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## Rape and the *Querela* in Italy: False Protection of Victim Agency

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RAPE AND THE *QUERELA* IN ITALY:  
FALSE PROTECTION OF VICTIM AGENCY†

*Rachel A. Van Cleave\**

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INTRODUCTION

“The victim has informed us . . . that she does not want to proceed with this trial. For this reason, and this reason alone, the case is being dismissed,” announced the prosecutor of the Kobe Bryant rape case.<sup>1</sup>

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1. Steve Henson, *Bryant and His Accuser Settle Civil Assault Case*, L.A. TIMES, Mar. 3, 2005, at A1 (setting out chronology of the criminal and civil cases against Bryant). After the court reporter mistakenly sent transcripts of the criminal proceedings to seven media entities, the Colorado Supreme Court issued an opinion about the media’s right to publish material from *in camera* proceedings regarding the accuser’s prior or subsequent sexual conduct. *People v. Bryant*, 94 P.3d 624, 631–32 (Colo. 2004) (holding that the District Court’s order prohibiting media entities from publishing the contents of these transcripts is a narrowly tailored, and therefore constitutional, prior restraint), *stay denied*, *AP v. Dist. Court*, 542 U.S. 1301 (2004). The consideration of the accuser’s sexual history led victim’s advocates to propose legislation that would

Certainly, the prosecutor was not required to drop the charges; the state could have pursued the case, subpoenaed the victim and then made a motion to treat her as a hostile witness during questioning at trial. However, as a practical matter, it is difficult to secure a conviction, especially a rape conviction, with a reluctant and uncooperative complaining witness. If this case had occurred in Italy, once the victim requested prosecution, she would not be able to change her mind.<sup>2</sup> In addition, even if a victim is later reluctant about pursuing rape charges, the state must proceed with prosecution.

Italian law requires rape victims to make a formal request that the state prosecute the alleged rapist. This request is called a *querela* and without such a request prosecution does not proceed, though there are some exceptions. In addition, the request for prosecution is irrevocable; the victim cannot withdraw her request for prosecution. Italian law has included the *querela* requirement for over one hundred years. It was included in the Zanardelli Code of 1889,<sup>3</sup> the first Penal Code of unified Italy, maintained in the Rocco Code of 1930,<sup>4</sup> the Penal Code of Fascist Italy, and—after a great deal of controversy—the *querela* survived the 1996 reform of Italy's rape law.<sup>5</sup> Rape is the only violent crime for which a *querela* is required under Italian law.<sup>6</sup> The drafters of the 1996 reform law justified maintaining the *querela* requirement for rape to ensure that a victim of rape is able to control the decision of whether to subject herself to a public trial.

This Essay describes the history of the *querela* in Italy and explores the controversy surrounding the decision to maintain this institution. In

strengthen Colorado's rape-shield law. Douglas Quan, *Two-year Ordeal Ends for Bryant, Accuser*, PRESS ENTERPRISE, Mar. 3, 2005, at A1. See also COLO. REV. STAT. § 18-3-407 (2005), adding a subsection to allow a court to issue a protective order prohibiting disclosure of information about a witness or victim in criminal cases specified in the statute.

2. I recognize that both men and women are victims of rape. However, since the vast majority of rape victims are women I have opted to use the feminine pronoun. See ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* xi (1999) ("Because rape victims are predominantly women, and rapists are usually men, my pronoun usage reflects that reality."); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1089, n.1 (1986) (recognizing that men as well as women are victims of rape).
3. CODICE PENALE [C.P. (1889)] art. 336 (1889)(It.) reprinted in I REATI SESSUALI 312 (Franco Coppi ed., 2000).
4. CODICE PENALE [C.P. (1930)] art. 542 (1930) (It.); For the only English translation of the 1930 Italian Penal Code, see THE AMERICAN SERIES OF FOREIGN PENAL CODES: ITALIAN PENAL CODE (Edward M. Wise, trans., Fred B. Rothman & Co. 1978).
5. Le Leggi, Feb. 15, 1996, n.66, art. 8 reprinted in I REATI SESSUALI 323 (Franco Coppi ed., 2000); CODICE PENALE [C.P.] art. 609.
6. TAMAR PITCH, UN DIRITTO PER DUE 154 (1998).

addition, this Essay questions the degree to which the *querela* can protect victim agency when the attitudes of judges and lawyers in the Italian criminal justice system reflect persistent rape myths.

Part I describes the *querela* and its role in Italy's criminal justice system. This section includes some introductory information on the Italian criminal justice system to put the role of the *querela* into context. Part II explores the history of this institution in the context of rape laws preceding the 1996 reform, and how this history shaped the debate surrounding the 1996 law. Part III describes the changes implemented by the 1996 law, and under what circumstances the new law requires prosecution by *querela*. Part IV examines scholarly discussions of victim agency in the United States in the context of mandatory policies for addressing domestic violence. This section compares the notion of victim agency propounded by those in favor of maintaining the *querela* requirement with definitions of victim agency explored by United States scholars in the context of domestic violence. Such a comparison reveals that the definition of agency relied on by those who argued in favor of maintaining the *querela* is too narrow for this device to serve as an effective protection for rape victims. Finally, Part V of this Essay concludes that the history of the *querela* and its current structure belie the argument that it can protect victim agency. This Essay recommends that feminist law reformers and anti-violence advocates in Italy focus on ways to educate police, judges, public prosecutors and others about rape, as well as endeavor to dispel persistent rape myths and expand the meaning of agency beyond the mere issue of victim "choice."

## I. CRIMINAL JUSTICE IN ITALY AND THE QUERELA

Unlike the *pubblico ministero* in Italy, and analogous officials in other countries with civil law roots, a prosecutor in the United States has a great deal of discretion to decide whether to institute criminal proceedings.<sup>7</sup> One important factor the United States prosecutor weighs is the likelihood that she will obtain a conviction against the defendant.<sup>8</sup>

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7. See William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1337 (1993) (also discussing indirect constraints on the discretion of U.S. prosecutors).

8. Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 519 n.102 (1975). See also Carrie A. Moser, *Penalties, Fouls, and Errors: Professional Athletes and Violence Against Women*, 11 SPORTS LAW. J. 69, 78

By contrast, the Italian Constitution provides for mandatory prosecution.<sup>9</sup> This constitutional provision requires the *pubblico ministero* to institute criminal proceedings upon receiving notice of a crime. Such notice may come from the police, other public officials, or private individuals who have knowledge that a crime has occurred. As to most offenses, and almost all violent offenses, prosecution proceeds automatically, or *d'ufficio*; that is, once the *pubblico ministero* receives notice of a crime, the prosecution of that crime begins automatically. However, as to some offenses, including rape, prosecution does not begin unless and until the victim presents a *querela*, a formal request for prosecution.

There is no exact parallel to the *querela* in the U.S. system of justice. *Querela* has been translated as "private prosecution"<sup>10</sup> and as "right of complaint."<sup>11</sup> Since neither of these translations adequately captures the fact that prosecution can not proceed without a *querela*, I have decided to use the Italian word. Both the Italian Code of Criminal Procedure and the Penal Code include provisions regarding the *querela*.<sup>12</sup> The criminal procedure code speaks of the *querela* as an expression of the victim's wish that the offender be prosecuted. The Penal Code describes the *querela* as a right of the victim to call for prosecution of offenses not requiring automatic prosecution.<sup>13</sup> Thus, a *querela* allows prosecution to proceed while also asking that criminal law be applied to the offender.<sup>14</sup>

Since the *querela* gives the victim control over the decision to prosecute, it is inconsistent with the hierarchical structure of authority first described by Mirjan Damaška.<sup>15</sup> One central aspect of a hierarchical model of criminal justice is official control over the investigatory and trial phases of a criminal inquiry.<sup>16</sup> This model helps to explain the relative lack of prosecutorial discretion, as well as the reluctance to allow lay judges to decide guilt or innocence. The history of Italy's criminal justice system is generally consistent with a hierarchical model. However, in 1989, Italy adopted a major reform implementing an adversarial trial system. This change was designed to take substantial authority and con-

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(2004) (discussing prosecutors' reluctance to pursue rape charges against professional athletes unless the case is "ironclad").

9. Costituzione della Repubblica [COST. 1948] [Constitution] (1948) art. 112.

10. FRANCESCO DE FRANCHIS, DIZIONARIO GIURIDICO: ITALIANO-INGLESE 1171 (1996).

11. C.P. (1930) arts. 120, 126.

12. CODICE DI PROCEDURA PENALE [C.P.P.] art. 336 (It.); C.P. art. 120.

13. C.P. art. 120.

14. ARTURO SANTORO, NOVISSIMO DIGESTO ITALIANO 640-59 (1968).

15. See Damaška, *supra* note 8, at 485-86 (describing the "ideal of official decisionmaking" in the hierarchical model).

16. *Id.* at 491 (describing how lay participation conflicts with this hierarchical ideal).

trol over criminal investigations and trials away from the investigative magistrate and place more decisions in the hands of the *pubblico ministero* and defense attorney.<sup>17</sup> Nonetheless, the *querela* existed long before these changes and may thus be viewed as somewhat aberrational. Indeed, there is no principle that determines whether an offense requires a *querela*.

The *querela* is a tool used to achieve a number of different goals. For example, pursuant to a 1981 law,<sup>18</sup> the Italian legislature altered a number of offenses to impose a *querela* requirement. The purpose of the law was to unclog the criminal justice system and to respond to criticisms of the number of amnesties granted when prisons were overcrowded or the backlog of cases was too great.<sup>19</sup> As to offenses involving the falsification of a private document,<sup>20</sup> misuse of a document signed in blank,<sup>21</sup> use of false documents,<sup>22</sup> or the suppression, destruction and concealment of genuine documents,<sup>23</sup> the 1981 law added an article stating that these offenses are prosecuted by *querela* unless the relevant document is a holographic will.<sup>24</sup> The 1981 law also imposed a *querela* requirement for the prosecution of certain property offenses.<sup>25</sup> The crimes of taking jointly owned property,<sup>26</sup> usurpation,<sup>27</sup> diversion of water and changing the condition of sites<sup>28</sup> were all amended to require a *querela* before prosecution may proceed.

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17. For detailed descriptions and analyses, in English, of Italy's 1989 Code of Criminal Procedure, see Michele Panzavolta, *Reforms and Counter-Reforms in the Italian Struggle for and Accusatorial Criminal Law System*, 30 N.C.J. INT'L L. & COM. REG. 577 (2005); William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429 (2004); Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227 (2000); Rachel A. Van Cleave, *An Offer You Can't Refuse? Punishment without Trial in Italy and the United States: The Search for Truth and an Efficient Criminal Justice System*, 11 EMORY INT'L L. REV. 419 (1997); William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1 (1992).

18. Le Leggi, Nov. 24, 1981, n.689.

19. Van Cleave, *supra* note 17, at 442; Pizzi & Marafioti, *The New Italian Code of Criminal Procedure*, *supra* note 17, at 6.

20. C.P. art. 485.

21. C.P. art. 486.

22. C.P. arts. 488, 489.

23. C.P. art. 490.

24. C.P. art. 493 *bis*.

25. *Id.*; Le Leggi, *supra* note 18.

26. C.P. art. 627.

27. C.P. art. 631.

28. C.P. art. 632.

Although the 1981 law imposed a *querela* requirement, exceptions were made where certain aggravating circumstances were present. For example, as to the crime of introducing or abandoning animals on another's land and wrongful pasturage,<sup>29</sup> the 1981 law added a paragraph requiring a *querela*, with exceptions for situations involving public waters, lands, resources or buildings, or any such spaces designated for public use.<sup>30</sup> A *querela* requirement was added to the crime of fraud,<sup>31</sup> unless certain aggravating circumstances are present.<sup>32</sup> The *querela* was not the only tool relied on by the 1981 law; this law also decriminalized some offenses, decreased the penalty for other offenses, and implemented a limited form of resolution of criminal charges without trial to allow for resolution of certain offenses without a full trial.<sup>33</sup>

Somewhat similarly, the *querela* is used as a compromise for offenses that have minimal public interest, but the state will nonetheless prosecute if the injured party requests prosecution. These offenses include so-called *delitti contro l'onore*, or crimes against one's honor, such as *ingiuria*, or insult,<sup>34</sup> and *diffamazione*, or defamation.<sup>35</sup> The main reason for the *querela* requirement is that such offenses are private in nature, because they harm only an individual, thus the public interest in prosecuting such crimes is tenuous and prosecution should occur only if the person harmed so wishes.<sup>36</sup>

The general provisions regarding the *querela* state that where the victim is under the age of fourteen, or is mentally infirm, the right of *querela* "shall be exercised by a parent or guardian."<sup>37</sup> The right of *querela* "may not be exercised more than three months from the date on which the victim had notice of the facts which constitute the offense."<sup>38</sup> A *querela* may be presented to a *pubblico ministero* or an officer of the *polizia giudiziaria*, best translated as criminal investigation department,<sup>39</sup> in writing or orally. The code of criminal procedure requires a transcript of an orally submitted *querela*, which must be signed by the complain-

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29. C.P. art. 636; Le Leggi, *supra* note 18.

30. C.P. art. 639(2); Le Leggi, *supra* note 18.

31. C.P. art. 640; Le Leggi, *supra* note 18.

32. C.P. art. 640(3); Le Leggi, *supra* note 18.

33. Van Cleave, *supra* note 17, at 430–31; Pizzi & Marafioti, *The New Italian Code of Criminal Procedure*, *supra*, note 17, at 20–26.

34. C.P. art. 594.

35. C.P. art. 595.

36. See generally FAUSTO GIUNTA, INTERESSI PRIVATI E DEFLAZIONE PENALE NELL'USO DELLA QUERELA 13 (1993).

37. C.P. art. 120.

38. C.P. art. 124.

39. DE FRANCHIS, *supra* note 10, at 1088.

ant, or his or her agent.<sup>40</sup> The official to whom the victim submits the *querela* must certify the date and place where the *querela* was submitted, as well as the identification of the complainant, and the transfer of all of this material to the *pubblico ministero*.<sup>41</sup> The Penal Code further states that the right of *querela* "may not be exercised if it has been expressly or implicitly waived by the person entitled to exercise it."<sup>42</sup> The complainant may also withdraw the *querela* by submitting a declaration to that effect to the appropriate official.<sup>43</sup> In summary, if a victim does not exercise this right within three months, or exercises it but subsequently waives or withdraws the *querela*, the offender goes unpunished.

When the Italian Penal Code requires a *querela* for rape, the rules are different in two significant ways. First, the victim has six months, rather than three months to submit a *querela*.<sup>44</sup> Second, a *querela* for rape, once presented, is irrevocable; the victim may not expressly or implicitly waive or withdraw it.<sup>45</sup> Section III of this Article explores these differences under the rape law reform of 1996. Before considering this reform, the next section explores the history of the *querela* in Italy.

## II. HISTORICAL PERSPECTIVE

Before the unification of Italy, the regional governments were split over the use of the *querela*. Under the Sardinian Penal Code of 1859, which covered Sardinia as well as northern regions such as Piedmont, Lombardy, Venetia, Parma and Modena,<sup>46</sup> rape was prosecuted *d'ufficio*, or automatically,<sup>47</sup> even though this code required a *querela* for other offenses such as adultery.<sup>48</sup> Although late 18th century Tuscan law required prosecution of rape committed without violence by *querela*,

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40. C.P.P. art. 337.

41. *Id.*

42. C.P. art. 124(3).

43. C.P.P. arts. 339, 340.

44. C.P. art. 609 *septies*, para. 2 (providing victim six months days to submit a *querela* for rape); C.P. art. 124 (providing victim three months to submit a *querela* for other offenses that require it).

45. C.P. art. 609 *septies*, para. 3 ("Once submitted, the *querela* is irrevocable"); C.P.P. arts 339, 340 (setting out the procedures for renouncing or withdrawing a *querela* for other offenses).

46. Edward M. Wise, *Introduction to THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE ITALIAN PENAL CODE xxi* (Fred B. Rothman & Co. 1978).

47. Maddalena del Re, *Il Regime di procedibilità nei delitti sessuali in I REATI SESSUALI* 217, 222–23 (Coppi, ed., 2000).

48. GIUNTA, *supra* note 36, at 7, n.7.



Tuscany's 1853 Penal Code abolished this provision and required automatic prosecution of all rapes.<sup>49</sup> By contrast, the Penal Code of the Two Sicilies of 1819, covering southern regions such as Naples, required prosecution by *querela*.<sup>50</sup> Faced with this split, the drafters of the 1889 Zanardelli Penal Code, the first Penal Code of unified Italy, had to decide whether to include a *querela* requirement for any offenses, including rape.

The decision to include the *querela* in the Zanardelli Penal Code illustrates how this institution, from its inception, posed challenges to its drafters to reconcile theoretical bases of the criminal justice system with a device that removes official control over the decision to prosecute certain offenses. The Zanardelli drafters claimed to have been influenced by the Enlightenment Era,<sup>51</sup> which reflected limits on the power of the state to punish individuals. In particular, the drafters were influenced by the writings of Cesare Beccaria,<sup>52</sup> specifically his treatise *On Crimes and Punishments* published in 1764.<sup>53</sup> Beccaria is most commonly credited with influencing the abolition of torture and capital punishment.<sup>54</sup> He also set out principles regarding the limitations on the state's power to punish. These included the idea that the state could only punish conduct that is dangerous to the state or to others, that the severity of punishment should be limited to only what is required to achieve deterrence, and that certainty of punishment is more important, for purposes of deterrence, than severity of punishment.<sup>55</sup> Particularly significant is the

49. *Id.* at 8.

50. *Id.* at 7. The Estense Code of 1771 also required prosecution of rape by *querela*. Codice Estense, vol. I, Bk. V, Title XI, art. VIII, Biblioteca Estense, Modena, Italy ("To avoid disgracing the families [involved in rape and other carnal crimes] only the following individuals may submit a *querela*: the deflowered, her father, her mother, and her brothers.").

51. Floriana Colao, *Il diritto penale politico nel codice Zanardelli in DIRITTO PENALE DELL'OTTOCENTO: I CODICI PREUNITARI E IL CODICE ZANARDELLI* 652, 655 (Sergio Vinciguerra, ed., 1999).

52. See generally Wise, *supra* note 4, at xxii (discussing Beccaria's influence); Isabella Rosoni, *Dalle codificazioni preunitari al codice Rocco in INTRODUZIONE AL SISTEMA PENALE* 3, 18 (A. Cadoppi et al., eds., 2nd ed., 2000).

53. HENRY PAOLUCCI, *Introduction to CESARE BECCARIA, ON CRIMES AND PUNISHMENTS*, at ix, ix-x (Henry Paolucci trans., 1963).

54. Joshua E. Kastenberg, *An Enlightened Addition to the Original Meaning: Voltaire and the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment*, 5 TEMPLE POL. & CIV. RTS. L. REV. 49, 55-56 (1995); see, e.g., Dawn Macready, Note, *The "Shocking" Truth About the Electric Chair: An Analysis of the Unconstitutionality of Electrocutation*, 29 OHIO N.U. L. REV. 781, 782 (2000); see also MARCELLO T. MAESTRO, VOLTAIRE AND BECCARIA AS REFORMERS OF CRIMINAL LAW (1942).

55. CARL LUDWIG VON BAR, ET AL., *A HISTORY OF CONTINENTAL CRIMINAL LAW* 413-15 (Thomas S. Bell et al. trans., 1916).

notion, derived in part from Beccaria's writings, that "punishment inflicted by the State" is not identical to "a pouring out of divine Justice."<sup>56</sup> That is, sins and crimes are distinct and the State is justified in punishing only the latter. This contradicts John Calvin, who argued that the state "owed a duty to God to enforce [God's] laws."<sup>57</sup>

Beccaria's writings espoused the idea that the state should maintain sole control over the imposition of punishment. While he did not write about the *querela* specifically, Beccaria opposed allowing victims to pardon their offenders because this would not guarantee certainty of punishment.<sup>58</sup> Beccaria further argued that "[t]he right to inflict punishment is a right not of an individual, but of all citizens, or of their sovereign."<sup>59</sup> Thus, according to this theory, the state's role is both limited, in terms of what conduct the state may punish, and exclusive, since the state controls the infliction of punishment. The *querela* is in tension with both of these underpinnings of Beccaria's theory because it allows for punishment of merely immoral conduct and allows the victim to decide whether prosecution proceeds. Furthermore, a decision to require the *querela* for rape indicates a determination that rape constitutes immoral rather than illegal conduct.

The principle that guided the distinction between sins and crimes was that the state was justified in inflicting punishment only for conduct that "violates or endangers the rights of others."<sup>60</sup> This principle begs the question of how to define the rights of others that the state is to protect. The Italian term for the rights entitled to state protection is *bene giuridico*, which Watkin translates as a legal "good, a benefit or an asset" and includes "life, physical integrity, property, family relationship, [and] livelihood."<sup>61</sup> The purpose of the concept *bene giuridico* was, at least in theory, to decriminalize conduct that offended only religious or moral values, or individual modesty. Thus, no matter how contemptible certain conduct was, such as sodomy or obscenity, it was not criminal because the conduct did not harm a recognized *bene giuridico*.<sup>62</sup> However, the Zanardelli Code included adultery and concubinage as

56. *Id.* at 415.

57. Kastenber, *supra* note 54, at 52.

58. Santoro, *Querela*, *supra* note 14.

59. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 58 (Henry Paolucci trans., 1963).

60. VON BAR, *supra* note 55, at 414.

61. THOMAS GLYN WATKIN, THE ITALIAN LEGAL TRADITION 122 (1997).

62. Giovanni Fiandaca, *I Reati Sessuali nel Pensiero di Francesco Carrara: Un Onorevole Compromesso tra Audacia Illuministica e Rispetto per a Tradizione*, 1988 RIVISTA ITALIANA DI DIRITTO E DI PROCEDURA PENALE [Riv. it. dir. proc. pen.] 903, 908 (Italy).

crimes.<sup>63</sup> The reasoning by which the drafters reconciled Enlightenment thinking with the decision to define adultery as criminal conduct is relevant to examining the justifications for requiring a *querela* for rape.

Francesco Carrara, one of the principal scholars involved in drafting the Zanardelli Code,<sup>64</sup> reasoned that adultery harmed society by threatening the institution of marriage and the family. Thus, the state was justified in punishing this type of sexual misconduct.<sup>65</sup> Nonetheless, the drafters decided that adultery was to be prosecuted only by *querela*, that is, upon the other spouse's request for prosecution. The reasons for requiring a *querela* were based on the importance of protecting the family from possible negative consequences of such prosecutions.<sup>66</sup> The drafters reasoned that leaving the decision of whether to prosecute in the hands of the harmed spouse would best protect the family from the publicity and embarrassment involved in a criminal trial.<sup>67</sup> This implied that the importance of the family overshadowed that of spousal fidelity and even society's interests in condemning sexual misconduct.<sup>68</sup> The Zanardelli drafters were also concerned that automatic prosecution of adultery would preclude the possibility that family unity would be restored.<sup>69</sup> That is, if prosecution was not automatic, a greater possibility existed that a husband and wife would reconcile rather than formally accuse one or the other of adultery or concubinage. The Zanardelli drafters extended both of these rationales to the crime of rape.<sup>70</sup>

The drafters concluded that it was necessary to ensure that families decide whether to pursue charges of rape or to shield the family from the embarrassment that might result from a criminal trial. A frequently quoted statement in support of prosecuting rape by *querela* maintained that:

[I]t would not be good for public morals or for the peace and honor of the domestic hearth to cast the large light of justice on intimate events too readily, since public charges could result in greater harm than good to those individuals and families that the law seeks to protect. Thus, it is more prudent

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63. C.P. (1889) arts. 353–54.

64. Wise, *supra* note 46, at xxv.

65. Fiandaca, *I reati sessuali*, *supra* note 62, at 917.

66. GIUNTA, *supra* note 36, at 11.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

to allow those who have been harmed decide how best to protect themselves.<sup>71</sup>

This quote illustrates how the drafters viewed the harm involved in rape. The main harm was that suffered by the family. The privacy and autonomy of the victim were not of central concern, if they were even considered at all.

The need to allow for the possibility of reconciliation also justified the *querela* for rape. Both the Zanardelli Code and the Rocco Code that followed it in 1930 expressly provided for reparatory marriage.<sup>72</sup> That is, if the person accused of rape entered into a marriage contract with the victim, criminal proceedings would end.<sup>73</sup> In fact, even if marriage was contracted after conviction of the accused, punishment was not to be imposed nor were any other consequences stemming from a criminal conviction to take effect.<sup>74</sup> This doctrine applied even if the accused used violence or threats of violence to commit the rape. This institution was abolished only recently in Italy.<sup>75</sup> The goal of reparatory marriage was to repair or compensate for the harm done to the victim's family that would otherwise be left with a non-virgin of marriageable age. As Vargas has asserted, this solution indicated that the legal interest at issue was "the loss of opportunity to contract marriage resulting from the loss of one's virginity."<sup>76</sup> The *querela* requirement not only enabled, but arguably encouraged, this form of private resolution. This is similar to how the law of the 1700s in parts of Italy encouraged forms of private punishments such as requiring the rapist to provide the victim's family with a dowry for the victim so that she might be able to marry, thus emphasizing the economic value of virginity.<sup>77</sup>

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71. del Re, *supra* note 47, at 223; *see also* MARIA VIRGILIO, *VIOLENZA SESSUALE E NORMA: LEGISLAZIONI PENALI A CONFRONTO* 98 (1997).

72. C.P. (1930) art. 544; C.P. (1889) art. 352.

73. *Id.*

74. Gabriella Colagrande, *I delitti contro la libertà sessuale fra querela remissibile e procedibilità d'ufficio*, *DIFESA PENALE*, July–Sept. 1983, at 115–116 (Italy); Fermo Benussi, *Delle denunce e delle querele nel nuovo Codice di Procedura Penale (art. 149–161)*, 1913 *GIUSTIZIA PENALE* 775, 782–83.

75. *Le Leggi*, Aug. 5, 1981, n.442.

76. *See* Gladys Acosta Vargas, *Conceptualizing the Law from a Gender Perspective: Conceptions Regarding Victim and Accused*, 7 *AM. U. J. GENDER SOC. POL'Y & L.* 319, 327 (1999).

77. *See* Daniele Peccianti, *Gli inconvenienti della repressione dello stupro nella giustizia criminale senese: Il dilagare delle querele nel settecento*, in *CRIMINALITÀ E SOCIETÀ IN ETÀ MODERNA* 477 (Luigi Berlinguer & Floriana Colao eds., 1991).

Cazzetta describes how the practical effect of the decision to require a *querela* for rape exemplifies “the crowning logic of the distinction between law and morality” propounded by the Zanardelli drafters.<sup>78</sup> Prevailing penal theory in the second half of the 1800s set out a clear line between law and morality and claimed that the criminal law was to be invoked only when rights were harmed, but not “to punish passions or bad instincts.”<sup>79</sup> Punishment for the purpose of protecting the virtue of modesty would be a patent violation of personal liberty since modesty is not a *bene giuridico*.<sup>80</sup> Cazzetta asserts that this reasoning resulted, as a practical matter, in the decriminalization of *stupro semplice*, simple rape. The focus on the distinction between law and morality led the drafters to conclude that the state was justified in limiting only violent conduct. Since *stupro semplice* did not involve violence, there was no violation of any right of the victim requiring the law’s protection.

These theories about the purposes of the criminal law combined with changing views of women to influence the treatment of rape. Throughout much of Italy’s history, the law has treated women as weak, inferior to men, and in need of protection.<sup>81</sup> Enlightenment thinking, however, supported the idea that men and women are equal, comparing the family to a republic rather than to a king and his kingdom.<sup>82</sup> These modern thoughts resulted in a provision in the 1865 Italian Civil Code establishing that father and mother could both exercise *patria potestà*, or parental authority.<sup>83</sup> Such limited recognition of equality between men and women influenced the penal theorists of the mid-1800s, who determined that women were to be treated as individuals and capable of consenting to intercourse.<sup>84</sup> This acknowledgment of women’s capacity, as opposed to the earlier conception of women as children, could be viewed as furthering the rights of women. However, the thinking of these theorists further concluded that women who engaged in intercourse outside of marriage did not require the protection of the criminal law; rather, such women were seen as dangerous seductresses and thus

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78. Giovanni Cazzetta, “Colpevole col consentire:” *Dallo stupro alla violenza sessuale nella penalistica dell’Ottocento*, 1997 RIV. IT. DIR. PRAC. PEN. 424, 430.

79. GIOVANNI CAZZETTA, PRÆSUMITER SEDUCTA: ONESTÀ E CONSENSO FEMMINILE NELLA CULTURA GIURIDICA MODERNA 247 (1999) (characterizing Carrara’s penal theory).

80. Cazzetta, *supra* note 78, at 429–30.

81. See MANLIO BELLOMO, LA CONDIZIONE GIURIDICA DELLA DONNA IN ITALIA: VICENDE ANTICHE E MODERNE 58 (1996).

82. *Id.* at 93.

83. *Id.* at 93–95. For translation of *patria potestà* see DE FRANCHIS, *supra* note 10, at 1056.

84. See Cazzetta, *supra* note 78, at 433; see also, Giovanni Cazzetta, Præsumiter Seducta: Onestà e Consenso Femminile nella Cultura Giuridica Moderna 254 (1999).

accomplices, not victims.<sup>85</sup> Yet, not all women were viewed this way; virtuous women were considered worthy of protection from seducers.<sup>86</sup>

The dichotomous view of women led to the following logic: “the vulgar, dishonest, and ill-bred woman would go before a court with an accusation of rape, just as easily as she goes about seducing men, thus she must have consented to sexual intercourse.”<sup>87</sup> On the other hand, “the honest woman would not create an uproar or make a public complaint, but instead suffer in silence, even though she had actually been seduced or raped and thus had not consented.”<sup>88</sup> Therefore, the distinction between a woman who did not consent and one who did consent was based on whether she sought justice in the courts; the virtuous woman did not, and therefore had not consented and was, in fact raped, but her rapist was not punished, while the vulgar woman sought justice, and therefore consented and had not been raped and her alleged rapist was not punished.<sup>89</sup>

The Italian scholar Maddalena del Re explains that the intertwining of the “modern” theory that women are free to consent to sexual intercourse and the continuing force of the need to protect virtuous women, along with the tradition of the *querela* requirement for the crime of rape, led to the decriminalization of *stupro semplice*, intercourse without consent.<sup>90</sup> Since the *querela* requires the victim’s formal and public accusation of rape, any woman who presents a *querela* will be viewed, not only as vulgar, but also as guilty along with the accused. Consequently, women were unlikely to come forward to present a *querela* and risk being prosecuted themselves for either defamation or for filing a false complaint.<sup>91</sup> Thus, the *querela* served as a barrier to rape prosecutions; such prosecutions would not happen unless the victim presented a *querela*, but the stigma attached to such an action effectively discouraged women from formally denouncing their rapists.

Under the Zanardelli Code, the features of the *querela* were the same for all of the offenses prosecuted this way; no distinction was made between rape and other offenses. Victims had one year from the date of the offense to present a *querela* and could revoke this request up to the beginning of the trial. As to rape, the following scenarios required prosecution *d’ufficio*: if the victim died as a consequence of or during

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85. *Id.*

86. *Id.*

87. Cazetta, *supra* note 78, at 446.

88. *Id.*

89. *Id.*

90. See del Re, *supra* note 47, at 222.

91. *Id.*

the rape, if the rape was committed in a public place, if the rape constituted an abuse of *patria potestà*, or if the rape was committed in connection with another offense, punishable by at least thirty months imprisonment and which was prosecuted *d'ufficio*.<sup>92</sup> Unlike the Penal Code provisions of the pre-unification regions that had required a *querela* for rape, the Zanardelli Code did not make an exception for situations where the rape was committed with the use of force or violence, or where it was committed by a public official;<sup>93</sup> in such cases the law required a *querela*. By requiring a *querela* even when violence or force was used to commit the rape, the Zanardelli Code stigmatized these victims as well as those women who simply had not consented to intercourse.

Attitudes regarding women and rape changed very little by the time the 1930 Rocco Penal Code was drafted. This code retained the institution of reparatory marriage.<sup>94</sup> In addition, while the Penal Code continued to criminalize seduction of minors,<sup>95</sup> abduction of a woman for the purpose of marriage,<sup>96</sup> and abduction of a woman for purposes of lust,<sup>97</sup> there was often a presumption that women had consented to the seduction, or were perhaps even the instigators of it.<sup>98</sup> Given such views, it is not surprising that the Rocco Code drafters did not question maintaining the *querela* requirement for rape. The justification given differed very little from that espoused by the Zanardelli drafters: "to avoid bringing to light episodes that involved one's intimate life and often remain unknown or even ignored, and as to which the publicity of a trial would result in greater harm than good for the victims."<sup>99</sup> Such language evokes an image of women in need of the state's paternalistic protection from the publicity of a rape trial, rather than focusing on the need to protect women from the rape in the first place. This paternalism was in tension with notions that women were somehow responsible for or complicit in the alleged rape. Nonetheless, the *querela* requirement for rape under the Rocco Code mostly tracked that of the Zanardelli Code, only with fewer exceptions to the *querela* requirement, thus requiring a *querela* in more cases. The only exceptions to the *querela* requirement under the Rocco

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92. C.P. (1889) art. 336.

93. GIUNTA, *supra* note 36, at 9.

94. C.P. (1930) art. 544; see VICTORIA DE GRAZIA, *HOW FASCISM RULED WOMEN: ITALY, 1922-1945* 90 (1992).

95. C.P. (1930) art. 526.

96. C.P. (1930) art. 522.

97. C.P. (1930) art. 523.

98. See DE GRAZIA, *supra* note 94, at 139 ("Custom as well as law presumed the woman to be a consenting party to her seduction, if not actually the instigator").

99. VIRGILIO, *supra* note 71, at 98.

Code were if the crime was committed by a parent or guardian or by a public official, or the crime was committed in connection with another offense which is prosecuted *d'ufficio*.<sup>100</sup> Only in these two situations was rape to be prosecuted *d'ufficio*.

By contrast, the two codes diverged dramatically on the issue of revocability. As mentioned above, the Zanardelli Code allowed a victim the opportunity to revoke or withdraw the *querela* right up to the beginning of the trial, as to all offenses prosecuted by *querela*. Under the Rocco Code, a prosecution of rape by *querela* became irrevocable. The justifications advanced for prohibiting revocation of a *querela* relied on images of women, especially unmarried women, and their families that differ sharply from the images of "weak" women in need of protection from the embarrassment of bringing forward charges of rape. One oft-repeated purpose for making the *querela* irrevocable was to prevent or discourage "vile arrangements and risqué blackmailing, which, given the very delicate nature of these crimes, would be possible if there were a right to withdraw" the *querela*.<sup>101</sup> This seems to indicate a concern about false accusations of rape by unmarried women, especially when this concern is considered in connection with reparatory marriage. As mentioned earlier, the Rocco Code provided for the extinction of certain sexual offenses when the perpetrator and the victim married.<sup>102</sup> The apparent fear was that unmarried women, or their families, who wanted to encourage marriage to a particular man could submit a *querela* charging rape. Aside from an acquittal, the only way to avoid punishment would be for the man to marry the woman.<sup>103</sup>

Another concern may have been that upon filing a *querela* a woman or her family could then demand a monetary settlement from the alleged rapist. Upon the agreement of the parties the *querela* could then be withdrawn. Indeed, de Grazia describes "the widespread opinion that the lower-class girl who purportedly exploited her sexual desirability to seduce a young man of good family was more reprehensible than the man who preyed on a virgin, for the former could not make amends through marriage."<sup>104</sup> There are a number of problems with this. First, such settlements are permitted as to other offenses prosecuted by *querela*, yet there is not the same concern about false accusations. Second, such a rationale evokes

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100. C.P. (1930) art. 542.

101. Maria Virgilio, *Articolo 8 in COMMENTARIO DELLE "NORME CONTRO LA VIOLENZA SESSUALE"* 271, 278 (2002).

102. C.P. (1930) art. 544.

103. *See supra* notes 72–74 and accompanying text.

104. DE GRAZIA, *HOW FASCISM RULED WOMEN*, *supra* note 94, at 139.



images of vengeful women or scheming and opportunistic families of women. Despite the inconsistencies and stereotypes present in these justifications, Italy's Constitutional Court has relied on similar depictions of women in upholding the irrevocability of the *querela*.

Rape defendants have challenged the irrevocability of the *querela* for rape on the grounds that this violates the constitutional provision that guarantees equality,<sup>105</sup> because as to all other offenses requiring a *querela*, a victim may revoke a *querela* up to the time of the trial. These defendants have argued that one purpose of the *querela* is to allow victims of these types of offenses to decide whether prosecution should proceed.<sup>106</sup> Likewise, victims ought to have an opportunity to reflect on whether they wish to continue prosecutions that they have already initiated.<sup>107</sup> Italy's Constitutional Court has rejected these arguments on several occasions.<sup>108</sup>

In upholding the differing norms regarding revocability, Italy's Constitutional Court noted that allegations of rape present special concerns not involved in other crimes requiring a *querela*.<sup>109</sup> Specifically, the Court recognized that there is no single and uniform purpose served by the *querela* requirement. Therefore, the legislature can consider different interests furthered by this institution in deciding upon which types of offenses to impose the *querela*. The legislature has determined that despite the seriousness of sexual offenses, the victim's privacy interests outweigh the government's interest in prosecuting these crimes when the victim does not wish to proceed. Thus, the court reinforced the paternalistic role of the state in protecting women from such publicity. The court then stated that given the danger that the criminal process might be used or otherwise subordinated for other purposes, the legislature decided to limit the importance of privacy interests the moment at which the victim has chosen to invoke the criminal system by making the *querela* irrevocable.<sup>110</sup> The concern that victims might make improper use of the *querela* closely parallels the Rocco Code drafter's fears of false rape accusations. The court also noted that once the victim presents a *querela*, her privacy interests have already been compromised;

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105. COST. 1948 art. 3.

106. See Colagrande, *supra* note 74.

107. *Id.*

108. Corte cost., Apr. 30, 1984, n.128; Corte cost., Apr. 12, 1978, n.42; Corte cost., Mar. 23, 1975, n. 75; Corte cost., June 27, 1974, n.216; see also VIRGILIO, *supra* note 71, at 116.

109. See, Corte cost., June 27, 1974.

110. *Id.*, n. 216.

therefore, continuing prosecution despite her subsequent wishes will not run counter to the purposes of requiring a *querela* in the first place.<sup>111</sup>

The history of the *querela* in Italy reveals that use of this institution for prosecuting rape has relied on dichotomous views of women. On the one hand, women were seen as needing protection from embarrassing trials so they were given the choice of whether to prosecute. On the other hand, such request was irrevocable under the Rocco Code because women might exploit the *querela* to force marriage or to extract money from the accused rapist. Throughout the twenty years during which Italy struggled with reforming its rape law, the question of whether the *querela* should survive remained contentious.

### III. THE 1996 REFORM

Serious attention was given to reforming Italy's rape law in 1979 when a proposed law was submitted to the legislature by popular initiative.<sup>112</sup> Three hundred thousand Italians signed a proposal that revamped rape law.<sup>113</sup> One of the most important aspects of this proposal was how it classified sex crimes. Previously, these offenses were set out under the section of the Penal Code entitled "*Delitti contro la morale pubblica e il buon costume*," or crimes against public morality and decency.<sup>114</sup> The proposed law, and the law ultimately adopted in 1996, moved the provisions defining sexual offenses to the section of the Penal Code entitled "*Delitti contro la persona*," crimes against the person or crimes against the individual.<sup>115</sup> While predominantly symbolic, this change is significant because it recognizes that rape and other crimes involving sexual assault harm the individual victims more than they harm society.<sup>116</sup> In addition, this categorical change represents the state's primary goal of protecting individual sexual liberty, in those terms, and not simply protecting public morals by prosecuting sexual offenses.<sup>117</sup> Such a statement

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111. *Id.*

112. TINA LAGOSTENA BASSI, AGATA ALMA CAPPIELLO AND GIACOMO F. REICH, *VIOLENZA SESSUALE: 20 ANNI PER UNA LEGGE* 33-37 (1998) (reproducing the 1979 proposed law as well as summaries and excerpts of the debates over the course of the 20 years during which reforms were considered by the Italian Parliament).

113. *Id.* at 33.

114. See WISE, *supra* note 4, at 177 for translation.

115. See Amy Jo Everhart, Note, *Predicting the Effect of Italy's Long-Awaited Rape Law Reform on "The Land of Machismo"*, 31 VAND. J. TRANSNAT'L LAW 671, 693 (1998).

116. PITCH, *supra* note 6, at 150.

117. MARTA BERTOLINO, *LIBERTÀ SESSUALE E TUTELA PENALE* 83 (1993) [hereinafter BERTOLINO, *LIBERTÀ SESSUALE*]; MARTA BERTOLINO, *Garantismo e Scopi di Tutela Nella*

is important because it attempts to eschew the idea that the victims of such crimes, predominantly women, can be used as instruments to further public or societal definitions of proper sexual conduct or other goals related to public morality.<sup>118</sup> The need for this change was only somewhat controversial and only early on in the reform process during the 1970s.<sup>119</sup> Otherwise, no one involved in reforming Italy's rape law questioned the need to re-categorize the sexual assault crimes.

In contrast to the lack of controversy over the decision to change how rape is categorized under the Penal Code, the institution of the *querela* was one of the most controversial topics during the process of reforming the law on rape.<sup>120</sup> Initially, advocates for reform were united in their desire to do away with the *querela*.<sup>121</sup> Indeed, the preamble to the Penal Code proposed by popular initiative in 1979 stated, "given the serious nature of rape, it must be prosecuted *d'ufficio*" and "it is simply inconceivable that the burden of this decision should be placed only on the victim."<sup>122</sup> The popular initiative specifically rejected the argument that the *querela* protects women's self-determination, characterizing this as a "false protection," and included no exceptions to prosecution *d'ufficio*.<sup>123</sup>

When the Italian Parliament initially considered the public-initiated reform, many members argued that there should be an exception to *d'ufficio* prosecution when the alleged rapist is the cohabitant or spouse of the victim.<sup>124</sup> These members expressed the concern that automatic prosecution would preclude reconciliation and thus the possibility that intervention by the state in prosecuting one spouse would harm the family.<sup>125</sup> The goal of encouraging familial reconciliation paral-

*Nuova Disciplina dei Reati di Violenza Sessuale*, XLIV JUS RIVISTA DI SCIENZE GIURIDICHE 51, 53 (1997) [hereinafter Bertolino, *Garantismo*].

118. Francesco Romano, *La Violenza Sessuale: Luci ed Ombre Nella Normativa Vigente e Nelle Prospettive di Riforma*, XXIII GIURISPRUDENZA DI MERITO 436, 441 (1991).

119. Bertolino, *Garantismo*, *supra* note 117, at 53; see also David Brunelli, *Bene Giuridico e Politica Criminal Nella Riforma dei Reati a Sfondo Sessuale in I REATI SESSUALI 25* (Franco Coppi ed., 2000) (discussing the 1996 law's classification of sex crimes).

120. See I REATI SESSUALI, *supra* note 3, at 21; Bertolino, *Garantismo*, *supra* note 117, at 74; VIRGILIO, *supra* note 71, at 101.

121. BASSI ET AL., *supra* note 112.

122. *Id.* at 33.

123. *Id.* at 34.

124. *Id.* at 38.

125. Pitch quotes a famous Italian saying, "Tra moglie e marito non mettere il dito," which translates to "Don't put even a finger between husband and wife." PITCH, *supra* note 6, at 154. She explains that this saying, as well as the reluctance to prosecute spousal rape *d'ufficio*, reflects the traditional idea that the State's role is to protect the family unit and to intervene as little as possible in these relationships. *Id.*

lels that expressed by the drafters of the Zanardelli and Rocco Codes. Some Senators opposed such an exception, arguing that the imbalance of power between the victim and the rapist is greatest when the victim is the spouse, making it even more difficult for the victim to exercise her right of *querela*, with the result that the crime goes unpunished.<sup>126</sup> Women's groups remained in agreement that rape be prosecuted *d'ufficio*.

During the Tenth Legislature, between the years 1987 and 1992, disagreement over the *querela* re-emerged.<sup>127</sup> Again the focus of the debate was whether to include an exception for spouses and cohabitants.<sup>128</sup> The argument against such an exception focused on the nature of the harm inflicted by sex crimes, beginning with the premise that sexual assault is no longer a crime against public morals or against the honor of the victim and her family, rather it is a crime of violence against the victim and harms her sexual autonomy.<sup>129</sup> Thus, protection of the victim's honor previously afforded by the *querela* is no longer a goal of the criminal law. Such an argument began to give substantive meaning to the predominantly symbolic nature of the changed classification of sex crimes. That is, by arguing that conceptualizing rape as a crime against the person rather than a crime against public morals, the law should no longer afford relevance to the purity of the victim based on her willingness to pursue prosecution.

In 1989, the focus of the debates surrounding the *querela* was no longer whether to include an exception for spouses and cohabitants. Rather, some Senators began to present arguments against prosecution *d'ufficio*, favoring instead the continuation of a *querela* requirement. One Senator asked, "Does prosecution *d'ufficio* help and support rape victims, or does it drag them into a controversy they want to avoid, or are not in a position to handle?"<sup>130</sup> In addition, concerns were raised that prosecution *d'ufficio* could mean prosecution against the wishes of the victim. Indeed, some Senators stated that a victim might prefer not to prosecute for a variety of reasons, including her wish to forgive the rapist.<sup>131</sup> Others countered that the best way to protect the autonomy and liberty of the victim was to prosecute and punish those who infringe on these interests.<sup>132</sup>

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126. See, e.g., BASSI ET AL., *supra* note 112, at 44 (quoting Senator Marinucci).

127. See generally *id.*

128. *Id.*

129. *Id.* at 59.

130. *Id.* at 65.

131. *Id.* at 66.

132. *Id.*

Stronger support for maintaining the *querela* is evident in the legislative debates between the years 1994–96, immediately before the reform was enacted. Pointing to the significance in the reclassification of rape as a crime against an individual, one Senator argued that “prosecution by *querela* affirms the individual nature of sexual offenses [and] . . . demonstrates that the legal order assigns greater value to the individual victim’s interests over those of the community.”<sup>133</sup>

In the end, the 1996 law maintained the *querela* requirement.<sup>134</sup> Before describing Article 609 *septies* of the Penal Code, the following subsection provides an overview of the 1996 rape law.

### *A. Rape Under the New Law*

Above, this Essay describes the important symbolic change in how sex crimes are categorized. That is, these offenses are no longer under the portion of the Penal Code entitled “crimes against public morality and decency,” which includes offenses such as obscene acts<sup>135</sup> and obscene publications and performances.<sup>136</sup> Instead the sexual offenses are now set out under the title defining “crimes against the person,” which includes offenses such as homicide,<sup>137</sup> assault,<sup>138</sup> insult,<sup>139</sup> defamation,<sup>140</sup> slavery,<sup>141</sup> false imprisonment,<sup>142</sup> threats,<sup>143</sup> violation of the home,<sup>144</sup> and disclosure of professional secrets.<sup>145</sup> This change eliminated the anachronistic notion that the importance of criminalizing certain sexual conduct was primarily to protect societal values, rather than to protect the sexual autonomy of the victim.<sup>146</sup> The 1996 law also repealed<sup>147</sup> a number of anachronistic offenses, such as “abduction for purposes of marriage,”<sup>148</sup>

133. *Id.* at 69.

134. C.P. art. 609 *septies* (“The crimes set out in articles 609 *bis*, *ter*, and *quater* are punishable upon the *querela* of the victim.”).

135. C.P. (1930) art. 527.

136. C.P. (1930) art. 528.

137. C.P. art. 575.

138. C.P. art. 581.

139. C.P. art. 594.

140. C.P. art. 595.

141. C.P. art. 600.

142. C.P. art. 605.

143. C.P. art. 612.

144. C.P. art. 614.

145. C.P. art. 622.

146. BRUNELLI, *supra* note 119, at 47.

147. Le Leggi, Feb. 15, 1996, n.66 art. 1.

148. C.P. art. 522 (“Whoever, by violence, threats or deceit, takes away or detains an unmarried woman, for purposes of marriage, shall be punished by imprisonment for

and "seduction through promise of marriage committed by a married person."<sup>149</sup>

As to the specific provisions delineating sexual offenses, Article 609 *bis* defines "simple sexual assault"<sup>150</sup> as the use of violence, threats, or abuse of authority to force the victim to perform or submit to sexual acts. The prescribed punishment is five to ten years imprisonment, raising the minimum from three years under the prior law; the maximum punishment remains the same. The 1996 law punishes the following with the same sentence of five to ten years: whoever takes advantage of a physical or mental infirmity of the victim, is present at the time of the offense, or who deceives the victim by impersonating another person and thereby causes the victim to perform or submit to sexual acts.<sup>151</sup> One of the most significant aspects of this Article is that the legislature substituted the term "sexual acts" for the terms "carnal intercourse" and "acts of lust" criminalized in separate articles under the prior provisions of the Penal Code.<sup>152</sup> The reason for eliminating the distinctions of the prior law was to avoid the evidentiary issues necessary to determine which crime, if any, was involved.<sup>153</sup> The important evidence usually required humiliating testimony from the victim describing in detail the offender's conduct, and had the effect of turning the victim into the "second defendant."<sup>154</sup> In addition, abrogating this distinction attempted to ensure the same level of punishment for such conduct.<sup>155</sup>

The effectiveness of eradicating the above distinction is questionable because the third paragraph of Article 609 *bis* states that in less serious cases, the punishment is to be reduced, but not by more than two-thirds. This means that in such cases of *minore gravità*, or less seriousness, the possible sentence must be between a minimum of one year and eight months and a maximum of three years and four

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from one to three years. If this act is committed against an unmarried person of either sex over the age of fourteen years but under the age of eighteen, the imprisonment shall be for from two to five years.").

149. C.P. art. 526. ("Whoever, by a promise of marriage, seduces a woman who is under age, having misled her as to his own status as a married person, shall be punished by imprisonment for from three months to two years. Seduction shall occur when there has been carnal intercourse.").

150. Virgilio, *supra* note 101, at 317.

151. C.P. art. 609 *bis*, para. 2.

152. Compare C.P. art. 609 *bis* with C.P. (1930) art. 527 and C.P. (1930) art. 528.

153. Everhart, *supra* note 115, at 692.

154. BRUNELLI, *supra* note 119, at 33; Alberto Cadoppi, *Articolo 3 in COMMENTARIO DELLE NORME CONTRO LA VIOLENZA SESSUALE* 25, 27 (Cadoppi ed., 1999).

155. Everhart, *supra* note 115, at 692.

months.<sup>156</sup> The purpose of this subpart is to ensure that an offender does not receive a punishment disproportionate to his or her conduct, especially since the new law raised the minimum sentence for sexual assault.<sup>157</sup> However, the new law does not define or specify the types of scenarios involving less seriousness, and therefore justifying a lesser sentence. Instead, this determination is left to the discretion of the judge.<sup>158</sup>

In contrast to the lack of specificity with respect to cases justifying a lesser sentence, Article 609 *ter* defines aggravating circumstances that increase the range of punishment to six to twelve years when, with respect to the offense set out in Article 609 *bis*, any of the following circumstances is present: 1) the victim is less than 14 years of age; 2) the defendant used weapons, alcoholic substances, narcotics, drugs or other instruments or substances posing a serious danger to the health of the victim; 3) the defendant is disguised or otherwise feigns that he is a public official or otherwise engaged in public duties; 4) the victim is otherwise subject to limitations on her personal freedom; or 5) the victim is less than sixteen years of age and the defendant is her ascendant, parent, including adoptive parents, or guardian. The last paragraph of this Article further increases the possible sentence to seven to fourteen years if the victim is less than ten years of age.<sup>159</sup>

The next Article defines *violenza presunta* or statutory rape<sup>160</sup> where there is no need to prove violence, threats, or abuse of authority as required by Article 609 *bis*. Article 609 *quater* sets out two forms of this offense. One situation is when the offender engages in sexual acts with a minor not yet fourteen years of age.<sup>161</sup> Another form of presumptive sexual consent is when the victim is a minor not yet sixteen but older than fourteen years of age and the offender is the victim's ascendant, parent, including adoptive parents, guardian, or is any other person to whom the victim has been entrusted for purposes of the minor's care, education, instruction, supervision, or custody, or any person who is

156. S. BELTRANI AND R. MARINO, *LE NUOVE NORME SULLA VIOLENZE SESSUALE: COMMENTO SISTEMATICO ALLA LEGGE N.6 50 (1996)*.

157. Roberto Borgogno, *Il delitto di Violenza Sessuale in I REATI SESSUALI*, 71, 85.(Franco Coppi ed., 2000).

158. *Id.* at 86; Maria Virgilio, *La Violenza Alle Donne: Risposte Delle Istituzioni Dopo La Legge Contro La Violenza Sessuale in VIOLENZE ALLE DONNE E RISPOSTE DELLE ISTITUZIONI* 181, 184 (Patrizia Romito ed., 2000); Sergio Moccia, *Il sistema delle circostanze e le fattispecie qualificate nella riforma del diritto penale sessuale: un esempio paradigmatico di sciatteria legislativa*, 1997 *Rivista Italiana Diritto di Procedura Penale* 395, 396.

159. C.p. art. 609, *quater* para. 2.

160. DE FRANCHIS, *supra* note 10, at 1455.

161. C.p. art. 609 *quater*.

cohabitating with the minor.<sup>162</sup> This Article provides for the same punishment as Article 609 *bis*, five to ten years imprisonment, and allows for the same two-thirds reduction for less serious cases. Nonetheless, if the victim is less than ten years of age, the punishment is from seven to fourteen years,<sup>163</sup> as under 609 *ter*.

The new law also narrowed the offense of corruption of minors. This offense punishes anyone who engages in sexual acts in the presence of a minor less than fourteen years of age, with the goal of having the minor participate in such acts.<sup>164</sup> The prior law set the age of the victim at sixteen years, thus such conduct in the presence of a minor fourteen years of age or older does not amount to the crime of corruption of a minor. The punishment of six months to three years is the same as it was under the prior law.<sup>165</sup> As to all of the offenses involving victims less than fourteen years of age, the offender may not claim as a defense mistake as to or ignorance of the victim's age.<sup>166</sup>

An important innovation of the new law is the crime of *violenza sessuale di gruppo*,<sup>167</sup> or group sexual assault.<sup>168</sup> This provision states that when more than one person participates in acts of sexual violence as defined in Article 609 *bis*, each offender is to be sentenced to six to twelve years imprisonment. If any of the aggravating circumstances set out in Article 609 *ter* are present, the punishment is to be increased by up to one third.<sup>169</sup> By defining group sexual assault as a separate crime, the legislature removed this situation from the general provisions on aggravating circumstances in the context of complicity set out in Article 112 of the Criminal Code, to address specifically this increasing and alarming phenomenon.<sup>170</sup>

This specific attention to group rape and the appropriate sentence to be imposed was, in large part, a public and legislative reaction to an incident in March of 1988 described in the media as "the rape in Piazza Navona."<sup>171</sup> A young woman was raped by three men in Rome's Piazza

162. C.P. art. 609 *quarter*.

163. C.P. art. 609 *quarter* paras. 3, 4.

164. C.P. art. 609 *quarter*.

165. C.P. art. 609 *quinquies*.

166. C.P. art. 609 *sexies*.

167. C.P. art. 609 *octies*.

168. Massimo Domini, *Articolo 9 in COMMENTARIO DELLE "NORME CONTRO LA VIOLENZA SESSUALE"* 291 (Alberto Cadoppi ed., 1999).

169. C.P. art. 64.

170. P. Ricci et. al., *Violenza sessuale e risposta istituzionale: Considerazioni critiche sulla nuova normativa penale in materia*, 1996/pt. I LA GIUSTIZIA PENALE 366.

171. Eugenia Del Balzo, "Lo stupro di Piazza Navona" *Le sentenze e alcune valutazioni*, 1989/n.1 QUESTIONE GIUSTIZIA 119.



Navona. The three were caught in the act, convicted and sentenced to four years and four months. On appeal, the sentence was cut in half, allowing the judge to grant them a suspended sentence.<sup>172</sup> Since the new law raised the minimum sentence to six years, suspended sentences are no longer possible for this offense.<sup>173</sup>

In addition to these changes to the rape law, the 1996 reform includes provisions that are designed to protect the privacy of the victim. For example, the 1996 law created the offense "concerning the protection of privacy," punishing anyone who divulges personal details or images of a rape victim with a sentence of three to six months.<sup>174</sup> The 1996 law also added a provision to the Italian Code of Criminal Procedure stating that although sexual assault trials are to be open to the public, the victim may request that these trials be closed partially or completely.<sup>175</sup> This provision also states that all such trials are to be closed when the victim is a minor.<sup>176</sup> Finally, this provision specifies that questions about the victim's private life or sexuality are not permitted unless this is necessary for the reconstruction of the facts.<sup>177</sup>

### *B. Prosecution Under the 1996 Law*

Article 609 *septies* sets out the situations in which prosecution of rape is to be initiated by *querela* and when prosecution is to be automatic.<sup>178</sup> As to simple or aggravated sexual assault, defined in Articles 609 *bis* and 609 *ter*, prosecution is by *querela* unless any of the following facts are present: 1) the victim is less than fourteen years of age; 2) the offender is a parent, including an adoptive parent of the victim, or cohabitates with the minor victim; 3) the offender is a guardian of the victim or is any other person to whom the minor has been entrusted for purposes of education, instruction, treatment, supervision, or custody; 4) the offender is a public official or otherwise charged with public service; or 5) the offense of sexual assault is connected to another offense as to which prosecution is automatic. In all of these situations, prosecution is *d'ufficio*, or automatic.<sup>179</sup> Except for the fourth and fifth situations

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172. *Id.*

173. BASSI, ET AL., *VIOLENZA SESSUALE*, *supra* note 112, at 64.

174. C.P. art. 734 *bis*.

175. C.P.P. art. 472 (3 *bis*).

176. *Id.*

177. *Id.*

178. My explanation is based on an outline in Virgilio, *supra* note 101, at 330.

179. C.P. art. 609, *bis*; C.P. art. 609 *ter*.

listed above, prosecution proceeds *d'ufficio* in order to protect minors who are victims of sexual assault.<sup>180</sup>

As to *atti sessuali con minorenni*, or sexual acts with a minor, essentially statutory rape, set out in Article 609 *quater*, prosecution proceeds by *querela* unless: 1) the victim is less than ten years of age; 2) the victim is less than sixteen years of age and the offender is an individual described in Article 609 *quater*, paragraph 1, subpart 2, and set out above in my translation of this provision, essentially one with some form of authority over the minor; 3) if the victim is less than fourteen years of age and the offender is a public official or one otherwise charged with carrying out public duties; 4) if the victim is less than fourteen years of age and the sexual offense is connected to another crime as to which prosecution proceeds *d'ufficio*, or automatically. The offenses of group sexual assault and corruption of a minor must be prosecuted *d'ufficio*; a *querela* is not required.

Thus, where the victim is an adult and the offender is not a public official, as set out in Article 609 *septies*, paragraph 4, subpart 3, group sexual assault is not involved, and the sexual offense is not connected to another offense requiring automatic prosecution, a rape prosecution must be initiated by a *querela*, that is, the *pubblico ministero* cannot prosecute the offender unless the victim declares that he or she wishes the prosecution to go forward. Similar to the Zanardelli and Rocco Codes, the 1996 law retains the *querela* requirement even in cases where the sexual assault was committed with the use of force, coercion, or violence.

Article 609 *septies* also includes rules regarding the *querela* in cases of rape that differ from some of the general provisions discussed in Part II, above. One such difference is that the victim has six months, rather than three under Article 124 of the Penal Code, in which to exercise the right of *querela*.<sup>181</sup> This exception to the three month limitation is the only such exception under the Penal Code.<sup>182</sup> Some reformers argued for an extension of up to two years of this time limitation.<sup>183</sup> The main argument was that the traumatic experience of rape makes it unlikely that most victims will be in a position, emotionally speaking, to make a reasoned decision, within only three months, regarding prosecution.<sup>184</sup>

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180. See Virgilio, *supra* note 101, at 330.

181. C.P. art. 609 *bis*, para. 2.

182. VIRGILIO, *supra* note 101, at 312.

183. *Id.*

184. *Id.*

The second significant divergence from the general provisions on the *querela* is that once the victim of a sexual offense requiring a *querela* fulfills this requirement it becomes irrevocable.<sup>185</sup> As to all other offenses prosecuted by *querela* it is possible to waive or withdraw the *querela* and thus prevent prosecution. This provision continues the rule under the 1930 Rocco code that a *querela* alleging rape is irrevocable. The rationale for not allowing victims to withdraw a *querela* is not entirely clear, but it seems that the legislature was concerned that a rape victim who exercises the right of *querela* might be pressured, by the offender, the victim's family, or others, to withdraw or waive the *querela*.

Most reformers maintained that the *querela* would protect victim agency. The next section explores the meaning of victim agency and then explains why the compromise ultimately adopted does not achieve this goal.

#### IV. VICTIM AGENCY

As discussed in the Introduction and in Part III, the primary rationale asserted for maintaining the *querela* requirement for sexual assault was to ensure protection of the victim's agency, or self-determination. This section describes the notion of victim agency, particularly as used by American legal scholars in the context of domestic violence. This section then examines inconsistent aspects of the *querela* requirement in the 1996 law and concludes that the drafters adopted a definition of victim agency that is too simplistic and therefore insufficient to empower victims of sexual assault.

Agency, autonomy and self-determination have been used to describe a number of feminist goals. For example, women's emancipation and "freedom from oppressive restrictions imposed by reason of sex" has been defined to mean protection of women's right to self-determination and individual autonomy; "free to decide one's own destiny, to define one's social role."<sup>186</sup> This goal focuses mainly on the elimination of barriers to women making decisions about their lives. Another use of these terms has been to recognize the "resistance, struggles, and achievements of the oppressed."<sup>187</sup> This description of agency recognizes that subordinated people cannot achieve full autonomy given their oppression;

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185. C.P. art. 609 *bis*, para. 3.

186. Gerda Lerner, *The Meaning of Seneca Falls, 1848-1998*, 45 *DISSENT* 34, 39 (1998).

187. Martha Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 54, 59 (Martha Fineman & Roxanne Mykitiuk eds., 1994).

agency for them is “always partial, contingent, and emerging.”<sup>188</sup> Coker and Mahoney highlight the dichotomous nature of the labels victimization and agency: “you are an agent if you are not a victim, and you are a victim if you are in no way an agent.”<sup>189</sup> Abrams has described one dimension of agency as “self-direction.”<sup>190</sup> Broadly defined, this aspect of agency focuses on “the ability to formulate goals and plans that are one’s own, as opposed to the products of the influence of others.”<sup>191</sup> This definition is broad enough to include making decisions about what career to pursue as well as developing strategies for leaving an abusive partner.<sup>192</sup> Significantly, this definition recognizes and validates as examples of agency actions that women in battering relationships may take to ensure the security of themselves and of their children.<sup>193</sup>

A large amount of legal scholarship in the United States focuses on issues of agency and victimization in the context of mandatory policies adopted to ensure effective responses to domestic violence.<sup>194</sup> Such policies include requiring police to arrest the batterer, the “mandatory arrest” policy, and requiring prosecutors to pursue prosecution of the batterer even in situations where the victim opposes prosecution, the “no-drop prosecution” policy.<sup>195</sup> Certainly, such policies seek to ensure that state actors take domestic violence seriously, an important goal for feminist law reformers. Indeed, some commentators argue that mandatory arrest policies actually empower victims by removing the burden of this decision from her and helping her to get out of the abusive relationship.<sup>196</sup> However, feminists are also concerned that these policies will

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188. Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 821 (2001).

189. *Id.* at 822 (quoting Mahoney, *supra* note 187, at 64.).

190. Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 824 (1999).

191. *Id.* at 829.

192. *Id.* at 830, 834.

193. *Id.*, at 824 (discussing Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991)).

194. See e.g., Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159 (2003); Christine O'Connor, Note, *Domestic Violence No-Contact Orders and the Autonomy Right of Victims*, 40 B.C. L. REV. 937 (1999).

195. Coker, *supra* note 188, at 806. See also Tonya McCormick, *Convicting Domestic Violence Abusers When the Victim Remains Silent*, 13 BYU J. PUB. L. 427, 437–46 (1999) (discussing the specific strategies adopted by Utah County and Maryland for prosecuting domestic abusers without the testimony of the victim).

196. Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 290 (1997).

result in state control of women who are victims of domestic violence. Mills argues that mandatory policies can “reinforce a battered woman’s psychic injury and encourage feelings of guilt, low self-esteem, and dependency” thus causing “the state to replicate unwittingly the behavior of the batterer in some cases.”<sup>197</sup> The challenge for feminist law reformers has been to ensure that domestic violence is taken seriously by state actors, while respecting the wishes and needs of the victim. An important insight is that the meaning of agency is broader and more complex than the narrow issue of whether the victim can decide whether her abuser is to be arrested and prosecuted.<sup>198</sup> That is, it is important to recognize and take account of how social norms influence individual choice and of the barriers that exist to impede choice.

The development of “coordinated community intervention programs” is, at least in part, an attempt to examine and address the obstacles to agency.<sup>199</sup> These programs seek to provide “essential services” for battered women such as “emergency housing, legal advocacy, support groups . . . , and financial resources.”<sup>200</sup> Not only can these services protect battered women from greater danger and abuse, they can also provide empowering support for battered women. This type of support can enable a battered woman to leave her batterer and can address her individual concerns that may make her reluctant to prosecute the batterer.<sup>201</sup> Thus, bringing together services and people outside the criminal justice system can respect the agency of the victim as well as increase the likelihood of successful prosecution of the batterer. In addition, an emphasis on educating police officers, prosecutors and judges has accompanied this development.<sup>202</sup> Victims of battering may be reluctant to invoke the criminal justice system because they fear how police,

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197. Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 595 (1999).

198. Coker, *supra* note 188, at 823 (“[S]imple accounts of women’s agency—‘if a woman wants to live in a violent relationship, it is her choice’—fail to account for the level of coercion and restraint operating in battered women’s lives.”) (quoting Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1874 (1996)).

199. Coker, *supra* note 188, at 845.

200. *Id.*

201. See Deborah Epstein, *Redefining the State’s Response to Domestic Violence: Past Victories and Future Challenges*, 1 GEO. J. GENDER & L. 127 Summer 1999, at 127.

202. See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J. L. & FEMINISM 3 (1999) (commending integrated domestic violence courts); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. LAW & CRIMINOLOGY 46, 52 (1992) (noting the problem of domestic abuse practiced by police).

prosecutors and judges might treat them.<sup>203</sup> Educational efforts seek to provide information that dispels traditional myths about domestic violence and explains the dynamics involved in battering relationships, and thus make it less likely that the victims of abuse will be abused by actors in the criminal justice system. Recognition that the notion of agency is complex has helped advocates for survivors of domestic violence address a variety of concerns that may prevent women from pursuing criminal prosecution.

#### V. VICTIM AGENCY AND THE QUERELA

Those who argued for retaining the *querela* in Italy applied a conception of agency too simplistic to achieve the goal of protecting victim agency in rape cases. While the 20 year debate over the reformed law reflects concerns that the state should not force rape victims to pursue prosecutions, reformers gave insufficient consideration to the obstacles that rape victims may face in deciding whether to initiate a *querela*. Nor did the reformers give adequate attention to the fact that throughout the history of the *querela* in Italian criminal justice, this institution has served as a barrier to rape prosecution. Thus, the symbolic importance of retaining the *querela* may well eliminate any advances in protecting victim agency. In addition, the final resolution of the issue of the *querela* was a compromise and thus produced inconsistencies that do not further even the simplistic notion of agency the reformers relied on.

The reform proposed by popular petition in 1979 emphasized the importance of symbolic changes to rape law in Italy. Of particular significance, as discussed above, was the categorization of rape as a crime against the person. Italian commentators uniformly recognize that this change was symbolic, but also went beyond mere symbolism because it reflected a change in the law's attitude about rape and the harm involved.<sup>204</sup> Yet, those reformers who favored maintaining the *querela* to protect victims from state coercion did not reflect on the symbolic impact of maintaining an institution that has served, for over 200 years, to silence victims of sexual violence. This device has been a way to encourage arrangements like reparatory marriage.<sup>205</sup> The reformers did not take up the question of how to alter the negative reputation of the

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203. Epstein, *supra* note 202.

204. See *supra* text accompanying notes 114–119.

205. See *supra* text accompanying notes 73–77.

*querela* as a “false protection” for rape victims, and how to best encourage victims to request criminal prosecution.

The argument that the *querela* will protect victims is met with additional skepticism because there are numerous examples throughout Italian history of legal reforms that seemed beneficial to women, yet achieved no real or immediate change. For example, although the Italian Civil Code of 1865 established that both husband and wife could exercise *patria potestà*, or parental authority,<sup>206</sup> the husband remained the head of the household; the wife could not enter into contracts without his consent, nor could she participate in *consiglio di famiglia*, or family conferences where important decisions were made by the adult men of the extended family.<sup>207</sup> The 1948 Italian Civil Code proclaimed that husband and wife have mutual obligations of cohabitation, fidelity and assistance, yet it also established that “the husband is the head of the family.”<sup>208</sup>

More generally, the Italian Constitution of 1948 declared that “[A]ll citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, or personal and social condition.”<sup>209</sup> The promise of equality remained unfulfilled until 1960.<sup>210</sup> For twelve years constitutional provisions specifying women’s equality were considered mere aspirations rather than immediately enforceable rights. The reasoning was that the equality provisions expressed goals for the legislature to work toward rather than actual rules in and of themselves that could be enforced right away.<sup>211</sup> A

206. See DE FRANCHIS, *supra* note 10, at 1056 for a translation of *patria potestà*.

207. BELLOMO, *supra* note 81, at 95 (asserting that the 1865 Italian Civil Code contained many of the same limitations on wives as did Napoleon’s Code). I have not located an explanation of *consiglio di famiglia*. My translation is based on my inferences from sources like BELLOMO and PAOLO UNGARI, *STORIA DEL DIRITTO DI FAMIGLIA IN ITALIA (1796–1975)* (2d ed., 2002), as well as from conversations with Italian women.

208. BELLOMO, *supra* note 81, at 132.

209. COST. (Italy) (Vincent A. Scanio & Manfred C. Vernon trans. 1948) [hereinafter Cost. (Italy)]. The Italian Constitution also includes provisions that specifically proclaim equality of the sexes. For example, one article states that “[t]he working woman has the same rights on basis of equality of work to the same compensation which applies to the working man.” *Id.* art. 37, para. 1. Another article provides that “[a]ll citizens of either sex may hold public offices and elective positions . . . .” *Id.* art. 51, para. 1.

210. CORTE COST., May 18, 1960 *reprinted in* BELLOMO, *supra* note 81, at 177–79 (declaring unconstitutional a portion of a 1919 law that excluded women from certain public offices that required the exercise of political rights and authority).

211. BELLOMO, *supra* note 81, at 166 and 168 (discussing decision by the Consiglio di Stato in 1954, holding that the equality provisions in the constitution simply set out guidelines for future legislation).

state institution did not rely on these provisions to strike discriminatory legislation until after the Italian Constitutional Court was created in 1956.<sup>212</sup> The history of the *querela* and the history of women's rights in Italy make it unlikely that the *querela* requirement for rape might nonetheless become, by itself, a real protection for women.

Scholarship analyzing victim agency in the context of devising strategies to tackle domestic violence reveals that victim agency is broader and more complex than simplistic notions of "victim choice." Certainly, the goal of protecting a rape victim's agency is important. As Boon points out, "when individuals are forced to engage in sexual or reproductive acts, their autonomy is circumscribed, their exercise of agency is not realized, and their ability to safeguard their freedom of choice and their physical integrity is compromised."<sup>213</sup> Prosecution of the rapist, which involves pretrial hearings, investigations, the trial itself, and the publicity surrounding all of these proceedings, against the wishes of the victim can further harm victim agency because, once again, the victim has no control. Indeed a number of commentators have asserted that prosecution of the rapist amounts to a second rape of the victim.<sup>214</sup> The state's prosecution of alleged rapists should take into account how rape harms victim agency and should avoid exacerbating this harm. However, simply delegating to the victim the decision of whether to initiate prosecution of the alleged rapist does not attend to the complexities of victim agency, nor does this solution examine and attempt to address barriers to victim agency that rape victims may face.

An effort to protect victim agency would first inquire into why rape victims are reluctant to initiate prosecution. Such an inquiry would parallel that considered in the development of "coordinated community intervention programs" designed to empower victims of domestic

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212. *Id.* at 169. Although articles 134–137 of the 1948 Constitution provided for the creation of a Constitutional Court, the Court was not created until 1956. *Id.*

213. Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 642 (2001).

214. TASLITZ, *supra*, note 2, at 49 (describing how victims feel "twice raped"); *see also* COPPI, *supra* note 3, at 18 (describing how Italian feminists have declared that the "rape trial" results in further harm to the victim); Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353 (2005) (discussing the harm caused by cross-examination, especially to victims of sexual assault and domestic violence, and explaining that it was after she subjected to a mock cross-examination by a lawyer in the prosecutor's office that the complainant in the Kobe Bryant case wanted to drop the charges); Leonore M.J. Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 526 (1999) ("[T]he legal system, in particular, further traumatizes victims of child molestation and forcible rape who have a relationship with the offender.").



violence.<sup>215</sup> The 1996 law addresses a couple of possibilities. As mentioned earlier, the new law makes it a misdemeanor to divulge the identity or images of a rape victim.<sup>216</sup> The law also prohibits questions at trial about the private life or sexual history of the victim, and allows the victim an opportunity to request that the trial, or portions of it, be closed to the public.<sup>217</sup> Victims who are concerned about protecting their privacy may be reassured by such provisions.<sup>218</sup> These provisions might therefore support victim agency by avoiding a situation where the victim is placed on trial. In addition, Italy has a relatively extensive network of anti-violence centers and hotlines for victims of rape (*telefoni rosa*).<sup>219</sup> However, unlike the coordinated community intervention programs, the Italian approach to protecting victim agency does not include a program for eradicating biases and prejudices that can arise in the criminal justice system as well as in society. Indeed, anti-violence activists have emphasized that legal reforms will not be as effective as they could be if “the attitudes or the ignorance of those charged with implementing them” do not change.<sup>220</sup> The following cases are examples of how rape myths continue to influence judicial evaluations of whether the victim consented to sex acts.<sup>221</sup>

In February 1998 the Third Section of the Italian *Corte di Cassazione*, the court of last resort for criminal appeals, overturned a conviction for rape on the grounds that a number of factors led the court to question the credibility of the eighteen-year-old victim.<sup>222</sup> In particular, the court noted that the victim was wearing jeans on the day that she had

215. See *supra* notes 199–202 and accompanying text.

216. C.P. art. 734 *bis*. Such criminal statutes are rare in the United States. See Marah de-Meule, Note, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N.D. L. REV. 145, 169 (2004).

217. C.P.P art. 472, para. 3 *bis*.

218. *But see* DE MEULE, *supra* note 216, at 173–74 (asserting that rape-shield laws are usually applied only to stranger rape cases and are, in any event, “insufficient to address the privacy needs of rape complainants”).

219. See VIRILIO, *supra* note 158, at 189.

220. CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* 1097 (2001).

221. Despite educational efforts in the United States, actors in the justice system still make disparaging comments.” See, e.g. Robert Perez & Rene Stutzman, *Judge’s Insult Shocks Rape Victim*, ORLANDO SENTINEL, Jan. 29, 2004, at A1 (reporting comment of Judge Gene Stephenson when looking at photograph of rape victim who had been beaten by her rapist: “Why would he want to rape her? She doesn’t look like a day at the beach.”); see also Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between “The Truly National and the Truly Local,”* 42 B.C. L. REV. 1081, 1092 nn.58–60 (2001) (describing additional examples of judicial bias against female victims of violence).

222. Cass., sez. tre, nov. 1998, Foro It. II 1999, CXXII, 163.

intercourse with the accused, her forty-five-year-old driving instructor, stating that "it is a fact of common experience that it is nearly impossible to remove jeans on another person without the wearer's active cooperation, after all [taking off jeans] is a difficult enough operation for the one wearing them."<sup>223</sup> The court called the victim's accusations into further doubt because there was no evidence that she resisted; indeed she got into the car after the rape and drove with the accused back to her home.<sup>224</sup>

More recently, the *Corte di Cassazione* quashed another rape conviction on the grounds that the evidence was not sufficient to show that the accused used violence or threats to accomplish the sexual acts, nor to show that the victim did not consent.<sup>225</sup> The trial court and the Court of Appeal both determined that the victim's testimony was credible because she reported the assault within hours of its occurrence and there was testimony that she appeared distraught and disturbed, to the point of fainting, after the assault.<sup>226</sup> In addition, both lower courts found that the circumstances of the assault made it difficult for the victim to resist. Specifically, the Court of Appeal pointed to the fact that the assault occurred very suddenly and unexpectedly, and that the accused immobilized the victim's legs and penetrated her anus with his hand and performed oral sex on her.<sup>227</sup> The Court of Appeal further determined that the offense of sexual assault, as amended by the 1996 law, is to protect the sexual self-determination of the victim from the sexual instinct of the accused, and this *bene giuridico* was harmed in the victim's encounter with the accused.<sup>228</sup> The *Corte di Cassazione* quashed the

223. Cass., sez. tre, nov. 1998, Foro It. II 1999, CXXII, 163, 169 (translation by author); see also Kitty Calavita, *Blue Jeans, Rape, and the "De-Constitutive" Power of Law*, 35 LAW & SOC'Y REV. 89, 94 (2001) (including further translation and discussion). For a more detailed description of this case, in English, see Rachel A. Van Cleave, *Sex, Lies, and Honor in Italian Rape Law*, 38 SUFFOLK U. L. REV. 427, 446-453 (2005).

224. Cass., sez. tre, nov. 1998, Foro It. II 1999, CXII, 163, 169.

225. Cass., sez. tre, 4 feb. 2002, n. 3949 reprinted in L. TEMI ROMANA—RASSEGNA DI DOTTRINA E GIURISPRUDENZA 130 (May-Aug., 2001). For the opinion of Court of Appeal in Rome affirming the conviction, see Corte app. di Roma, sez. tre., 12 July 2000, n. 6679, reprinted in L. TEMI ROMANA—RASSEGNA DI DOTTRINA E GIURISPRUDENZA 90-92 (Jan.-Apr., 2001).

226. Corte app. di Roma, sez. tre, 12 July 2000, n. 6679, reprinted in L. TEMI ROMANA—RASSEGNA DI DOTTRINA E GIURISPRUDENZA 90-92, 91 (Jan.-Apr., 2001).

227. Corte app. di Roma, sez. tre, 12 July 2000.

228. Despite the fact that the lower court convicted S.M. of sexual assault the court determined that mitigating factors were present and sentenced S.M. to two years confinement and suspended this reduced sentence. *Id.*, at 90-91. See also VIRGILIO, *supra* note 158, at 184-85 (discussing the broad discretion judges have under the 1996 law to reduce a defendant's sentence).

conviction because the facts described by the Court of Appeal showed that the victim's hands were not restrained while the accused performed oral sex on her and that she admitted to having had an orgasm during the encounter.<sup>229</sup> The court concluded that these facts did not indicate that the victim was "at the mercy" of the defendant and therefore she could have attempted at least minimal resistance.<sup>230</sup> In addition, she failed to manifest any objections to the defendant's actions during the twenty minute encounter.<sup>231</sup>

These decisions illustrate that while some Italian judges are no longer governed by biases and myths that have plagued rape law many still are and find it difficult to believe a victim who did not physically resist the assault or was not immobilized by the accused.<sup>232</sup> Virgilio asserts that strengthening the ties between the local entities such as the police, judges, and medical personnel and women's groups and the anti-violence centers will provide better support for victims of violence and lead to changes in how the law is applied.<sup>233</sup> Certainly, this is promising. Nonetheless, these were not issues addressed by those who favored maintaining the *querela* requirement.

Finally, the internal inconsistencies in the 1996 law with respect to the *querela*, as well as the differences between the *querela* for rape and the *querela* for other offenses, indicate that the need for legislative compromise best explains the inclusion of the *querela* requirement. Most significantly, once a sexual assault victim presents a *querela* she may not revoke it.<sup>234</sup> It makes little sense to say, on the one hand, rape is to be prosecuted by *querela* to give the victim this choice, but then to limit

229. Corte app. di Roma, sez. tre, 12 July 2000.

230. Corte app. di Roma, sez. tre, 12 July 2000.

231. Cass. sez. tre, 4 feb. 2002, no. 3949, reprinted in L TEMI ROMANA—RASSEGNA DI DOTTRINA E GIURISPRUDENZA 130 (May–Aug., 2001).

232. Additional facts described in a brief comment on the S.M. case reveal that S.M. and the victim had been dating. Mariateresa Elena Povia, *Problematica relative alla valenza del dissenso nel reato di violenze sessuale*, L TEMI ROMANA—RASSEGNA DI DOTTRINA E GIURISPRUDENZA 92–94 (2001) (commenting on the Court of Appeal decision and concluding that a victim must communicate her lack of consent to the defendant). See also Luca Giordano and Mariateresa Elena Povia, *Nota*, L TEMI ROMANA—RASSEGNA DI DOTTRINA E GIURISPRUDENZA 130, 131 (May–Aug., 2001) (commenting on the decision of the *Corte di Cassazione* and lamenting that the court did not devote greater analysis to the meanings of "force" and "lack of consent" in the context of sudden and unexpected assaults). Skepticism of a rape complainant who did not physically resist dates back to the views of Enlightenment thinkers that the "'consummated' rape must be a permitted rape." GEORGES VIGARELLO, *A HISTORY OF RAPE: SEXUAL VIOLENCE IN FRANCE FROM THE 16TH TO THE 20TH CENTURY* 43 (Jean Birrell trans., 2001).

233. VIRGILIO, *supra* note 158, at 189 and 191.

234. See *supra* text accompanying note 185.

the victim's choices by making the *querela* irrevocable. If pressure on the victim is a real concern, it makes more sense to do away with the *querela* requirement for rape altogether. After all, the victim could be subject to the same pressures when deciding whether to present a *querela* to begin with. The extension of the time for presenting a *querela* from three months to six months paradoxically leaves the victim vulnerable to such pressures for a longer period of time.<sup>235</sup> The reasons for changing both of these aspects of the *querela* for rape amount to paternalistic views of rape victims. It is difficult to see how such paternalism is consistent with victim empowerment. Furthermore, setting up a separate *querela* system, extending the time for presenting the *querela* and making it irrevocable, solely for sexual offenses serves to preserve the "special" nature of these offenses.<sup>236</sup>

Since the *querela* is one tool that the Italian legislature has relied on to trim government's responsibility to prosecute less serious offenses,<sup>237</sup> requiring the *querela* for rape adds to the perception that the state does not take crimes of sexual violence seriously. An aspect of the 1996 law that further contributes to this perception is the exception to the *querela* requirement where the sexual assault was committed along with another offense that is prosecuted *d'ufficio*.<sup>238</sup> A similar exception existed in both the Zanardelli and Rocco Codes.<sup>239</sup> The following example illustrates the effect of this exception. The Italian Penal Code defines robbery as taking the property of another by means of violence or threats of violence.<sup>240</sup> Robbery is prosecuted *d'ufficio*.<sup>241</sup> If a sexual assault that would otherwise be prosecuted by *querela* is accompanied by a robbery, both the robbery and the sexual assault are to be prosecuted automatically, whether or not the victim wants prosecution to proceed. The justification for this exception echoes those given for the same exception under the prior penal codes; investigation of the robbery will likely bring to

235. VIRGILIO, *supra* note 71, at 115.

236. PITCH, *supra* note 6, at 161.

237. See *supra* text accompanying notes 19–33.

238. C.P. 609 *septies* para. 4(4).

239. The Zanardelli Code required prosecution *d'ufficio* if the rape was accompanied by another offense punishable by at least thirty months imprisonment and which is prosecuted *d'ufficio*. C.P. (1889) art. 336 The Rocco Code provided that rape was to be prosecuted by *querela* unless "the act is related to another crime for which prosecution must be initiated automatically." C.P. (1930) art. 542, para. 3(2).

240. C.P. art. 628.

241. I NUOVI QUATTRO CODICI : CIVILE E DI PROCEDURA CIVILE, PENALE E DI PROCEDURA PENALE E LE LEGGI COMPLEMENTARI 1053 (Francesco Bartolini et al. eds., 2003) (including procedural notes following article 628 of the penal code, stating that robbery is prosecuted *d'ufficio*).

light evidence of the sexual assault, thus the goal of protecting the victim's privacy can no longer be achieved.<sup>242</sup> This reasoning does not explain why the rape victim's agency is to be sacrificed in such scenarios. Unfortunately, despite the repeated claims of Italian scholars and legislators that rape is a serious offense<sup>243</sup> there is a real danger that this exception sends the message that rape is not serious enough for the state to assume the burden of automatic prosecution unless it is connected to another crime that must be prosecuted automatically. Indeed, such a message echoes that found in the history of rape in Italy.<sup>244</sup> Nonetheless, nonsexual but related facts such as "breaking and entering, abduction, assault on the victim or relatives and neighbors, and theft . . . gave the crime [of rape] significance."<sup>245</sup>

It is difficult to understand how prosecution against the wishes of the victim simply because the accused may have also ripped jewelry from the victim's neck protects the agency of the rape victim.

### CONCLUSION

One Italian commentator argues that the *querela* is the only means of protecting the victim and should be retained until the criminal justice system develops effective alternatives.<sup>246</sup> However, this approach adheres to an unduly narrow definition of victim agency that focuses solely on victim control over the decision to prosecute and avoids the difficult inquiry into why rape victims may be reluctant to formally request criminal prosecution. While some promising steps have been made to create support mechanisms for victims of sexual violence, there remains a striking void of systematic efforts to destroy persistent rape myths held by individuals who work in criminal justice. Endeavors to educate po-

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242. See Tiziana Jurincich, *Delitti sessuali ed estinzione del reato connesso: una nuova pronuncia della Corte Costituzionale* 10 GIURISPRUDENZA ITALIANA 1895 (1998) (reproducing and commenting on decision n.64 of the Italian Constitutional Court issued on March 17, 1998. The court relied on this reasoning to support the *d'ufficio* prosecution of the sexual assault even though the robbery charge had been quashed).

243. See VIRGILIO, *supra* note 71, at 100 (stating that the argument that prosecution by *querela* minimizes the seriousness of sexual offenses is simply not convincing, and citing others who are in agreement).

244. GUIDO RUGGIERO, *THE BOUNDARIES OF EROS: SEX CRIME AND SEXUALITY IN RENAISSANCE VENICE* 96 (1985) (concluding that in Renaissance Venice rape was a minor offense).

245. *Id.* Ruggiero notes that while rape in such situations was considered more serious, the effect was that "these ancillary misdeeds were consistently underpenalized in the context of rape".

246. GIUNTA, *supra* note 36, at 73.

lice, prosecutors, defense attorneys and judges are crucial to creating a criminal process that does not subject a victim to a "second rape." In addition, the internal inconsistencies created by the 1996 law with respect to the *querela* requirement resulted in not only a narrow definition of victim agency, but also in a subordination of the goal of agency to paternalistic concerns completely at odds with notions of empowerment. The 1996 law gives the victim the decision of whether to prosecute the sexual assault, but does not allow her an opportunity to change her mind if she decides to go forward. Furthermore, the 1996 law takes away the victim's ability to make this choice where the sexual assault is connected to another offense requiring automatic prosecution.

More importantly, preserving the *querela* ignores the silencing effect this device has had on rape victims throughout its history. It is a mystery how the 1996 law can transform an institution that has only harmed victims of sexual violence into one that plays a central role in protecting such victims.

One solution that would have reversed the issue of victim choice was proposed, but ultimately rejected.<sup>247</sup> This proposal would have required prosecution *d'ufficio*, but when there is a lack of an express manifestation of the victim's wish to proceed, the prosecutor must notify the victim of her right to oppose prosecution.<sup>248</sup>

Another possibility would be to examine the issue of victim choice outside the context of sexual assault and instead consider this more broadly within the Italian criminal justice system. Before 1989 when Italy dramatically altered its criminal justice system, state control of criminal prosecutions was the rule, and victim involvement in this decision the exception, reflecting hierarchical notions of state authority. Important aspects of the 1989 reform of the Italian Code of Criminal Procedure created mechanisms through which the defendant and the prosecutor can agree to disposition of criminal charges without recourse to a full trial.<sup>249</sup> Despite these changes, the 1989 Code included procedures for implementing the *querela* similar to those under the prior

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247. The so-called "Bassanini-Gramaglia amendment" was proposed in February, 1989. VIRGILIO, *supra* note 71, at 102.

248. This amendment would not have given effect to opposition by the victim if the victim is under the age of fourteen or the accused is the parent of the victim, or is a public official. *Id.* at 102-103 (reproducing the amendment).

249. See Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 46-54 (2004); Pizzi and Marafioti, *supra* note 17; Van Cleave, *supra* note 17.

code.<sup>250</sup> Yet, the new code did not consider on a more global level the role of the victim and the extent to which the victim's wishes as to prosecution should influence the initiation of criminal proceedings as to all offenses. Deliberation on the role of the victim generally may result in a new procedural device that is founded on specific principles, in contrast to the variety of purposes served by the *querela*.

Nonetheless, even a procedural device that reflects a broader evaluation of the role of the victim will not succeed in protecting the agency of rape victims if the biases of players in the justice system are not eradicated, and if other barriers to the victim's choice are not addressed. ♣

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250. C.P.P. 336-41.