged with adultery.

This new clause also contained a more radical underlying assumption: the belief that all females, not just young girls, were susceptible to deception. Although this subject will be discussed later, it reflects changes in cultural assumptions from the colonial period of which women could be seduced. The *Siete Partidas* had differentiated between the abduction of chaste women (nuns, virgins and "honest" widows) using seduction, and that of married women carried out through violence. Underlying this stipulation was the assumption that married women could not be seduced. The inclusion of this new clause in the 1903 Reform Law and the 1921 code attests to changing attitudes about women in the republican period. This new article made them victims rather than equal partners in the

[54] *Proyecto de código penal para la República Argentina* (1891), tit. II, cap. I, art. 148.

crime of abduction. With the 1903 Reform Law, the penal code began to offer protection for single as well as married adult women.

This special clause on married women, along with those that addressed the violent nature of abduction, demonstrate attempts in Republican law to protect grown women from violent sexual assault and kidnapping. Argentine historian Gisela Sedeillán noted that liberal laws tended to maintain traditional patriarchal values, reinforcing the implicit roles of women as daughters, mothers and spouses subordinate to men.[55] While upholding women's traditional roles in marriage, it seems that perhaps the influence of positivist penology in law also provided them, at least in theory, greater protection from assumed complicity in crime.

From Moral to Minor: Replacing Conduct with Age

While on the one hand republican law sought to protect adult women from assault through clauses on violence, on the other, it aimed primarily to protect youth against moral corruption. As positivist ideas began to dominate the process of codification, age gradually became the primary definer of sexual crimes, replacing moral character as the feature of a victim that made sexual acts criminal. The shift from moral character to age is most clearly seen in clauses on rape. Between the 1887 code and the 1903 Reform Law, the reorganization of the section on rape, the changing definition of this crime, and the inclusion of males as its potential victims highlighted the increasing focus on youth.

[55] Sedeillán, "Los delitos sexuales," 112.

In his 1868 Plan, Tejedor took the first step towards making rape a more youth-centered crime by adding age to its definition. At the same time, he upheld colonial distinctions between different categories of women by varying punishment according to the victim's marital status and moral character. Tejedor primarily defined rape as a violent act: the "sexual approximation of a woman against her will employing physical violence and threat of imminent danger to her body or life."[56] However, he included two secondary clauses that identified two types of victims: women who were incapacitated for whatever reason, and minors under the age of twelve. Although he included young girls as potential victims of rape, he also maintained the assumption of the moral character of the victim. The punishments for rape differentiated between an honest woman (*mujer honrrada*), a minor, and a prostitute. Tejedor also proposed distinct punishment if the attack resulted in serious alteration to the health of the minor or the death of the victim. Although Tejedor noted in his commentary that it did not matter whether the woman was *honrrada* or not, the punishments he laid out clearly indicate that this correlation had not yet completely disappeared.[57]

The 1887 code made slight alterations to Tejedor's definition of rape, which placed the victim's age before her moral character. The rewording of the clause made violence and youth *equal* determinates of the crime. Article 127 of the code stated: "Rape is committed when there is sexual approximation in any of the following cases, even if the act is not consummated: a. when force or intimidation is used, b. when the woman is

[56] *Proyecto de código penal para la República Argentina* (1868), L. I, tit. III, cap. I, art. 1.
[57] *Ibid*., 315.

deprived of sense or feeling for whatever reason, c. when the woman is under twelve even when none of the other circumstances are present."[58] Here both age and force equally define rape. This contrasts to Tejedor's definition as *primarily* forced sexual approximation of a woman.

In a sense, the 1887 definition made age trump violence as a determining feature, as it considered any sexual approximation of a young girl under 12 rape, even if there was no violence involved. Rodolfo Rivarola's commentary shows that the concept of consent lay behind this stipulation. He commented in his 1890 critique that under no circumstances could a child younger than twelve years old consent to sex.[59] Twelve was also the legal age at which the Civil Code allowed young girls to marry with parental consent. Twelve, then, was a key age at which girls reached a certain level of sexual maturity, which allowed them to agree to marriage and sexual intercourse.

By changing the organization of Tejedor's plan, the 1887 Code also moved further away from the colonial prescription of differentiating punishment based upon the victim's moral state. The code maintained the distinctions between women, but rearranged the order in which they appeared. Under punishments, married women and youth under twelve were now listed first, honest women (*honrrada*) second, and prostitutes last. Additionally, the wording changed from the death of the "victim" to the death of the "minor." This alteration punished men who killed child victims but not those that killed adult victims of rape. Although slight, these changes indicate the increasing

[58] *Código Penal de la República Argentina* (1888), L. II, tit. III, cap. II, art. 127.
[59] Rivarola, *Exposición y crítica del código penal*, 162.

predominance of the use of age as a variable in gauging the severity of a crime rather than moral character and even violence. Although the 1887 code came under immediate attack, these stipulations remained the lawful definition until the 1903 Reform Law.

Following Rivarola's critique, the 1891 plan went further to emphasize the youthfulness of victims by reorganizing the section on rape and changing the definition of the crime. First, the proposal altered the order of the clause, repositioning the three different cases that constituted rape. Where the 1887 code had listed the use of force or intimidation first, and the minor under twelve last, the 1891 plan inexplicably switched these prescriptions to read: "the person who has sex outside of marriage, with a person of one or the other sex, in the following cases: 1. When the victim is under 12 yrs old, 2. When the offended person is without reason or sense, or for illness or any other causes is unable to resist, 3. When force or intimidation is used."[60]

This may not seem like an important shift. However, in colonial as well as republican law, violence was the principle feature of rape that distinguished it from seduction. Placing the case of age above the use of force and intimidation, then, indicates a clear move in the law towards protecting young victims over adult women from sexual attack.

The 1891 plan also changed the definition of rape by removing the clause "even if the act is not consummated." This extraction made sexual intercourse a requirement for rape. Following the positivist individualization of punishments, the code acknowledged that it may be necessary to sentence two delinquents differently for the same crime, given

[60] *Proyecto de código penal para la República Argentina* (1891), L. II, tit. II, cap. I, art. 146.

the nature of the criminal act, the perversity of the criminal and the conditions under which he committed the act. The official commentary for this differentiation of punishment provided the example of two men who raped minors younger than twelve. The lawmakers' commentary on this extraction exemplifies how they had begun to assume the victims of rape to be young girls.

Finally, the 1891 plan extracted all mention of differing punishments based upon the victim's character or social standing, moral or otherwise. The removal of married women and prostitutes from the article underlines this change. The 1903 Reform Law, founded upon the 1891 plan, maintained the same wording and organization of this clause, solidifying into the law the shift in the definition of rape towards youthful victims. Despite further changes to the law in 1906 and 1916, this clause remained the same in the 1921 code.

The removal of sodomy from the law and the inclusion of males as victims of rape further illustrate how elites increasingly focused on the young in "Crimes against honesty." In the *Siete Partidas*, sodomy epitomized the correlation between sin and crime. Spanish law defined sodomy as the "sin into which men fall having sex with one another against nature and natural custom." Such actions hurt not only the men involved, but also "the land where it is committed."[61] The *Partidas* normally assumed consent in the "sin of lechery against nature," and condemned both participants to death. However, the law exempted from punishment those forced into the act and those younger than fourteen. It did not penalize unwilling victims of sodomy older than fourteen because

[61] Part. 7, tit. 21, preface.

force negated their complicity. It absolved minors under fourteen for ignorance: they did not understand the wretchedness of their actions.[62] Colonial law, then, recognized three situations in which sodomy could occur: consensual sex between adult males, forced sexual intercourse whatever the victim's age, and sex with a minor, whether forced or consensual.

Sodomy disappeared in its most deleterious form—consensual sex between consenting males—from republican law. Carlos Tejedor made the first step towards extracting sodomy by making it the fifth article under the crime of rape. He simply applied to sodomizers the same punishment that rapists received.[63] The 1903 Reform Law went one step further to remove all direct mention of sodomy. It eliminated the fifth article of rape and included male victims in the primary description of the crime. It defined rape as "sex outside of marriage with a person of *one or the other sex*…" (my italics).[64] Essentially, these changes removed sex between consenting male adults and limited legal action against sodomy to times when the perpetrator employed violence or force, or corrupted a minor in the act.

Tejedor's reasons for excluding sodomy provide important insight into changing ideas among elites and lawmakers of consent versus force and the dividing line between childhood and adulthood. He provided three distinct, yet interrelated, rationales for removing sodomy from the law: the lack of material evidence necessary for its

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[62] Part. 7, tit. 21, ley 2.

[63] *Proyecto de código penal para la República Argentina* (1868), L. I, tit. III, cap. 2, art. 5.

[64] *Código Penal de la República Argentina, nueva edición conforme al texto official con las modificaciones introducidas por la Ley de Reformas* (Buenos Aires: Librería Nacional J. Lajouane & C^{ia}, editores, 1918), L. I, sección I, tit. III, cap. II, art. 127.

prosecution, its continued cultural shamefulness, and its private nature. Underlying all three arguments was the elite desire to keep sex between consenting males out of public view.

Tejedor's first reason for removing sodomy was the lack of material evidence needed to prosecute it. Liberal criminological philosophy stressed the imperative of having physical evidence to prove the occurrence of crimes. Tejedor reasoned that the law should only prosecute acts of sodomy that left material proof, or as he referred to it, "visible and appreciable damage."[65] To be criminal, then, sodomy had to harm one of the participants in the act, and consensual sex did not injure either party.

While his argumentation was in line with the philosophical underpinnings of current criminological thought, Tejedor may also have supported limiting the prosecution of sodomy to certain circumstances because of a desire to keep the act hidden from public view. Referencing French criminologist, Adolphe Chauveau, he questioned the value of pursuing crimes that occurred in "secret" and were "covered with a thick veil," which did not "openly perturb society that [did] not know about them." He asked, "What good comes from discovering hidden blunders, such shameful mysteries? What interest does morality have in these infamous revelations?" Tejedor's use of words like "blunders," "shameful mysteries" and the belief that sodomy "perturbs" society, reveals that he regarded it as an injurious act that offended public morality and modesty and, therefore, needed to be concealed.[66]

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[65] *Proyecto de código penal para la República Argentina* (1868), 318.
[66] Ibid.

The commentary of other elites demonstrates that Tejedor was not the only lawmaker who reviled sodomy. Rodolfo Rivarola expressed similar disgust about "the ugly crime of sodomy," asserting that the law should "be repulsed to make reference" to it.[67] Rivarola and Tejedor alike concluded that in circumstances of sex between consenting adult males, the "law should be silent, even if it is dictated by a feeling of respect for public modesty."[68] Historian Cristian Berco posited that a collective elite silence regarding consensual sodomy was part of an effort to excise public debate about an act considered a blight on civilized society.[69] As Argentine elites sought to join the ranks of European nations, they believed it necessary to hide what they deemed to be a barbarous, shameful act from public view.

Tejedor reasoned that consensual adult sex should lie outside of the arm of the law in part because of its private nature. Again citing Chauveau, he questioned the judgment of prosecuting adult males who practiced consensual sodomy as an intrusion into the private sphere:

> It is enough that justice is forced to proclaim the crime, and punish it when the scandal is made public, or when the freedom of people has been attacked. What would be the consequences of similar intervention by public action? Wouldn't it be *to consecrate the magistrate's inquisition in the private life of the citizens*, to subject intimate actions to its investigations, *to open in one word the sanctuary of the home*…?[70] (my emphasis).

Tejedor's views of sodomy may have been partially influenced by Victorian repulsion of the act. While he never directly quoted English law, looking more French and Italian criminologists, this seems to have been a widespread attitude at the time.

[67] Rivarola, *Exposición y crítica del código penal argentino*, 141.

[68] *Proyecto de código penal para la República Argentina* (1868), 318.

[69] Berco, "Silencing the unmentionable."

[70] Adolphe Chauveau, *Théorie du Code Pénal*, 1843, quoted in *Proyecto de código penal para la República Argentina* (1868), 319.

This passage clearly indicates that Tejedor regarded sodomy as an element of citizens' private lives that should not fall under the law. Given the belief that sodomy was a social disgrace, it follows that Tejedor and his contemporaries would use its "private" nature to justify hiding it from public view.

The penal code was not completely silent about sodomy, however. Republican law only removed one of the three situations outlined in the *Siete Partidas* in which sodomy could occur. It maintained the circumstances that involved the use of violence and resulted in the corruption of minors. The law's preservation of sodomy in these cases raises questions as to the jurisdiction of the state. Tejedor denied the right of the law to prosecute consensual adult sex because it was private, but allowed the state to intervene in the private sphere when children were involved. The 1903 Reform Law defined rape as "sex outside of marriage, *with a person of one or the other sex*" in three situations: when the victim was a minor younger than twelve, when the offended person could not resist for any reason, and when the crime involved force or intimidation.[71] Republican law legally lowered the age stipulation from the colonial precept of fourteen to twelve. The code, then, exclusively prosecuted acts of sodomy committed against children under twelve, heightening the punishment when a grave alteration to the victim's health, or worse, his or her death, occurred.

While laws concerning sodomy epitomize the secularizing tendency that began at the end of the eighteenth century, which broke down the correlation between sin and crime, it also illustrates the turn in republican law towards protecting young victims from

[71] *Código penal de la República Argentina* (1918), L. I, sección I, tit. III, cap. II, art. 127.

sexual assault. The seventeenth century jurist, Antonio Gomez, believed that all crime, whether public or private, causes a double injury: to the offended and to the republic.[72] In the late nineteenth century, the legal treatment of sodomy blurred the line between the two realms when it came to the protection of children. What was a private, shameful act, beyond the reach of the law, when practiced between consenting male adults became a threat to the public good when exercised upon youth. In the latter case, the law did not hesitate, at least in theory, to open the "sanctuary of the home."

As rape and abduction were sexual crimes that potentially involved violence or force, so republican law used them to protect grown women from coerced sexual intercourse. As the treatment of sodomy demonstrates, the age of twelve marked a definitive line between child and adult based upon the right to marry and the ability to consent to sex. Additionally, the redefinition, reorganization, and inclusion of young male victims in articles on rape demonstrate the shift from colonial consideration of the victim's moral character to republican concern with his or her youthfulness. While the law still defined abduction and rape by the violence used in their perpetration, the youth of the victim became the defining characteristic that made abduction and sexual intercourse criminal acts.

Redefining Innocence: The Seduction of Virgins and Girls

While age slowly replaced moral character as the premise of what constituted rape, changes in the description of *estupro*, or seduction, simultaneously redefined the

[72] Levaggi, *Historia del derecho penal argentino*, 29.

meaning of innocence. Young girls replaced morally chaste women as the presumed victims of seduction. The *Siete Partidas* had described men who "lie with women…using deception not force."[73] These were not just any women, however, but nuns, virgins and widows who lived "honestly" in their homes. A woman's chastity was a prerequisite for her ability to be seduced.[74] The *Partidas* deemed the seduction of a virgin an affront to God, an attack on someone living honestly before him, and an act of dishonor for the relatives of the woman. Although the victim's virginity never completely disappeared from Republican law, her age replaced her assumed moral character as the defining feature of this crime, stressing youthful innocence over virginal innocence. The focus on the victim's virginity in *estupro* highlights cultural questions of consent and the sanctity of youth, and the increasing influence of scientific and medical discoveries on the legal process.

In republican law, popular ideas concerning consent, age and virginity affected how seduction became a crime exclusively committed against young girls. In the commentary to his original plan, Carlos Tejedor acknowledged the difficulty he faced in deciding whether or not to include seduction in the code. In the end he did, and he defined it as sex with a virgin woman older than twelve and younger than twenty using seduction.[75] His conclusion, drawing from the Spanish Code of 1850, highlights the

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[73] Partida 7, tit. 19, preface.
The distinction between deception and force differentiated *estupro* from both rape and abduction. While rape only involved violence and abduction could involve either deception or violence, this crime *only* involved deception.

[74] Tit. 19 only included nuns, virgins and "widows" who lived honestly. It excluded married women because there was no violence involved.

[75] *Proyecto de código penal para la República Argentina* (1868), L. I, tit. III, cap. III, art. 1.

continuation of a basic colonial assumption surrounding seduction: "Force can happen to whatever person: seduction is not punishable except when it happens to determined women."[76] The premise is that not just any woman could be seduced. Rather, a woman's virginity, or at least her "regular conduct," predicated her ability to be deceived.[77]

The underlying premise of Tejedor's comment was that the law could not prosecute consensual sex, but only sex that resulted from a man deceiving a woman. Only *doncellas*, or "maidens," were seducible. But what does "maiden" mean and who was considered to be one? *Doncella* translates into English as virgin. In colonial law, the direct link between virgin and seduction was clearly defined. Cultural continuity ensured that these connotations carried over from the colonial to the republican period. Rodolfo Rivarola reiterated this connection in his 1890 critique, when he asserted that only a virginal woman who has been seduced merited protection by the law.[78] In republican law, however, age-based definitions of both abduction and seduction increasingly blurred this connection.

Between the 1887 code and the 1903 Reform Law, age replaced moral character as the defining feature of the victim that criminalized sex resulting from deception. The 1887 code changed Tejedor's definition in two ways: it lowered the top age from twenty down to fifteen, and it identified the victim as a virginal woman (*mujer virgen*). It therefore made *estupro* a crime that could only be committed against girls younger than

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[76] Ibid., 328.
This assumption also extended to the abduction of virgins/young girls.
[77] Ibid., 321.
[78] Rivarola, *Exposición y crítica del código penal argentino*, 163.

fifteen who were physical virgins. Although the commentary of the 1887 code echoed Tejedor's conclusion that *estupro* assumed a virginal woman, or "at least one whose conduct has been regular until that point," the clause itself predicated a physical state of virginity, not the presumption of good conduct.[79]

The 1891 plan fundamentally changed the definition of *estupro*. It shifted the foundation of this crime from a physical state, that of virginity, to a condition, that of "honesty" (*honesta*). Following the positivist reliance upon new scientific findings, the drafters of the 1891 plan supported this shift based upon the discoveries of European legal doctors. They had shown that the rupture of the hymen, indicating a loss of virginity, could occur in any accident, and may not actually happen during sexual intercourse.[80] Virginity was not, as Rivarola had asserted, a juridical category.[81] The difficulty of proving seduction in the face of possible consent necessitated a more stable category than virginity.

What replaced virginity to define *estupro*? At first glance it appears that the shift from virgin to "honest" in the 1891 plan signaled a return to the colonial focus on a woman's moral character through her chastity and appropriate lifestyle. However, the pairing of "honest" with the conditions of age (the only people who can be victims of *estupro* had to be under 15), made the focus of the relationship young innocence rather than chaste innocence. The youthfulness of the victim became proof of her "honest"

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[79] *Código Penal de la República Argentina* (1888), 123.
[80] *Proyecto de código penal para la República Argentina* (1891), 160-161.
[81] Rivarola, *Exposición y crítica del código penal argentino*, 146.

character.[82] The 1903 Reform Law adopted the definition from the 1891 plan into law, punishing a man with 3-6 yrs of prison when the victim was an "honest" woman older than 12 and younger than 15.[83] This definition remained the same in the 1921 code.

One reason for the shift to youthful innocence in *estupro* and the increasing protection of young victims lies in a common belief in the sanctity of childhood and ideas of consent. The official commentary in the 1887 Code indicated a cultural belief in the purity of youth. The law, it posited, saw "a monster of barbarous lechery in he who profanes…that which for all types of human and divine reason should be respected."[84] Rodolfo Rivarola echoed these sentiments when he criticized punishing the rape of a married woman and a young girl under twelve equally. Married women had the ability to incite or provoke an attack while "infancy always merits the greatest respect, whatever its condition."[85] In line with this idea was the cultural belief that "in no case can the consent of a minor under twelve occur."[86] Both law and social custom considered young girls under twelve to be completely innocent and unable to exercise their own will.

These ideas fit within two distinct cultural trends. First was the continuation of the colonial association between ignorance and youth. The *Siete Partidas* negated the punishment of girls under the age of twelve in cases of incest, because they did not know

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[82] The 1891 plan further highlighted the exclusivity of youth in this clause by adding, "and numbers 2 and 3 of the last article are not present." This refers to the two stipulations under rape of the victim lacking sense and the use of force or intimidation, leaving the first case of a victim under 12 years old.
[83] *Código Penal de la República Argentina* (1918), L. I, sección I, tit. III, cap. III, art. 130.
[84] *Código Penal de la República Argentina* (1888), 120.
[85] Rivarola, *Exposición y crítica del código penal argentino*, 140.
[86] Ibid, 162.

what kind of sin they were committing.[87] The second trend—the increasing romanticization of childhood—emerged in the late nineteenth century. Historian Eugenia Rodriguez Sáenz identified this trend in Costa Rica as a cultural invention that emerged simultaneously with the idea of juvenile delinquency.[88] These ideas of infancy and youth influenced the way in which lawmakers redefined seduction to protect young girls.

An inherent contradiction in the definition of *estupro* in the 1903 Reform Law demonstrates how this change occurred. The Reform Law removed the stipulation of the use of seduction in the execution of the act of *estupro*, but maintained the "honest woman" as the condition of the victim. Traditionally, the chastity of the victim was a fundamental prerequisite for her ability to be seduced. If deception was no longer a defining element of the crime, what did "honest" mean? Given the removal of the stipulation of seduction, "honesta" came to mean exclusively "young." A woman's innocence was no longer linked to her virginity. Here, then, is the shift from innocence based on chastity to innocence rooted in youth. Historian Eugenia Rodriguez Sáenz points out that in Costa Rica, youth and innocence were often culturally synonymous with virginity: "a child of a very young age…was generally prepubescent, for which there was greater possibility that the victim was perceived in a state of virginity, sexually innocent and morally whole."[89] Commentary on the codes indicates similar cultural assumptions in Argentina. Rivarola commented, "By general rule, among us a woman older than fifteen knows how to guard her own honesty, if she is truly honest…[the law] presumes…that

[87] Part. 7, tit. 18, ley 2.
[88] Rodriguez Sáenz, "¿Víctimas inocentes o codelincuentes?," 174.
[89] Ibid., 187.

being younger than fifteen she is ignorant of sin."[90] While cultural assumptions aligned age and virginal innocence, the removal of virginity and seduction from the legal definition of *estupro* made it nothing more than an act of sexual intercourse with a girl between the ages of 12 and 15.[91]

The underlying presumption in colonial Spanish law of the moral character of victims of sexual crimes did not legally change until the beginning of the twentieth century. Carlos Tejedor made the first step towards replacing chaste women with young children by including age in the definition of abduction and seduction. However, he also conserved colonial distinctions of women by their moral character through his different prescriptions of punishment. He penalized those who transgressed against virgins and women who live "honestly" more than others. The 1887 Code upheld these distinctions. The 1903 Reform Law finally removed moral character from the clauses on *estupro*, defining the act solely based upon the age of the victim.

The definition of seduction exclusively by age highlights shifting cultural ideas of innocence, consent and youth. As Positivism increasingly influenced the legal process, scientific medical discoveries made the presence or absence of physical virginity insufficient to prove that seduction had or had not occurred. Age then replaced virginity as proof of innocence. The narrow age range of possible victims of seduction, those between twelve and fifteen, suggests the development of adolescence as a stage of growth and maturation. While twelve marked the dividing line between those who could consent

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[90] Rivarola, *Exposición y crítica del código penal argentino*, 148.

[91] While more research is needed, the substitution of seduction for definitions based on age may signify the change in meaning from "seduction" to the modern category of "statutory rape."

and exercise will and those who could not, fifteen became the legal cut off for the innocence of girls.

The Preeminence of Children: Authority and the Corruption of Minors

In the crimes of rape, abduction and seduction, the shift from chaste, moral women to young, innocent girls highlights the concern in the late nineteenth century with protecting youth. The crime of "corruption of minors" and the development of clauses that punished adults in positions of authority more severely than other transgressors further emphasized the new focus on youth. The clauses on the corruption of youth highlight an inherent tension surrounding the gendered dynamics of victims of crime. The treatment of young male victims in the law potentially exposed them to unpunished sexual assault, given that the law clearly defined the protection of innocent girls while leaving boys exposed. This juxtaposition exposes underlying cultural assumptions of gender and reveals an implicit lack of concern about male youth.

From Incest to Authority

Lawmakers removed incest from republican law and replaced it with clauses that punished adults in positions of authority over children more harshly than other offenders. The title in the *Siete Partidas* that dealt with "those who lie with their relatives or sisters-in-law," was one of the only articles that explicitly referenced age.[92] Under the second law of this title, any man could accuse another of incest unless the perpetrator was a boy younger than fourteen or a girl under the age of twelve. The *Partidas* did not give an

[92] Part. 7, tit. 18, preface.

explicit reason for the exemption of young transgressors of incest. However, the reasoning given in the section on sodomy provides an answer. The law did not punish a boy under fourteen of sodomy because of the ignorance associated with his youth. This reasoning indicates that minors could not be accused of incest because they did not know how awful it was. In republican law, provisions that held authority figures responsible for their young charges replaced direct reference to incest. The presence of these "clauses on authority" reinforced the new association of youth as the primary victims of sexual crimes.

Carlos Tejedor removed incest from his plan for two reasons: its religious nature and the problem of adult authority over children. He questioned whether or not to include incest in his plan because of its strong association with sin. Liberal law negated the right of the state to interfere in issues of morality. While Tejedor acknowledged that parents abused their power and ignored the "most sacred feelings and duties" to educate the next generation when they committed incest, he reasoned that the law should be silent about it. Although "religion condemns such acts," he wrote, "law should do without them and not cause greater scandals than those that it corrects."[93] Tejedor chose to leave incest out of his plan because of its religious connotation.

While he excluded incest as a crime in and of itself, because it destroyed the "physical and moral forces" of children, Tejedor retained the right of the law to punish those who abused their authority over youth by committing the act. He subsumed incest into *estupro* through a clause that singled out authority figures for greater punishment

[93] *Proyecto de código penal para la República Argentina* (1868), 322-323.

than other criminals. The second article of seduction gave a greater prison sentence to the perpetrator who "exercises authority, or by a priest, tutor or teacher or any other person charged with the education or protection of the minor, *or by her relative (ascendiente) or brother* (my italics)."[94] The substitution of incest with clauses such as these underlines the gravity of an adult abusing his or her authority over youth. The law frowned upon those who took advantage of their position to educate or care for children, corrupting their innocence or causing them harm.

Articles on authority remained a central feature of all subsequent legislation. The 1887 code adopted Tejedor's clause but removed reference to teachers or tutors, including only one "who exercises authority, by a priest or by any other person charged with the education or protection of the minor, or by her relative (*ascendiente*) or brother."[95] The 1891 plan reversed the order of the wording, emphasizing the action performed by a relative rather than other authority figures. It also specified more precisely what type of relative. The clause punished the act when it "is committed by a *relative of the direct line (ascendiente, descendiente, afín en línea recta), brother* or someone charged with the education and protection of the youth, or in concert with two or more people (my italics)."[96] The most notable aspect of this clause on authority is that it applied to rape, not seduction.

The punishment of authority figures for the crime of rape highlights how changes to the organization of crimes within the code favored youthful victims. In Tejedor's

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[94] Ibid., L. I, tit. III, cap. 3, art. 2.
[95] *Código Penal de la República Argentina* (1888), L. II, tit. III, cap. III, art. 131.
[96] *Proyecto de código penal para la República Argentina* (1891), L. I, tit. II, cap. I, art. 149.

original proposal, the articles regarding authority figures applied exclusively to the two crimes that presumed minor victims, *estupro* and the corruption of minors. The 1887 code grouped these two crimes together in one chapter, highlighting their very obvious association. The 1891 plan, however, regrouped them with the other crimes that were not explicitly associated with minors. This reorganization made the assumption that children are the victims of all sexual crimes.

The organization of the 1903 Reform Law made youth the assumed victims of rape. It grouped rape with seduction and "attempts at modesty" under one chapter. This extended to rape the clauses on authority that had been exclusive to seduction. Additionally, one article prescribed the same punishment when the victim of both rape and seduction died. By combining these two crimes under the same heading, the law blurred the distinction between them and assumed the youthfulness of the victim in most cases. The association between these two crimes remained in the 1921 code.

The secularization of law removed the connotation between sin and crime, leaving no room for religious reference in republican penal codes. For this reason, lawmakers extracted incest from legislation and replaced it with clauses that punished with greater severity adults who abused their authority over children. Extending clauses on authority to criminal actions such as rape, which did not exclusively assume youthful victims, blurred the lines between crimes. The result was an increased focus on children as the victims of sexual assault.

Protecting Society through Minority: Legal Prostitution and the Corruption of Minors

The crime of corrupting and prostituting minors is another that uniquely captures the new emphasis on children in republican law. The *Siete Partidas* defined five different kinds of prostitution, and in all cases assumed a male pimp and a female sexual object. In the republican era, the legalization of prostitution caused this criminal act to become directly and uniquely tied to minors of both sexes. The definition of the "corruption or prostitution of minors," and the age of those included in its provisions continued to change even after the 1903 Reform Law. The constantly shifting nature of this crime reflects a growing elite anxiety about the effects of prostitution on society. As lawmakers attempted to counterbalance the damage that prostitution inflicted, they used the legal category of "minority" to protect society.

The final crime of lechery in the *Siete Partidas* dealt with *alcahuetes*, or mediators—men who corrupted good women. It defined these as "a manner of people from whom comes much evil to the earth… they are facilitators of sin."[97] The reason for such malevolence was that these men deceived women and forced them into carnal immorality. The *Partidas* identified five types of mediators: there were rogues (*vellacos malos*) who watched over public prostitutes and took part of their earnings, and interpreters (*trujamán*) who, for part of the profit, acted as go-betweens for men and women who prostituted from their houses. After *trujamanes* came men who kept young, knowledgeable girls (*mocas asabiendas*) captive in their homes and took from them what they earned by "doing evil with their bodies." The man so vile that he prostituted his own

[97] Part. 7, titulo 22, preface.

wife came next, followed by those who fornicated with married women, or women of good standing, for some sort of compensation. The *Partidas* punished these men because they caused the perdition of good women. The worst type, who the law condemned to death, was he who pimped his own wife, a nun, virgin, married woman or a widow of good standing. In all cases, colonial law assumed a male pimp and a female prostitute.

In republican law, pimping took out the adult component and became exclusively associated with the corruption of minors. In the only article that addressed prostitution, Tejedor punished "whoever habitually, abuse[s] authority/confidence to facilitate prostitution or corruption of minors younger than twenty to satisfy the desire of another."[98] In this clause, "whoever" could refer to either a male or female corruptor, and "minors" included both male and female victims. Tejedor identified four specific circumstances necessary for this crime: the promotion or facilitation of corruption, that the prostituted were minors, that it happened habitually or with the abuse of confidence or authority, and that it was not for the enjoyment of the corrupter him or herself, but for the sexual appetite of another.[99] So Tejedor defined the corruption of minors by age, abuse of authority and habitual action.

The 1887 code decreased the age limit for the crime from Tejedor's suggested twenty to eighteen. It also included a provision that increased the penalty for corrupting a child younger than fourteen. The 1891 plan maintained the age cap of eighteen, but rejected the distinction between victims older and younger than fourteen, judging that it

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[98] *Proyecto de código penal para la República Argentina* (1868), L. I, tit. III, cap. II, art. 3.
[99] *Ibid*., 326.

was unnecessary in order to establish a punishment.[100] The code provided no further explanation as to *why* it did not require this differentiation. It may have been due to another article that increased the prison sentence if the minor was younger than twelve, or if the corruptor was a relative, husband, or anyone charged with the youth's education.[101] The commentary for this clause suggested that the young age of the victim in the first case, and the greater perversity (*la mayor vileza*) of the perpetrator in the second, merited greater punishment.

The 1903 Reform Law conserved this definition but made the crime more severe in two ways. First, it increased the prison sentence when the victim was under twelve and the perpetrator was related to the victim. Second, it added deportation as a punishment for repeat offenders. These changes indicate the seriousness with which officials regarded the prostitution of youth, especially in light of the growing anxiety at the beginning of the twentieth century with the corruptive effects of prostitution in general. They also reflect the influence of Positivism on the process of codification, as positivist lawmakers tended to increase all punishments in order to better protect society.

The plan presented to Congress in 1906 highlighted the increased anxiety among elites over the pernicious effects of prostitution at the turn of the twentieth century. The project simultaneously proposed to expand the jurisdiction of the state in regulating legal prostitution and included articles that reinforced the protection of youth. Several new articles served to expand the reach of the law, moving the definitions away from the

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[100] *Proyecto de código penal para la República Argentina* (1891), 164.
[101] Ibid., tit. II, cap. II, art. 155.

exclusive focus on minors. These included a clause that punished those who forced women into prostitution, those who benefited individual monetary gain from prostitution, and those who aided the circulation of obscene objects in society. Another clause attempted to regulate the "trade of whites."[102]

Other clauses served to reinforce the code's primary focus on protecting children from corruption. The 1906 plan included a stipulation that punished the abuse of authority in the prostitution of individuals older than 18 when violence was involved.[103] This article protected all minors up to the age of eighteen. Until now, the law had only punished adults who abused their authority over children younger than fifteen. Additionally, by holding managers of prostitution houses accountable, the 1906 proposal provided increased protection for those youth who may have been forced into prostitution. Finally, it punished anyone who "dishonestly abused" a child of either sex, within the three circumstances of rape, but without sexual intercourse. This clause provided children with legal protection from sexual abuse that did not involve forced intercourse. All of these provisions further defended youth against sexual assault.

The 1921 code responded even more strongly to concerns over the social effects of legal prostitution, attempting to use minority as a means of regulating the industry. The

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[102] Much has been written on the "White Slave Trade," especially in Argentina, as at the turn of the twentieth century the country received an international reputation as a hotbed of white European women's perdition. See Donna Guy, " 'White Slavery,' Citizenship and Nationality in Argentina," in *Nationalisms and Sexualities* edited by Andrew Parker, Mary Russo, Doris Sommer and Patricia Yaeger (New York: Routledge, 1992): 201-217; also Guy, *Sex and Danger in Buenos Aires: Prostitution, Family and Nation in Argentina* (Lincoln: University of Nebraska Press, 1991).

[103] *Proyecto de Código Penal para la República Argentina, redactado por la Comisión de Reformas Legislativas constituída por decreto del Poder Ejecutivo de fecha 19 de diciembre de 1904* (Buenos Aires: Tipografía de la Cárcel de Encausados, 1906), L. II, tit. III, cap. III, art. 128, 129.

code increased the age of those protected under the law to include all people under 22, which was the cut off age of minority in the Civil Code.[104] The inclusion of all minors under 22 greatly expanded the jurisdiction of the state. The 1921 code also differentiated between crimes committed against victims younger than twelve, those between the ages of twelve and eighteen and those between eighteen and 22.[105] This article, then, included women who were legally minors, but who had been previously excluded from attempts to protect young, innocent girls from sexual assault.

Unlike most other definitions of sexual crimes, which remained the same after the 1903 Reform Law, the clauses on the corruption of minors continued to change through the 1921 code. The incorporation of all minors under the age of 22 into clauses on prostitution may have been a way for elites to curb the corrupting effects of legalized prostitution on society through criminal law. The regulation of prostitution through legal minority fits within turn-of-the-century nationalist movements, which sought to safeguard society from disorder and immorality and to ensure the safety and future of the nation.

The Innocent Girl, The Vulnerable Boy: Gendered Dynamics of Victimhood

As should be clear from the previous discussion, the law's increasing stress on youthful victims sought primarily to protect young, innocent girls from sexual attack and society from the pernicious effects of legalized prostitution. The penal code simultaneously legally exposed young boys to unpunished sexual assault. In juxtaposition

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[104] *The Argentine Civil Code*, book I, section I, title 9.

[105] *Código Penal Argentino, sancionado el 30 de Septiembre de 1921* (Buenos Aires: Talleres Gráficos Argentinos de L. J. Rosso y C[ía], 1921), tit. III, cap. III, art. 125.

to the crimes of rape, seduction and kidnapping, which were exclusively associated with chaste female victims in the *Siete Partidas*, sodomy and incest were sins that claimed male victims as well as female. The *Partidas* protected boys younger than fourteen from prosecution for these crimes, stipulating that because of their ignorance of sin, they could not be convicted as consensual participants. In republican law, the inclusion of incest and sodomy in rape and seduction removed both colonial crimes that explicitly involved male victims as well as the protection they had enjoyed. Young boys were then only protected in republican codes through nuances of language.

Between Tejedor's plan and the 1903 Reform Law, the law incorporated male victims into the clause on rape. In his commentary on the crime, Tejedor remarked that it did not matter whether the victim was a man or a woman, but he kept sodomy as its own distinct article. Additionally, Tejedor's wording of the principle article of rape exclusively assumed acts of sexual aggression against females.[106] He punished the man who "using physical violence or threats of imminent and actual danger to one's body or life, forces *a woman* to suffer sexual 'approximation' against her will" (my italics).[107] The 1887 code replicated this formulation. Additionally, in the fifth article of rape, it referred only to the "defendant convicted of sodomy," but made no explicit reference to male victims of the crime.

The 1891 project removed the article about sodomy and replaced it with new wording in the description of rape. It called rape "sex outside of marriage with a *person*

[106] *Proyecto de código penal para la República Argentina* (1868), 315.
[107] Ibid., L. I, tit. III, Cap. II, art. 1.

of one or the other sex." This extended the stipulations for rape – the use of violence, a victim without sense, and a minor under twelve – to male as well as female victims. The inclusion of "person of either sex" in the definition of rape in the 1903 Reform Law constituted the first legal acknowledgment of male victims of sexual crimes in Republican law.

Despite this inclusion, the intricacies of the Spanish language potentially threatened to exclude male victims of sexual assault from legal repercussion. One commentary from the 1891 plan demonstrated this danger. In the discussion of the corruption and prostitution of minors, the explanatory note referred to Tejedor's wording: "who habitually or with the abuse of authority or confidence promotes or facilitates the prostitution or corruption of *minors* (*menores*) younger than 20, to satisfy the desires of another…(my italics)."[108] The 1891 commentary highlighted that Tejedor referred to "*menores*" in the plural, which included boys, as well as girls, as potential victims of prostitution. However, it also noted that Tejedor fixed the punishment for this crime only against the corrupter of "*la menor,*" which indicated that the crime could only be committed against victims of the feminine sex.[109] While the 1891 code affirmed that prostitution can damage both male and female minors and should be reproached equally, the two examples it cited from Tejedor's code demonstrate how, through mere slippages in gendered grammar, young boys faced potential lack of protection under the law.

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[108] Ibid., art. 3.
[109] *Proyecto de Código Penal para la República Argentina* (1898), 163-164.

Another example from the 1903 Reform Law demonstrates how lawmakers almost exclusively assumed that victims of these crimes were female. Although the law made rape an act against a "person of one or the other sex," a subsequent clause referred exclusively to female victims. The fourth article, addressing cases of exacerbated circumstances in the rape of a youth, read: "…when [in] the cases of [rape] serious damage to the health of the victim results, or when it is committed by a relative of direct line, a brother charged the education or protection of *the little girl ("la niña")*, a priest or by two or more people."[110] Although the clause on rape included both sexes, the following article exposed lawmakers' assumption of young female, not male, victims. The same goes in Rivarola's critique of the 1887 code. Throughout his commentary, the jurist referred exclusively to women and girls. The only time he mentioned male victims was in his brief discussion of sodomy. Not surprisingly, he ended his musing in questioning whether females could also be sodomized.[111]

Although boys were included in rape and the corruption of minors through language, by their very nature, they were excluded from the two crimes of seduction, *estupro* and *rapto*. The underlying assumption was that young boys could not be seduced. Since innocence associated with virginity was the most important requisite of seduction, this assumption created a different relationship between young boys and innocence than that between young girls and innocence. In affect, it assumed that young boys were not innocent and in need of protection in the same way as little girls.

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[110] *Código Penal de la República Argentina* (1913), art. 19, letra "d."
[111] Rivarola, *Exposición y crítica del código penal argentino*, 140-143.

The inclusion of male victims within the definition of rape highlights the increasing focus on children in criminal law. Lawmakers' oversight of young boys in the codification process, however, exposes cultural gender norms. Males did not need, or perhaps merit, the same legal protection from moral corruption that the law extended to young, innocent female victims.

Conclusion

In the mid-nineteenth century, liberal elites began to systematize law as a foundation for the newly consolidated nation of Argentina. This prolonged, often conflictive process extended through the second decade of the twentieth century. Around the 1890s, new positivist ideas from Europe began to replace the reigning liberal philosophy that had dominated since mid century. While liberal concepts of free will and individual rights influenced the first penal code of 1887, the 1903 Reform Law marked the legal adoption of positivist ideas of criminal behavior stemming from the scientific study of man. Together with shifting criminological paradigms, the desire of elites to import norms from Europe and simultaneously adapt them to Argentine society worked to stymie the codification of penal law. Not until 1921 did lawmakers draft a code that began to meet the expectations of those involved in the process.

The influence of positivist ideology on the legal process formed part of the turn-of-the-century nationalist campaigns to ensure the future of the nation through the protection of children. This trend is evident in the republican redefinition of colonial sexual crimes. Over time, the cultural assumptions underlying these criminal acts changed. As lawmakers increasingly defined the acts of rape, seduction, kidnapping and the corruption of minors by the age of the victim, rather than her assumed moral character, the penal code came to focus more and more on children. At the same time that age-based definitions sought to protect young victims from moral corruption, the

continued definition of abduction and rape according to the violence used in their perpetration protected grown women from violent sexual attack.

While redefining colonial crimes of lechery as actions carried out against children, lawmakers simultaneously gave new meanings to the social categories of childhood and adulthood. The law used age to distinguish four main groups of females: children under twelve years old, girls between the ages of twelve and fifteen, unmarried women older than fifteen, and married women. Twelve marked the line between childhood and adolescence. Female children under twelve could not exercise their will to consent to sexual acts. They were also perceived as completely innocent. Through the redefinition of crimes involving deception, adolescence emerged as an intermediary stage towards adulthood. During the three years between twelve and fifteen, girls were still considered innocent, but they were old enough to give their consent in sex. After a youth passed the age of fifteen, she joined the ranks of adult women.

Marriage complicated this picture, however. The Civil Code allowed young girls to marry at the age of twelve with their parents' approval, bypassing the intermediary stage of adolescence. How could she make such an important decision as marriage when she was presumed not to be able to consent to sex? This contradictory assumption demonstrates that at the same time that lawmakers defined different types of women and differentiated between them according to age, consent, violence and marriage, the lines between childhood and adulthood were often very blurry.

That most of lawmakers' energy went into discussing female sexuality, chastity and consent highlights the presumption that women were the primary victims of sexual

assault. Limited discussion of males and the treatment of sodomy, however, provide glimpses at changing attitudes towards male sexuality. The removal of sodomy from the law had two simultaneous effects. First, it decriminalized consensual sex between adult males, which illustrates the movement towards removing religiously charged sins from secular law. It also made sodomy an act of rape either committed using violence or against boys under the age of twelve. The state, then, restricted itself when it came to the consensual actions of adult males, rejecting the intrusion of the law into the private sphere, but extended its long arm to protect youth. In the case of males, the line between adulthood and childhood also rested upon consent. The state's willingness to act on the behalf of young victims is also evident in Rivarola's commentary about *estupro*. He questioned which women needed care for their own honor, and which merited the benefit of state vigilance. He concluded that modern legislation should limit itself to the protection of minors. It was no longer about a woman's virginity or reputation, but about her age.

The legal changes that made young children the assumed victims of sexual assault occurred in 1903, at the same time that Congress ushered Positivism in as the underlying philosophical premise of penal law. In theory, the influence of positivist penology incorporated the lawmaking process into larger nationalist movements, but did positivist elites' views of children and deviant sexuality affect the realities of administering justice in criminal courts? The potential disparity between these two processes raises many questions about the influence of positivism in the lives of the women and girls that the law sought to defend. How did elite lawmakers' changing views of female sexuality

compare with more widely held cultural assumptions? Did criminal court judges share their opinions? What kind of justice did victimized females receive in a male-dominated legal system? This study of congressional codification provides the essential legal and theoretical background for answering these questions through an investigation of the changing criminal justice system in late-nineteenth-century Buenos Aires.

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