

# Renaissance *Redux*? Chastity and Punishment in Italian Rape Law<sup>†</sup>

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## I. INTRODUCTION

This essay examines an Italian sexual assault case that received significant media attention.<sup>1</sup> The *Corte d'appello*<sup>2</sup> of Cagliari concluded that the defendant was not entitled to a reduced sentence when he was convicted of sexually assaulting his fourteen-year-old step-daughter. On review, the Third Section of Italy's *Corte di Cassazione*<sup>3</sup> held that the lower court's refusal was erroneous. *Cassazione* faulted the appellate court for failing to consider that the victim had already engaged in sexual activity with others.<sup>4</sup> This case illustrates how changing rape laws on the books does not always bring about immediate change in attitudes. Indeed, notions of chastity and rape myths continue to influence interpretation of Italian rape law reforms.

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<sup>1</sup> See, e.g., Gennaro De Falco, *Sentenza choc? No, la colpa è dei media*, n.9 DIRITTO E GIUSTIZIA, Mar. 4, 2006, at 41. The author has translated this opinion and included it as an appendix to this essay.

<sup>2</sup> A court of second instance in Italy. Rachel A. Van Cleave, *Italy*, in CRIMINAL PROCEDURE A WORLDWIDE STUDY 303, 330–31 (Craig M. Bradley ed., 2d ed. 2007). The defendant was convicted by the *tribunale*, the court of first instance. It is not clear whether the *tribunale* reduced the defendant's sentence.

<sup>3</sup> I refer to this Court as either the *Corte di Cassazione* or simply *Cassazione*. *Cassazione* is Italy's court of last resort for civil and criminal appeals. See Van Cleave, *supra* note 2, at 329.

<sup>4</sup> Cass., sez. tre, 17 feb. 2006, n.6329, reproduced in <http://www.altalex.com/index.php?indstr=49&idnot=10373> (last visited Feb. 24, 2006); Marta Bertolino, *Reati sessuali e tutela di minori: la prospettiva dei mezzi di informazione e quella dei giudici a confronto*, 2006 RIVISTA ITALIANA DI DIRITTO PROCEDURA PENALE [RIV. IT. DIR. PROC. PEN.] 338; Giovanni Rizzo, *Casi di minore gravità nei reati sessuali e discrezionalità del giudice*, XXXV IL DIRITTO DI FAMIGLIA E DELLE PERSONE 1047 (2006) [hereinafter Rizzo, *Casi*].

The reaction to this sentence was swift and nearly unanimous, with the Italian newspapers describing the decision as “shocking.”<sup>5</sup> Another newspaper article reported the reactions of politicians and associations, all of whom expressed disbelief and serious concerns.<sup>6</sup> The Italian President of UNICEF, Antonio Sclavi, stated that international-rights law does not permit the law to mitigate criminal sentences for sexual conduct with minors.<sup>7</sup> “I felt as if I had gone back fifty years in time and been punched in the stomach,” was the reaction of Maria Gabriella Carnieri Moscatelli, President of Italy’s *Telefono Rosa*, a hotline for victims of sexual assault.<sup>8</sup> Indeed, only a couple of months before the decision by *Cassazione*, *Telefono Rosa* had reported that violence against women was on the rise, especially violence against young women.<sup>9</sup> An unnamed judge in the upper echelons of the *Corte di Cassazione* released a statement that “this sentence will go down in infamy . . . and will be cited as a negative example of how a decision should be written and reasoned, much like the fate of the decision about rape and jeans.”<sup>10</sup>

As discussed below, language used by *Cassazione* in this recent opinion raises a number of troubling questions. Has Italy gone at least five hundred years back in time when virginity had a market value and was a measure of a woman’s honor and the honor of her family? Are rape myths so entrenched in the Italian judiciary that not even the recent reform of Italian rape law can vanquish them? This case, as well as others involving the question of “less seriousness,” highlights a fundamental tension in Italy’s reform of rape law. A salient goal of the reform was

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<sup>5</sup> Repubblica.it, *Sentenza shock della Cassazione sulla vicenda di una 14enne: Il patrigno aveva abusato di lei*, Feb. 17, 2006, <http://www.repubblica.it/2005/e/sezioni/cronaca/cassazione/cassagrave/cassagrave.html> (last visited Feb. 18, 2006).

<sup>6</sup> Repubblica.it, *Bufera dopo la sentenza-shock della Cassazione sullo stupro “meno grave” per chi ha già avuto rapporti* Feb. 17, 2006, <http://www.repubblica.it/2005/e/sezioni/cronaca/cassazione/cassagravereaz/cassagravereaz.html> (last visited Feb. 18, 2006).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Repubblica.it, *Violenza, i vertici della Cassazione pronti a sconfessare la sentenza*, Feb. 17, 2006, <http://www.repubblica.it/2005/e/sezioni/cronaca/cassazione/senteseppe/senteseppe.html> (last visited Feb. 18, 2006). This is not the first controversial opinion involving the crime of rape issued by the Third Section of the *Corte di Cassazione*. It has been nearly ten years since this section of Italy’s court of last resort overturned a rape conviction because the eighteen-year-old victim was wearing jeans when her forty-five-year-old driving instructor raped her (The court opined that it is difficult to remove another person’s jeans without the other’s assistance, so the intercourse must have been consensual). Cass., sez. tre, 6 nov. 1998, Cristiano, *Foro It. II* 1999, CXXII, 163 at 169. For a detailed discussion in English of the court’s opinion, see Rachel A. Van Cleave, *Sex, Lies, and Honor in Italian Rape Law*, 38 SUFFOLK U. L. REV. 427, 446–52 (2005). See also Samantha Frank, *Jeans: An Alibi for Rape*, 7 BUFF. WOMEN’S L.J. 10 (1999); Phoebe A. Haddon, *All the Difference in the World: Listening and Hearing the Voices of Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 377 (1999).

to alter the historical and cultural mindset about rape—to move from conceptualizing rape as a crime against public morals and decency to appreciating the offense as one that harms women as individuals. Specifically, the injury is now understood as harm to a person’s sexual autonomy. This is certainly progress. The problem is that scholars<sup>11</sup> and judges have incorporated this “modern” understanding of sexual autonomy into their interpretation of the punishment provisions of the new law. Scholars and judges interpret the provision that allows a reduced sentence for sexual offenses that are “less serious”<sup>12</sup> to require an assessment of the extent to which the particular victim’s sexual autonomy has been damaged. This focus on the individual victim for the purpose of determining the defendant’s punishment has allowed archaic notions about the characteristics of the victim and the value of chastity to reenter judicial analysis of the crime.

Part II of this essay describes some important aspects of the 1996 reform of Italian rape law<sup>13</sup> as background for understanding the provision allowing a sentence reduction for less serious cases. Part III explains the interpretation of the term “*minore gravità*,” or less seriousness, and how scholars and judges have incorporated age-old notions about the value and importance of the victim’s chastity, thus shifting the focus back to the victim and who she is or what she did, while at the same time reducing the significance of the defendant’s actions and culpability. In Part IV, the analysis turns to the specific provision under which the defendant, T.M., was convicted and *Cassazione*’s evaluation of the opinion denying T.M. a reduced sentence. This part demonstrates that the soundness of *Cassazione*’s logic depends on that court’s adherence to historic and damaging rape myths.

## II. ELIMINATING ANACHRONISTIC LANGUAGE

Efforts to reform Italy’s rape law began in 1979 when three hundred thousand Italians submitted a proposal to the Italian legislature that ultimately revamped the law.<sup>14</sup> One aspect of this reform of particular importance, though characterized as primarily symbolic, was to change the classification of sexual offenses in the Italian Penal Code. Sexual offenses had been set out under the archaic heading of

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<sup>11</sup> Italy, like many countries of the civil law tradition, has a long history of valuing scholarly opinions on questions of interpretation. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 56–57 (3d ed. 2007).

<sup>12</sup> Codice penale [C.P.] art. 609 *quarter* (para. 3).

<sup>13</sup> For more in-depth discussions of the 1996 reform, in English, see Rachel A. Van Cleave, *Rape and the Querela in Italy: False Protection of Victim Agency*, 13 MICH. J. GENDER & L. 273, 289–98 (2007); Amy Jo Everhart, *Predicting the Effect of Italy’s Long-Awaited Rape Law Reform on “The Land of Machismo,”* 31 VAND. J. TRANSNAT’L L. 671, 693 (1998).

<sup>14</sup> Italy has a system for popular initiatives whereby citizens can petition the legislature to enact or amend laws. TINA LAGOSTENA BASSI, AGATA ALMA CAPPIELLO & GIACOMO F. RECH, *VIOLENZA SESSUALE: 20 ANNI PER UNA LEGGE* 33–37 (1998) (reproducing the 1979 popular initiative).

“crimes against public morality and decency,”<sup>15</sup> while the law ultimately adopted in 1996 placed sexual offenses within the section of the penal code entitled “crimes against the person.” The symbolic importance of this reclassification was that it acknowledged the personal harm suffered by the individual victims of sexual offenses, and it recognized that victims, predominantly women, would no longer be used to further societal definitions of sexual morality.<sup>16</sup> However, as discussed below, this change has had more than a merely symbolic effect.

Another important aspect of the reform, relevant to this essay, is that the new law eliminated the distinction between what had been two separate offenses. Before the 1996 reform, the penal code criminalized “violent acts of lust,”<sup>17</sup> under one provision, and “carnal violence” in another.<sup>18</sup> The crime “acts of lust” involved forceful sexual conduct that did not result in penetration, while “carnal violence” was limited to sexual conduct resulting in intercourse or penetration. This distinction had various consequences. A court had to determine whether there was any penetration of or by the genitalia of either the victim or the defendant. If so, the crime was one of carnal intercourse. To make this determination, courts required what has been described as “humiliating” testimony from the victim.<sup>19</sup> Such testimony often resulted in turning the victim into a “second defendant” due to the fact that she had to describe with detail and precision what had occurred.<sup>20</sup> This distinction as to the nature of the criminal act assumed that greater harm resulted from carnal intercourse than from acts of lust. The prior law punished carnal intercourse with three-to-ten years’ imprisonment, but punished the crime “acts of lust” with two-to-six years’ imprisonment.<sup>21</sup>

The 1996 reform eschews this distinction and punishes violent or forceful “sexual acts”<sup>22</sup> and “sexual acts” with minors.<sup>23</sup> One reason for eliminating this

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<sup>15</sup> THE AMERICAN SERIES OF FOREIGN PENAL CODES: ITALIAN PENAL CODE 177 (Edward M. Wise trans., Fred B. Rothman & Co. 1978) [hereinafter Wise] (translation of this term).

<sup>16</sup> Van Cleave, *supra* note 13, at 290 n.118 (citing Francisco Romano, *La Violenza Sessuale: Luci ed Ombre Nella Normativa Vigente e Nelle Prospettive di Riforma*, XXIII GIURISPRUDENZA DI MERITO 436, 441 (1991)).

<sup>17</sup> C.P. (1930) art. 521 (“Whoever, [by violence or threats] . . . commits on another acts of lust other than carnal intercourse . . .”); Wise, *supra* note 13, at 177–78 (translation).

<sup>18</sup> C.P. (1930) art. 519 (“Whoever, by violence or threats, compels another to have carnal intercourse shall be punished by imprisonment for from three to ten years”); Wise, *supra* note 15, at 177 (translation).

<sup>19</sup> Alberto Cadoppi, *Articolo 3*, in COMMENTARI DELLE NORME CONTRO LA VIOLENZA SESSUALE 25, 27 (Cadoppi ed., 2d ed. 1999) [hereinafter Cadoppi, 2d ed.].

<sup>20</sup> *Id.*

<sup>21</sup> Carnal intercourse was punished with three-to-six years’ imprisonment, while libidinous acts were punished with two-to-six years’ of imprisonment. C.P. (1930) arts. 521 and 519, respectively.

<sup>22</sup> Whoever forces, by violence or abuses their authority to threaten, another to engage in or submit to sexual acts is punished with a term of imprisonment from five-to-ten years. C.P. art. 609 *bis*. (translation).

distinction was to avoid the need for the detailed testimony of the victim to establish whether penetration had occurred. In addition, the reform rejected the idea that the mere lack of penetration necessarily meant the offense was not as harmful.<sup>24</sup> The 1996 law raised both the minimum and maximum sentence for illegal “sexual acts” to imprisonment from five to ten years.<sup>25</sup> These changes—criminalizing sexual acts and increasing the punishment—eventually led to the addition of the provision for reducing a sentence in a less serious case by up to two-thirds.<sup>26</sup> By 1995, some members of the legislature became concerned that even the five-year minimum sentence might be disproportionate to some offenses of sexual violence, and the provision for less serious cases was added to both articles 609 *bis*, sexual violence, and 609 *quarter*, sexual acts with a minor.<sup>27</sup> However, the legislature left the meaning of “less serious” undefined.

### III. INTERPRETING “*MINORE GRAVITÀ*” AND THE CONCEPT OF “*BENE GIURIDICO*”

Despite codifying new terminology, the legislature did not define the term “sexual acts,” nor did it establish guidelines for determining when a case was one of “*minore gravità*,” or less seriousness. However, the prevailing view among scholars and courts is that the term “cases of less seriousness” did not import the prior distinction between “carnal intercourse” and “acts of lust” to permit a sentence reduction for acts of lust. Such an interpretation would “negate one of the principle goals of reform”<sup>28</sup> because the victim would still be required to describe the details of the sexual assault. Furthermore, interpreting “cases of less seriousness” to mean “violent acts of lust” would completely contradict the new law’s recognition that the lack of penetration does not necessarily make the sexual conduct less serious. Finally, reliance on the distinction under the prior law would not make sense since the result under the 1996 law, in cases of less seriousness, could be a sentence of as little as one year and eight months, while the minimum sentence under the prior law for acts of lust was two years.<sup>29</sup> Indeed, *Cassazione*

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<sup>23</sup> C.P. art. 609 *quarter*; See *infra* note 46 and accompanying text reproducing a translation of this article.

<sup>24</sup> Chiara Foladore, *Sulla nozione degli atti sessuali “di minore gravità” previsti dall’art. 609-bis c.p.*, XLI CASSAZIONE PENAL, Apr. 2001, at 1500, 1501.

<sup>25</sup> C.P. arts. 609 *bis* and 609 *quarter*.

<sup>26</sup> The range of a reduced sentence is 20–40 months. S. BELTRANI & R. MARINO, *LE NUOVE NORME SULLA VIOLENZE SESSUALE: COMMENTO SISTEMATICO ALLA L. 15.2.96 N.66, 50* (1996).

<sup>27</sup> Cadoppi, 2d ed., *supra* note 19, at 31. Cadoppi also links the inclusion of the reduced sentence provision with the legislature’s decision to abandon provisions in prior reform proposals criminalizing sexual harassment, which had been intended to cover the least serious forms of illegal sexual conduct. *Id.* at 43.

<sup>28</sup> Alberto Cadoppi, *Commento art. 609-bis C.P.* in COMMENTARIO DELLE NORME CONTRO LA VIOLENZA SESSUALE E CONTRO LA PEDOFILIA 439, 530 (Alberto Cadoppi ed., 4th ed. 2006) [hereinafter Cadoppi 4th ed.].

<sup>29</sup> *Id.* at 528; Foladore, *supra* note 24, at 1501.

has rejected the argument that sexual assaults not involving penetration are necessarily “less serious cases.”<sup>30</sup>

The dominant view is that courts are to exercise discretion in determining whether a particular sexual assault is a case of less seriousness and to be guided by other provisions of the penal code involving principles that apply to all punishments. Specifically, judges are to consider the factors they regularly evaluate when exercising their discretion to impose a sentence within the range established by a criminal statute. Article 133, a statute of general application, instructs judges to evaluate the seriousness of the crime based on “1) the nature, type, means, object, time, place and any other aspect of the act; 2) the seriousness of the harm, or the danger occasioned to the victim of the offense; and 3) the scope of intent or the degree of negligence.”<sup>31</sup> The second paragraph of article 133 states that courts are also to consider the defendant’s culpability, based on his or her criminal history, motives, conduct during and after the offense, and individual circumstances, including his or her family life.<sup>32</sup>

However, most scholars have concluded that the factors regarding the culpability of the individual defendant are not relevant to an evaluation of “cases of less seriousness” for purposes of sexual offenses.<sup>33</sup> *Cassazione* has also concluded that the special nature of the mitigated sentence in 609-*quarter*, and in 609-*bis*, makes it inappropriate to consider the factors set out in paragraph two of article 133, regarding the culpability of the defendant.<sup>34</sup> Instead, a court is to consider only the first two factors in the first paragraph of article 133 to determine “whether it is possible to conclude that the individual sexual liberty of the victim has been harmed in a way that is not serious.”<sup>35</sup> The mitigation decision, according to *Cassazione*, requires a “broad evaluation of the incident, not limited to the objective components of the offense, but also to include subjective aspects and the factors set out in article 133.”<sup>36</sup> The “subjective aspects” are those that relate to the harm that the particular victim suffered. That is, the determination of whether a particular sexual offense is a case of less seriousness depends on the extent to which the *bene giuridico*, legal good or right,<sup>37</sup> protected by the crime has been damaged.

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<sup>30</sup> Cass., sez. tre, 8 jun. 2000, n.154, Nitti, reproduced with a discussion by Foladore, *supra* note 24; *See also* Cass., sez. tre, 30 dec. 1996, n.11293, Vigo, discussed with similar cases in Gianfranco Dosi, *Violenza sessuale: l’interpretazione rafforza la tutela della persona*, n.20 DIRITTO E GIUSTIZIA, May 27, 2000, at 6.

<sup>31</sup> C.P. art. 133 (para. 1); Wise, *supra* note 15, at 45 (translation).

<sup>32</sup> C.P. art. 133 (para. 2).

<sup>33</sup> Cadoppi, 2d ed., *supra* note 19, at 99. On the importance of interpretation by legal scholars in the civil law tradition, see Merryman & Pérez-Perdomo, *supra* note 11.

<sup>34</sup> C.P. art. 133 (para. 1).

<sup>35</sup> Cass., sez. tre, 8 jun. 2000, n.154, Nitti, *supra* note 30.

<sup>36</sup> Cadoppi, 2d ed., *supra* note 19, at 99.

<sup>37</sup> THOMAS GLYN WATKIN, *THE ITALIAN LEGAL TRADITION* 122 (1997).

The concept of the *bene giuridico* in Italian criminal law is rooted in the Enlightenment Era principle that the State could punish individuals for conduct that posed a danger to others or to the State only, and not for immoral or sinful conduct.<sup>38</sup> Watkins explains that this term includes “life, physical integrity, property, family relationship, [and] livelihood.”<sup>39</sup> The purpose of articulating the *bene giuridico* protected by law was to ensure that the State would punish only conduct that infringed on the legal rights of others.<sup>40</sup> Focus on the *bene giuridico* in the context of punishment for sexual offenses has implicitly given more than symbolic meaning to the reclassification of sexual offenses as crimes against the person or individual discussed above.

The symbolic emphasis on the State’s role in protecting the individual’s sexual autonomy has had a practical effect on the substantive law of the punishment for sexual offenses. *Cassazione* has stated that determining whether a sexual offense is less serious necessitates considering the harm to the *bene giuridico* of the particular victim. The *bene giuridico* protected by punishing sexual violence, under article 609-*bis*, is the sexual liberty or autonomy of the victim; that is, the right of the victim not to be forced to engage in unwanted sexual acts. By contrast, the crime of sexual acts with minors, under article 609-*quarter*, is said to protect the *bene giuridico* of “the harmonious or appropriate sexual development of the minor.” Thus, cases of less seriousness are those in which the harm to the minor’s appropriate sexual development has been minimal. This framing of the concept of less seriousness necessarily invites a subjective evaluation of the victim and is particularly disturbing.

This subjective standard permits a court to consider a broad range of evidence about the individual victim, to determine the extent to which the victim’s sexual autonomy was harmed, for adult victims; or the extent to which the victim’s sexual development was compromised, for minor victims. Indeed, a court can consider the physical and mental condition of the victim, psychological characteristics and age of the victim, the extent of sexual compulsion, and the harm suffered by the victim, including psychic harm.<sup>41</sup> *Cassazione*’s opinion in the case against T.M. reveals how this analysis of “*minore gravità*” has given a new home to traditional attitudes about rape that the citizen’s reform proposal of 1979 sought to overcome.<sup>42</sup>

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<sup>38</sup> See Van Cleave, *supra* note 13, at 280–81 and citations therein for a discussion of the concept of *bene giuridico*.

<sup>39</sup> Watkin, *supra* note 37, at 122.

<sup>40</sup> CARL LUDWIG VON BAR, A HISTORY OF CONTINENTAL CRIMINAL LAW 414 (Thomas S. Bell trans., 1916).

<sup>41</sup> Giovanni Rizzo, *Atti sessuali con minorenne “intraprendente” e “disinibita”: esclusa la “minore gravità”*, XXXVI IL DIRITTO DI FAMIGLIA E DELLE PERSONE 681, 684 (2007) [hereinafter Rizzo, *Atti*].

<sup>42</sup> For an analysis of another context in which it has been difficult to change attitudes of judges and lawyers about the crime of rape and about the nature of sexual liberty, see Marta Bertolino, *Libertà sessuale e blue-jeans*, 1999 RIV. IT. DIR. PROC. PEN. 694, 699 (focusing in

## IV. THE CASE AGAINST T.M.

The defendant, T.M., was convicted of engaging in sexual activity with a minor under paragraph two of article 609-*quarter* of the Italian penal code, which provides, in relevant part:

The punishment established in article 609 *bis* applies to anyone who, despite the absence of the elements set out in that article, engages in sexual acts with a person who, at the time of the act:

- 1) is not yet 14 years old;
- 2) is not yet 16 years old, and the offender is an ascendant, parent, including adoptive parents, [or one who cohabitates with such] or guardian, or any other person to whom the minor has been entrusted for reasons of health, education, instruction, protection or custody, or with whom the minor cohabitates. . . .

*In less serious cases the punishment is reduced by up to two-thirds.*<sup>43</sup>

Article 609-*bis* provides that the range of punishment is between five and ten years imprisonment for “anyone who with violence, threats, or by abuse of authority, compels another to engage in or submit to sexual acts.” Since the purpose of 609-*quarter* is to protect minors, this provision does not require proof of the elements set out in 609-*bis*.

T.M. came within article 609-*quarter* because he was cohabitating with the victim and the victim’s mother, and the victim, S.V., was over the age of fourteen but under the age of sixteen. The conviction did not require any evidence of force, violence or threats. Nor did the conviction require a finding of lack of consent. The *tribunale*, or court of first instance, sentenced the defendant to forty months imprisonment for violating article 609-*quarter* and to two months imprisonment for assault<sup>44</sup> and threats.<sup>45</sup>

It is not clear from the *Cassazione* opinion whether the forty-month sentence for sexual acts with a minor was based on a reduction pursuant to paragraph three

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particular on the conclusion by the *Corte di Cassazione* in the jeans case that a woman’s failure to resist is evidence of consent).

<sup>43</sup> C.P. art. 609 *quarter* (emphasis added). The language in brackets and the following paragraph were added to this article: Apart from the situations described in art. 609-*bis*, an ascendant, parent, including adoptive parents, or one who cohabitates with such, or a guardian, who abuses their power related to their position, engages in sexual acts with a minor who is over the age of 16, is punished with 3–6 years of imprisonment. Le Leggi, Feb. 6, 2006, n.38, art. 6, para. 1(a) available at <http://www.camera.it/parlam/leggi/06038l.htm> (last visited July 15, 2008).

<sup>44</sup> C.P. art. 581 (“Whoever strikes another, if the act does not result in physical or mental illness . . .”); Wise, *supra* note 15, at 194 (translation).

<sup>45</sup> C.P. art. 612 (“Whoever threatens another with any wrongful harm . . .”); Wise, *supra* note 15, at 205 (translation).

of article 609-*quarter*, or whether the *tribunale* reduced the sentence in reliance on a provision defining “extenuation generally.”<sup>46</sup> In any event, the *corte d’appello* concluded that T.M. was not entitled to a sentence reduction for a case of less seriousness under article 609 *quarter*. The *Cassazione* opinion summarized the intermediate court’s reasoning: “the unnatural nature of the relationship” between T.M. and his girlfriend’s fourteen-year-old daughter was such that it “compromised the harmonious sexual development of the victim.” While the *Cassazione* opinion does not reveal precisely what the *corte d’appello* meant by “unnatural,” I infer from other language in the *Cassazione* opinion that the *corte d’appello* was concerned with the twenty-six year age difference between S.V. and T.M., the quasi-familial relationship between the two, and the fact that the sexual act consisted of oral sex.

*Cassazione* took issue with the two main conclusions of the intermediate court: that the conduct engaged in by the defendant was “unnatural” and that S.V.’s encounter with T.M. harmed her sexual development; thus, this was not a less serious case. *Cassazione* acknowledged that the “defendant took advantage of the situation in which the young victim found herself since he had become part of her nuclear family by cohabitating with [S.V.’s] mother.”<sup>47</sup> However, *Cassazione* emphasized that the familial nature of the relationship is an element of the offense, “without which there would be no crime since at the time of the incident, the girl had already turned fourteen, and had given her consent to the sexual act,”<sup>48</sup> and therefore was not relevant to the issue of “less seriousness.” Indeed, a sexual act engaged in without the use of force with a youth over the age of fourteen, but not yet sixteen, is not a crime in Italy unless the defendant is in a position of authority over the victim, as defined by article 609 *quarter* of the penal code. *Cassazione* stated that the definition of the offense itself takes into account the seriousness, and unnaturalness of the defendant’s conduct based on his role as the live-in boyfriend of the victim’s mother; thus, the *corte d’appello* was not justified in relying on this fact to deny the defendant a reduced sentence.

The *Cassazione* opinion further concluded that the nature of the sexual act, oral sex, could not be the basis for denying T.M. a reduced sentence since the victim herself “shrewdly chose” this act rather than intercourse, based on her opinion that oral sex would pose less of a health risk to her. *Cassazione* stated that T.M. “intended to have vaginal intercourse, but the girl, knowing that [T.M.] had drug problems in the past, opted for oral sex as less risky, in her opinion.”<sup>49</sup> This led *Cassazione* to conclude that the sexual conduct between T.M. and S.V. was “completely consensual” and therefore could not justify denying T.M. a reduced sentence.

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<sup>46</sup> C.P. art. 62 *bis*. (allowing a court to consider mitigating circumstances not listed in article 62); Wise, *supra* note 15, at 22–23 (translation).

<sup>47</sup> Cass., sez. tre, 17 feb. 2006, n.6329, *supra* note 4, at 3.

<sup>48</sup> *Id.* at 4.

<sup>49</sup> *Id.*

As to the *corte d'appello*'s conclusion that S.V.'s sexual encounter with T.M. harmed the sexual development of S.V. as a basis for denying T.M. a sentence reduction, the *Cassazione* panel stated that this was completely inconsistent with the fact that S.V. admitted that she had engaged in sexual conduct since the age of thirteen. The *Cassazione* opinion stated that "given S.V.'s numerous sexual encounters with men of her age and older, it is permissible to conclude that already at the time of her encounter with the defendant, [S.V.'s] sexuality was much more developed than what one would normally expect of a girl her age."<sup>50</sup> Thus, the reasoning of the *corte d'appello* that relied on the harm to S.V. to deny the defendant a sentence reduction was erroneous.

Before critiquing *Cassazione*'s opinion, it is important to note a number of open questions. For example, although S.V. had withdrawn the *querela* for assault and threats, the fact that T.M. had been convicted of these offenses in the *tribunale* court indicates that some form of violence or threats, even if minimal, was involved. In addition, *Cassazione* mentions evidence that S.V. had fallen down at some point during her encounter with T.M. Certainly, more information would be helpful, but this evidence may negate the conclusion that S.V. participated in the oral sex completely voluntarily. It may be that the *corte d'appello* could have relied on these facts to deny T.M.'s request for a reduced sentence. However, aside from these lingering questions, the "logic" of the *Cassazione* opinion makes sense only if archaic notions about chastity and consent are still relevant under Italian law.

*Cassazione*'s conclusion that S.V. gave her full consent to the sexual encounter with T.M. is based on the fact that once T.M. made it clear he intended to have sexual intercourse with her, she "opted" for oral sex. This reasoning is reminiscent of a Texas case in which a court found consent to the sexual encounter based on the fact that the victim had asked the defendant to use a condom so that the victim would not risk HIV infection or pregnancy. This decision was soundly denounced.<sup>51</sup>

*Cassazione*'s opinion suffers from the same reliance on the rape myth that if a woman does not resist the sexual assault, she must have consented.<sup>52</sup> Under this view, a victim who takes steps to minimize the harm to herself must have been a willing partner to the sexual conduct. The tenor of *Cassazione*'s language paints S.V. as having completely consented to oral sex when she convinced her mother's boyfriend (who was twenty-six years older than she) not to have sexual intercourse with her instead. This portrayal of S.V.'s conduct indicates the persistence of this

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<sup>50</sup> *Id.*

<sup>51</sup> See Carla M. da Luz & Pamela C. Weckerly, *Texas "Condom-Rape" Case: Caution Construed as Consent*, 3 UCLA WOMEN'S L.J. 95 (1993); CAL. PENAL CODE § 261.7 ("[E]vidence that the victim suggested, requested, or otherwise communicated to the defendant that the defendant use a condom or other birth control device, without additional evidence of consent, is not sufficient to constitute consent").

<sup>52</sup> See Bertolino, *supra* note 42, at 699.

damaging rape myth, even though it did not result in an acquittal of T.M. in this case. In the 1998 “jeans case,”<sup>53</sup> *Cassazione* reversed a rape conviction relying on this same rape myth; there was no evidence that the victim “vigorously resisted” her attacker, so *Cassazione* inferred consent.

Equally troubling is *Cassazione*’s determination that the *corte d’appello* reasoned illogically when it evaluated the harm to S.V. The *corte d’appello* apparently evaluated the harm to the *bene giuridico* in terms of the damage to S.V.’s normal and harmonious sexual development and concluded that this was serious enough to preclude a finding that the offense was a “less serious case.” According to *Cassazione*, the analytical defect was that the *corte d’appello* did not consider the fact that S.V. had previously engaged in sexual conduct with other men. While the scholars who defend *Cassazione* correctly state that the court did not declare that sexual acts with a victim who is not a virgin are less serious,<sup>54</sup> the fact that *Cassazione* found the prior sexual experience of the victim relevant at all is worrisome.<sup>55</sup> Affording the sexual experience of the victim any importance, even in the context of sentencing, resuscitates the ancient value placed on chastity. One Italian scholar has characterized this as the idea that the “honest,” that is chaste, woman was entitled to the protection of the rape laws, while “immoral,” unchaste, women were not.<sup>56</sup> Even more specifically, the prior law had criminalized the “corruption of youth,” defined as “commit[ting] acts of lust on the person of or in the presence of a person under the age of 16, . . . [or] induc[ing] a person under the age of sixteen to commit acts of lust.”<sup>57</sup> This provision expressly stated that no conviction or punishment could be had “if the minor was a person already morally corrupted.”<sup>58</sup> A minor who had already engaged in sexual conduct was morally corrupt and not entitled to the protection of the law.<sup>59</sup> While the new law ensures that the unchaste and morally corrupt are now entitled to the law’s protection, *Cassazione*’s rationale, which makes the victim’s sexual history

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<sup>53</sup> See *supra* note 10.

<sup>54</sup> Giuseppe Buffone, *Lo stupro è meno grave se la vittima non è piu vergine? Non lo dice la Cassazione*, available at <http://www.altalex.com/index.php?idstr=49&idnot=10373> (last visited Feb. 24, 2006). See also Rizzo, *Casi*, *supra* note 4, at 1051 (*Cassazione* did not declare that sexual acts with a minor who has had sexual experience is less serious).

<sup>55</sup> Indeed, the 1996 reform added a provision that prohibits questions about the victim’s private life or sexual history. This restriction on permissible questions does not apply to the offense “sexual acts with minors,” and it is not clear why. C.P.P. art. 472, para. 3-*bis*. See also Novella Galantini, *Art. 15*, in Cadoppi, 2d ed., *supra* note 19, at 395, 397.

<sup>56</sup> Giovanni Cazzetta, “Colpevole col consentire:” *Dallo stupro alla violenza sessuale nella penalistica dell’Ottocento*, 1997 RIV. IT. DIR. PROC. PEN. 424, 446. See also GEORGIA ARRIVO, *SEDUZIONI, PROMESSE, MATRIMONI: I PROCESSI PER STUPRO NELLA TOSCANA DEL SETTECENTO* 35 (2006) (describing the ancient notion that the definition of rape was based on the condition of the victim; that the law was to protect unmarried virgins).

<sup>57</sup> C.P. (1930) art. 530; Wise, *supra* note 13, at 180 (translation).

<sup>58</sup> C.P. (1930) art. 530, para. 3; Wise, *supra* note 13, at 180 (translation).

<sup>59</sup> Marta Bertolino, *Reati sessuali e tutela di minori: la prospettiva dei mezzi di informazione e quella dei giudici a confronto*, 2006 RIV. IT. DIR. PROC. PEN. 340, 347.

relevant, implies that victims with sexual experience have not secured the full protection of the law.

Interestingly, despite the post-decision clamor, chastity continues to be relevant in a court's evaluation of "less seriousness." A few months after issuing the decision about T.M., *Cassazione* evaluated another denial of a reduced sentence by the *Corte d'appello* of Cagliari.<sup>60</sup> In this case, the victim was just two months under the age of fourteen; therefore, subpart (a) of article 609 *quarter* applied, and no evidence of force or lack of consent was necessary to convict. The evidence indicated that she had participated in finding a place to meet the defendant to engage in sexual intercourse and that she had left her hometown to be with the defendant. In addition, there was no evidence that the defendant had coerced or forced the victim to engage in sexual intercourse with him. Nonetheless, *Cassazione* found the preclusion of a sentence reduction based on "less seriousness" convincing. The *corte d'appello* and *Cassazione* emphasized that the minor and the defendant had engaged in repeated acts of sexual intercourse, and that even though the minor seemed to have consented, this was "nonetheless a traumatic experience for [the minor] since this was her first sexual encounter at the young age of 13 years and 10 months," and that she must now "live with the traumatic defloration by an adult man."

"Defloration," of course, means that she lost her virginity to the defendant. While there was mention of the fact that the minor had become pregnant and had an abortion, these facts did not expressly enter either court's evaluation of *minore gravità*. Instead, it seems that these courts were more concerned with the fact that the sexual encounter with this defendant had resulted in the minor's loss of virginity at a young age. The defendant was sentenced to five years imprisonment. The parallel to the T.M. case is that the sexual history or experience of the minor played a central role in the court's evaluation of the seriousness of the offense; in T.M., this resulted in a lesser sentence, while in the subsequent case, it did not.

#### V. THE PERSISTENCE OF ANACHRONISTIC ATTITUDES

What was thought to be merely a symbolic aspect of the 1996 reform has had a substantive effect on punishment for sexual offenses. Presently, sexual offenses are within the section on "crimes against the person," and the *bene giuridico* has been defined as a minor's "harmonious sexual development." Scholars and judges have relied on these aspects of the reform to conclude that an evaluation of the seriousness of the offense requires a subjective appraisal of the victim, including the victim's sexual maturity; indeed, they have concluded that other factors about the defendant are irrelevant. This approach invites courts to engage in an invasive evaluation of the minor's physical, mental and psychological characteristics, as well as her sexual history, rather than an assessment about the nature of the conduct and the culpability of the defendant. Since these considerations are not

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<sup>60</sup> Cass. pen., sez. tre, 12 oct. 2006, n.34120, *reprinted in Rizzo, Atti, supra* note 41.

relevant to the existence of a sexual offense, they should not be used as a way to graduate sexual offenses for purposes of imposing punishment. A grading system that is based on subjective characteristics of an individual victim amounts to a system for evaluating the relative worth of each victim on the basis of her sexual history and how she conducted herself before, during and after the sexual offense.

I repeat a position I have taken elsewhere: Before the 1996 reform of rape law can have real meaning for victims, entrenched rape myths must be dispelled.<sup>61</sup> Italy must attend to the damage these myths cause victims and Italian society as a whole by seeking to educate judges, police and prosecutors to free the criminal justice system of these archaic concepts. The idea that a court should even consider the sexual experience of the victim in assessing the appropriate prison time for the defendant is especially troubling.

While it might make sense to call on the legislature to repeal the *minore gravità* provision, or to specifically define such instances, I doubt both the likelihood and the effectiveness of such a solution. It is likely that rape myths would find a place in the analysis in some other way. Indeed, punishment for sexual offenses, like that for other crimes, is still subject to a court's finding of "general extenuation" allowing a court to "take into account various other circumstances regard for which justifies a reduction of punishment."<sup>62</sup>

The *Istituto Nazionale di Statistica (ISTAT)*, Italy's National Institute of Statistics recently published findings that incidents of violence against women are on the rise. This likely tells us that the numbers of such incidents being reported have increased. It is a good sign that more women are calling on the criminal justice system to address violence they have suffered. However, if courts continue to evaluate the subjective aspects of victims as described in this essay, it will not be long before such violence goes, once again, *sommerso*, or buried.<sup>63</sup>

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<sup>61</sup> Van Cleave, *supra* note 13, at 304.

<sup>62</sup> C.P. art. 62 *bis*; Wise, *supra* note 15, at 23 (translation).

<sup>63</sup> See Assoc. Donne Magistrato Italiane, LA VIOLENZA DOMESTICA: UN FENOMENO SOMMERSO (1995).

## APPENDIX

*Opinion of the Court*<sup>64</sup>

*Corte di Cassazione*, Criminal Section III, Feb. 17, 2006, n. 6329.

DEVELOPMENT OF THE CASE—The *Corte d'appello* of Calgliari issued a decision on November 25, 2003, resolving T.M.'s (the defendant) challenge to the tribunal's verdict of November 30, 2001, convicting him of sexual assault and sentencing him to three years and four months imprisonment. The tribunal of Calgliari also convicted the defendant of assault and battery, with a sentence of two months imprisonment. The *corte d'appello* concluded that it could not consider the conviction for assault and battery since the victim had withdrawn the *querela*<sup>65</sup> for these offenses but otherwise affirmed the tribunal's decision and ordered the appellant to pay the costs for the representation of the civil party.<sup>66</sup>

First,<sup>67</sup> the defendant denied that he lived with the girl, S.V., the victim of sexual acts, and her mother.<sup>68</sup>

The *Corte d'appello* concluded that the result of the testimony showed the opposite and that in any event, this element was established by the statements of the defendant himself when he claimed that the victim lied about the sexual encounter because the defendant had scolded her for not giving enough attention to her schoolwork.

The defendant also claimed that the evidence showed that it was not clear why or how S.V. had fallen down. The appellate Court observed that this evidence was marginal and concluded that it could disregard the defendant's claim that the victim lied because S.V. had no difficulties revealing to the court her sexual encounters with other men, both her age and older.

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<sup>64</sup> I have added footnotes to the opinion to explain briefly some concepts that I will not develop in this essay. This translation follows the paragraphing used by *Cassazione*. In translating this opinion, I have attempted to achieve what Langer calls a "faithful but autonomous restatement." Maximo Langer, *From Legal Transplants to Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 33 (2004).

<sup>65</sup> A *querela* is a specific request for prosecution that Italian law requires as to some offenses. I describe this institution in detail in Rachel A. Van Cleave, *Rape and the Querela in Italy: False Protection of Victim Agency*, 13 MICH. J. GENDER & L. 273 (2007).

<sup>66</sup> Italy, like other countries having their roots in the civil law tradition, allows the victim to be a civil party to the criminal case. See Rachel A. Van Cleave, *Italy*, in CRIMINAL PROCEDURE A WORLDWIDE STUDY 347 (Craig M. Bradley ed., 2d ed. 2007).

<sup>67</sup> Opinions of the *Corte di Cassazione* begin with a summary of the prior proceedings, including arguments of the defendant and of the prosecution.

<sup>68</sup> Since the *Corte d'appello* is a court of second instance, the defendant is able to argue his innocence and is not limited to arguing legal errors.

The defendant insisted that the victim lied when she stated that she did not tell others of her encounter with the defendant and that the goal of her complaint was to free herself from him.

The *Corte d'appello* concluded that the witnesses confirmed the victim's version and that it would have been sufficient to file a complaint based on the violence to which the defendant had subjected the family, to free herself of the defendant.

According to the appellate court, the seriousness of the offense precluded a finding of less seriousness.

The defendant has appealed to *Cassazione* claiming only that the appellate court's decision precluding a finding of less seriousness, pursuant to c.p.p. art. 609-*quarter*, paragraph three, is without reason and manifestly illogical. He claims, in fact, that there was only one sexual encounter to which the girl calmly agreed; that although she declined intercourse, she opted, without difficulty, to engage in oral sex; and that since the age of thirteen she had engaged in sexual acts with boys and adult men.

REASONS FOR OUR DECISION—The one basis for the defendant's appeal deserves to be taken up.

The appellate court refused to find that the facts of this case were of less seriousness and denied a sentence reduction pursuant to art. 609-*quarter*, paragraph 3. The appellate court emphasized the "unnatural nature of the encounter" and found that the victim's "normal and appropriate sexual development" had been compromised.

This conclusion is inconsistent with the appellate court's description of the only episode—that set out in the charges—of sexual abuse by the defendant against a minor: the victim fully consented to the encounter, and she even chose the method. In fact, the defendant had intended to have sexual intercourse with the victim, but she opted for oral sex since she knew the defendant had prior drug addiction problems and she thought oral sex would pose less of a risk of HIV infection to her.

Certainly, this does not eliminate the reprehensible conduct of the defendant, who actually took advantage of the situation in which the young victim found herself since he had become part of the same nuclear family by cohabitating with the victim's mother. But this interpersonal relationship is already one of the elements of the offense involved (punished with five to ten years imprisonment), without which there would be no offense since the girl was fourteen years old at the time and, as already stated, she consented to the sexual encounter with the defendant.

In this context it is not possible to agree with the challenged opinion, which bases the seriousness of the offense on the unnatural nature of the encounter, which was in fact shrewdly chosen by the minor

because she believed that this would avoid the risks associated with other forms of sexual conduct given the defendant's history of drug use.

Even less convincing is the *corte d'appello's* other reason for denying the sentence reduction: that is, the negative consequences that this sexual encounter had and will have on the sexual development of the minor.

The conclusion is altogether illogical in as much as it failed to consider, what was described earlier in the same opinion, that the girl had, since the age of thirteen, already engaged in numerous sexual encounters with men of all ages, such that it is possible to conclude that at the time of the encounter with the defendant, her sexuality was much more developed than one would normally expect of a girl her age.

The case must be remanded to the *Corte d'appello*, and giving due regard to the importance of what is set out above, that court is to evaluate whether it may deny the sentence reduction based on reasons different from the reasons this court has criticized.