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Sudden, Forced, and Unwanted Kisses in the #MeToo Era: Why A Kiss is Not “Just A Kiss” Under Italian Sexual Violence Law

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Sudden, Forced, and Unwanted Kisses in the #MeToo Era: Why A Kiss is Not “Just A Kiss” Under Italian Sexual Violence Law[©]

RACHEL A. VAN CLEAVE*

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©Copyright 2019 Rachel A. Van Cleave. See Rachel A. Van Cleave, *What Italian Sexual Violence Law Can Teach US Law in the #MeToo Era*, THE RECORDER (Mar. 7, 2019), <https://www.law.com/therecorder/2019/03/07/what-italian-sexual-violence-law-can-teach-us-law-in-the-metoo-era/>, for my short opinion piece on this topic.

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It's evening in a U.S. law firm office, and the boss has called in an employee to help him locate a file on his computer. She sits at his desk and finds the file and tells him that she will organize his computer files the next day. As she stands to leave, he offers to drive her home. She politely declines. He then asks how she's doing, it seems she recently started working there. When he compliments her on her work, she thanks him. Suddenly, he comments on her earrings, stating, "these are cool," as he quickly moves closer, putting his hands on each side of her head and begins kissing her on the mouth. She pulls away. Several awkward seconds go by, while he continues to hold her hands, before she says, "Um, I have a boyfriend." He replies, "That's cool. I'm married." He then says, "Ok. You're not into that," and moves between her and the door to his office. He says, "I just wanted to show you how much I appreciate you. Everything is ok, right? Nothing happened! We're good here, right?" He then puts his arms out to gesture for a hug, repeating, "We're good here." She nods, keeps her elbows bent and arms close to her chest as he hugs her and kisses her on her cheek. She then leaves his office.

This Public Service Announcement tells us that the above scenario is based on an actual incident and ends with "#ThatsHarassment."¹

In Italy, this boss could be prosecuted for the crime of sexual violence.

I. INTRODUCTION

One of the many significant aspects of the #MeToo movement has been the similar patterns of sexual misconduct that hundreds of women, primarily, have experienced. Much of the behavior reported is appalling and as such merits separate and thorough discussion.² The focus of this Article is the sudden, forceful, and unwanted kiss.³ Many women reported descriptions of forced kisses by men in positions of authority or power as compared to the women subjected to these kisses. For example, Rachel Crooks, who worked in Trump Tower, described how after she greeted Mr. Trump by offering a handshake, he kissed her on the mouth forcibly and without her consent.⁴

1. #ThatsHarassment PSA episode entitled, "The Boss," AD COUNCIL, <https://www.ad-council.org/Our-Campaigns/Safety/Confronting-Sexual-Harassment> (last visited Feb. 20, 2019) (I've only summarized the portrayal in this video. The full, nearly four-minute, video is worth watching despite how uncomfortable it makes the viewer). I am grateful for the license granted by the Ad Council to show the full version of this PSA at the Women and the Law Symposium on March 8, 2019.

2. Riley Griffin, Hannah Recht & Jeff Green, *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/graphics/2018-me-too-anniversary/>.

3. See *infra* Part II for my explanation of the words sudden, forceful, and unwanted.

4. Megan Twohey & Michael Barbaro, *Two Women Say Donald Trump Touched Them Inappropriately*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/us/politics/donald-trump-women.html>; see also Clara Sinclair, *Woman Who Accused Trump of*

Indeed, Mr. Trump has bragged about not waiting to ask, but just kissing women.⁵ More recently, Nobel Laureate, Óscar Arias Sánchez, has been accused of pinning women to the wall and trying to kiss them.⁶ While a number of men have lost their jobs due, in part, to forced kisses, none have faced criminal prosecution for forced kisses in the United States. By contrast, there have been criminal convictions of “sexual violence” for sudden, forceful kisses under Italian law.

Eight years ago, two law professors, one Italian, Alberto Cadoppi, one U.S., Michael Vitiello, co-authored an article in which they considered a conviction in Italy for sexual violence based on forced kisses.⁷ They determined that there were no criminal cases involving adults and forced kisses in the U.S. and that it was unlikely there would be such a case, unless an underage victim was involved.⁸ Indeed, the authors “remain[ed] convinced that a kiss is just a kiss.”⁹ They further stated that while “a creative law professor might come up with a bizarre example of a person who dashes about kissing his victims, fully aware that his victims do not want him to kiss them. . . . [T]raditional crimes like simple battery can provide sufficient protection.”¹⁰

This Article calls for a reconsideration of whether such conduct amounts to sexual violence in light of the #MeToo reports of sudden kisses that have exposed the frequency with which this occurs and the harmful impact on the victims. This Article is part of a larger project studying how Italy

Forcing Her to Kiss Him is Running for Office, BOINGBOING (Feb. 6, 2018), <https://boingboing.net/2018/02/06/woman-who-accused-trump-of-for.html>. At least eighteen other women have accused Donald Trump of sexual misconduct. See e.g., Eli Saslow & Carolyn Van Houten, *Is Anyone Listening?* WASH. POST. (Feb. 19, 2018), https://www.washingtonpost.com/news/national/wp/2018/02/19/feature/trump-accuser-keeps-telling-her-story-hoping-someone-will-finally-listen/?noredirect=on&utm_term=.6d37d4483fc4 (describing Rachel Crooks as one of nineteen women who have accused President Trump of sexual assault).

5. David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST. (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.c800d29c6e81.

6. Elisabeth Malkin & Frances Robles, *The Hurdles Women Faced in Accusing a Nobel Laureate of Sexual Misconduct*, N.Y. TIMES (Feb. 10, 2019), <https://www.nytimes.com/2019/02/10/world/americas/oscar-arias-costa-rica-metoo.html>.

7. Alberto Cadoppi & Michael Vitiello, *A Kiss is Just a Kiss, or is it?: A Comparative Look at Italian and American Sex Crimes*, 40 SETON HALL L. REV. 191, 191 (2010).

8. This project is primarily limited to situations involving adults since sexual violence against minors is treated separately and specifically in both the U.S. and Italy. The differences under U.S. and Italian law regarding minors and sexual violence is worthy of a full project by itself.

9. Cadoppi & Vitiello, *supra* note 7, at 217.

10. *Id.* at 217 n.236. This is the position Professor Cadoppi has taken in Italian language materials, as well. ALBERTO CADOPPI, COMMENTARIO DELLE NORME CONTRO LA VIOLENZA SESSUALE E CONTRO LA PEDOFILIA 43 (4th ed. 2006). Instead, the examples of Donald Trump and Óscar Arias Sánchez alone illustrate patterns of behavior by individual men. The reports about Leslie Moonves, described in Part V also illustrate a pattern of behavior.

reformed its fascist-era rape laws to better protect the sexual autonomy of victims. While application of the 1996 Italian law still has a way to go to fulfill this goal,¹¹ it has certainly progressed significantly since the infamous “jeans case.”¹² Certainly, the fact that a forced unwanted kiss might result in a conviction for sexual violence indicates that judges and lawyers in Italy have devoted considerable attention to analyzing the criminal relevance of sudden unwanted kisses. Highlighting this work for audiences in the U.S. and applying a comparative law lens creates the distance that can be helpful for evaluating what we have previously taken for granted or not fully questioned. My review of these types of cases in Italy and relevant Italian scholarship reveals a number of attitudes and assumptions that inform how we can think about these scenarios in the U.S. This study challenges the conclusion of Professors Vitiello and Cadoppi that “a kiss is just a kiss.” Unlike simple battery, a sudden, forced and unwanted kiss intrudes on the sexual autonomy of the victim in a way that is not trivial and therefore deserves specific analysis and protection.

Part II of this Article considers what justifies an analysis of forced kisses and includes a review of the #MeToo reports of sudden, forced kisses to challenge the assumption that forced kisses are sufficiently infrequent as to not merit consideration as a sex crime. This section also includes an explanation of the terms “sudden, forced, and unwanted” in this context. The number of these types of situations and the impact on the women compels us to rethink how criminal law in the U.S. might address this phenomenon. Part II also considers what U.S. scholars, judges, and lawyers might learn from considering the relevant Italian experience on this topic.

Part III describes the reforms effected by the 1996 Italian law on sexual violence relevant to the question of sudden, forced kisses and how the *Corte di Cassazione* (Italy’s Supreme Court for non-constitutional matters) has interpreted the term “sexual acts” in the 1996 law to include sudden, forced kisses in a number of cases. Italy reformed its rape law in 1996, so current law defines a person who has committed sexual violence as “whoever, by violence or threats or abuse of authority compels another to do or submit to

11. A recently released opinion by the Ancona Court of Appeal is an example of the persistence of rape myths. According to news reports, the court overturned a conviction for rape finding that the victim was not credible. The court commented on a photograph of the victim and agreed with the defense argument that the victim was “unattractive and too masculine to be a credible rape victim.” *Cassazione* annulled this decision and Italy’s Justice Ministry has ordered an inquiry into the ruling. *Italy Outraged as Court Finds Victim Too Ugly to Be Raped*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/aponline/2019/03/13/world/europe/ap-eu-italy-rape-verdict.html>.

12. See, e.g., Rachel A. Van Cleave, *Sex, Lies, and Honor in Italian Rape Law*, 38 SUFFOLK U. L. REV. 427 (2005) (discussing Cass. Pen., sez. III, 6 novembre 1998, *Cristiano*, Foro it., II 1999, CXXII, 163). Indeed, the *Corte di Cassazione* subsequently made it clear that it is not a defense to the offense of sexual violence that the victim was wearing jeans and therefore must have consented. Cass. Pen., sez. III, 26 novembre 2001, *Akid*, available at <https://www.altalex.com/documents/news/2006/07/03/violenza-sessuale-sulla-possibilita-disfilare-il-jeans-indossato-dalla-vittima>.

sexual acts shall be imprisoned from five to ten years.”¹³ Here, I explore in some detail aspects of the 1996 reform, including the harm to be protected by the sexual violence law. One important goal of the reformed law is to focus on protecting the sexual autonomy of the victim, in contrast to the prior laws, which sought to protect honor, chastity, and public morals. Reviewing a number of *Cassazione* decisions about forced kisses over the past twenty years, this Article highlights some shifts in the Court’s understanding of sexual violence.

There are three specific aspects of *Cassazione*’s analysis, in the context of sudden, forced kisses, that reform efforts in the U.S. should consider: (1) the *Corte di Cassazione* does not limit its interpretation of “sexual acts” to only touchings of intimate parts; (2) the Court does not require that the offender have the specific intent of achieving his or her own sexual arousal or gratification; and (3) the court has found that the sudden nature of such kisses can satisfy the “violence” element of the Italian law. While archaic rape myths still creep into how Italian prosecutors and judges address sexual violence,¹⁴ there is also evidence of progress that is worthy of consideration by U.S. scholars and lawyers.

Part IV sets out examples of how laws, such as sexual battery in California, a criminal law prohibiting “sexual contact” in Michigan, as well as the current draft of the Model Penal Code provision on “criminal sexual contact” would likely address the situation of sudden, forced, and unwanted kisses. This demonstrates important contrasts with how the Italian *Corte di Cassazione* has addressed these situations and recommends a reevaluation of laws like this in the U.S. to consider the three conclusions reached by the Italian Court set out above.

Part V of this Article describes some of the incidents of sudden, unwanted kisses reported as part of #MeToo in the last year to demonstrate that these incidents are not so rare and trivial as to justify excluding them from sexual violence analysis. These examples also underscore the harm sudden, forced, and unwanted kisses inflict on victims.

II. WHY ANALYZE SUDDEN, FORCED KISSES UNDER ITALIAN LAW?

With the numerous reports of more serious and violent sexual assault and sexual misconduct in the #MeToo era, why focus specifically on forced kisses? As with any possible expansion of the criminal law, the potential to further increase criminal convictions and incarceration is an important

13. Codice penale [C.p.] 609-*bis* (It.) (emphasis added). The last sentence of this provision allows for a reduction in the sentence for “cases of less seriousness.” *Id.*

14. Jason Horowitz, *Are You Too Old to Have Been Sexually Harassed? In Italy, Maybe*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/world/europe/italy-carlo-tavecchio-sexual-harassment.html> (describing a motion by the public prosecutor to dismiss charges of groping by Elisabetta Cortani, the president of the female division of the Lazio soccer club, against her boss, Carlos Tavecchio, when he was the head of Italian soccer, stating that since the complainant was 53, she could not have been intimidated by Tavecchio).

consideration. Historically, in the United States, men of color have borne this burden at vastly disproportionate rates, particularly as to sex offenses.¹⁵ Moreover, most U.S. jurisdictions impose additional consequences such as registration as a sex offender.¹⁶ Perhaps most significantly, such an expansion raises the question of the extent to which the law, particularly criminal law, can or should drive social change. I am mindful of these significant concerns. I wholeheartedly support efforts to reform and rationalize criminal justice in the United States, including addressing excessively draconian punishments and overly expansive sex offender registration laws. I also support efforts to rid the criminal justice system of explicit and implicit bias. These efforts can and should continue. At the same time, it is important to assess conduct that harms individual sexual autonomy and consider how best to address it.

I remain convinced that exploring the impact and harm of sudden, forced kisses by assessing the Italian *Corte di Cassazione*'s opinions and the analyses of Italian scholars will help map out a richer understanding of sexual violence in the United States.

Many situations considered in this project would likely be analyzed as civil or disciplinary matters under U.S. sexual harassment law, which covers behavior in the workplace, or Title IX, which covers such conduct at educational institutions. Nonetheless, this Article focuses on potential criminal liability of forced kisses for two reasons. First, Italian criminal law does not include a provision for sexual harassment. Indeed, up until very close to the time that the 1996 law was adopted, it included a provision for *molestie sessuali*, essentially sexual harassment, but ultimately, and perhaps unfortunately, it was left on the cutting room floor.¹⁷ Second, the line between conduct that violates sexual harassment law and conduct that constitutes criminal sexual assault is not clearly delineated; sexually harassing conduct might also be considered sexual assault, even if criminal charges are never filed. The purpose of this project is to prompt a fulsome discussion of this issue and to consider how Italian criminal law in this context can help to sharpen and deepen our analysis and understanding.

The use of the phrase “a kiss is just a kiss”¹⁸ in the title of Professors Cadoppi and Vitiello's article itself illustrates the importance of engaging in

15. I agree that this is a very real concern, but one that should be addressed by working to rid the criminal justice system of explicit and implicit bias, not by trivializing the impact of sexual violence. See Ana Gruber, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 A. CRIM. L. REV. 259 (2018) (recognizing the importance of considering the type of sentence that should accompany any expansion of sexual assault laws).

16. This is another extremely valid point emphasized by Professors Cadoppi and Vitiello. Cadoppi & Vitiello, *supra* note 7, at 210-13.

17. CADOPPI, *supra* note 10.

18. From the song, *As Time Goes By* written by Herman Hupfeld in 1931 and performed by the character Sam in the movie *Casablanca* in which the lyrics speak of lovers. The lyrics are reproduced at <https://www.google.com/search?q=lyrics+to+as+time+goes+by&rlz=>

this discussion. Evoking the romance of the lovers portrayed by Humphrey Bogart and Ingrid Bergman in the movie *Casablanca*,¹⁹ the article's title suggests that this image of two lovers is similar to the situation of the assistant to the Chief of Police, who was subjected to her commander's advances as he sought to kiss her on the mouth more than once and ended up kissing her neck.²⁰ As described in more detail below, the facts of the Italian case considered by Professors Cadoppi and Vitiello are nothing like the romance between the characters in *Casablanca*. Juxtaposing these two images helps set the contours of the debate and, in turn, can help us determine how the law might address such situations.

Why we should consider Italian law is another legitimate question. Judges and lawyers in Italy have exhibited historically, and still today, adherence to entrenched rape myths and stereotypes about women who claim to have been raped or sexually assaulted.²¹ As discussed below, before the 1996 reform, sex crimes had been classified as crimes against public morality and decency. Sexual violence is now classified as a crime against the person. Initially, this was considered merely a symbolic change. In two cases, in particular, one decided right before the 1996 law went into effect²² and another shortly after,²³ the Court's opinions illustrate the significance of categorizing sexual violence as a crime against an individual and presents stark contrasts to each other. This analysis can further sharpen understanding in the U.S. about the interests to be protected by the criminal law.

Another reason to consider Italian law in this respect is the fact that a provision, which would have established a lesser offense of *molestie sessuali*, essentially sexual harassment, was dropped from the law that ultimately went into effect. On the one hand, this has been described as a missed opportunity, especially given similar laws in France and Spain.²⁴ On the other hand, the fact that the legislature considered but then dropped such a provision can help to inform how the Italian courts have decided to address sudden, forced kisses as a crime of sexual violence when victims are unlikely to have any other recourse.

This Article uses the words "sudden, forced, and unwanted" to explain a number of aspects about the incidents described. The word "sudden"

1C5CHFA_enIT749US806&oq=lyrics+to+as+time+goes+by&aqs=chrome..69i57j69i60j69i61.17786j0j4&sourceid=chrome&ie=UTF-8 (last visited Nov. 26, 2018).

19. *CASABLANCA* (Warner Brothers 1942).

20. Cass. Pen., sez. III, 26 gennaio 2006, n. 19808.

21. I have discussed this in significant depth in the context of the infamous "jeans case." See Van Cleave, *supra* note 12, at 427.

22. See *infra* notes 49–59 and accompanying text for a discussion of Cass. Pen., sez. III, 22 novembre 1995, n. 11318, *Delogu*, reprinted in 1997 RIV. IT. DIR. PROC. PEN., 962 [hereinafter *Delogu* case].

23. See *infra* notes 76–86 and accompanying text for a discussion of Cass. Pen., sez. III, 27 aprile 1998, *Di Francia*, reprinted in *Foro it.*, 1998, II, p. 505.

24. Stefania Tabarelli de Fatis, *Sulla rilevanza penale del "bacio" come atto di libidine prima e dopo la riforma dei reati sessuali* 1997 RIV. IT. DIR. PROC. PEN. 965, 980–81.

conveys that these incidents typically catch the victim by surprise given how quickly the offender acts. The incidents described are also unexpected by the victim because there is not, nor has there been, any intimate relationship between the victim and the offender. The incident described above and depicted in the #ThatsHarrassment public service announcement illustrates this, as does Rachel Crooks' experience with Mr. Trump. The term "forced" or forceful indicates that, in many instances, the offender has in some way restrained the victim. However, even where the offender has not held the victim's head, shoulders, hands, or arms, he has ambushed her in a way that is sudden as well as forceful. In addition, while not all examples involve so-called "profound" kisses, a strong argument that force is involved exists due to the sudden nature with which a kiss is thrust upon the victim. The scenarios described above also illustrate this. Finally, the term "unwanted" is related to both sudden and forced in that the victim is caught off guard and unable to firmly convey that she does not want contact with the offender's mouth. These situations are not merely kisses without the victim's consent in ambiguous situations. Rather, they involve the offender putting his mouth on the victim's mouth, cheek, or neck in a sudden way without any indication from the victim that she (or he)²⁵ would enjoy, or want, such contact.

Obviously, context matters. In Italy, as in other cultures, kisses on the cheek that are exchanged as part of a greeting are not sexual acts. By comparison, how Rachel Crooks described her encounter with Donald Trump is quite different. She and Mr. Trump initially shook hands, and Mr. Trump began kissing each of her cheeks as one might in Italy. However, he continued to go back and forth kissing each of her cheeks before suddenly he kissed her directly on her mouth—something neither typical nor culturally expected in Italy or in the U.S. Nor was this kiss anything like the rapport between the characters in *Casablanca*. Similarly, the situation depicted in the #That-sHarassment public service announcement described above is not what an employee expects of an employer.

Kisses between two adults in an intimate relationship are extremely unlikely to be considered criminal. Indeed, none of the Italian cases I have located involve criminal charges for kisses involving two people who were or had been in intimate relationships. Rather, such events involve an employer forcing himself on an employee.²⁶ In addition, the #MeToo reports described in Part V do not involve two adults who had been intimate partners.

25. Jody Allard, *An Unwanted Kiss by a Woman is Still Sexual Assault*, ROLE REBOOT (Mar. 15, 2018), <http://www.rolereboot.org/culture-and-politics/details/2018-03-unwanted-kiss-woman-still-sexual-assault/> (describing the kiss by Katy Perry of nineteen-year-old American Idol contestant, Benjamin Glaze).

26. I have not located a case similar to the absurd hypothetical that Cadoppi and Vitiello suggest in their article. See Cadoppi & Vitiello, *supra* note 7, at 217 n.236.

III. SEXUAL VIOLENCE LAW IN ITALY

I have previously described the 1996 reform of Italian rape law in the context of discussing the procedural mechanism called the *querela*,²⁷ as well as in the context of analyzing the provision that allows a judge to reduce a sentence for sexual violence in cases of “less seriousness.”²⁸ Efforts to reform began in 1979 when over 300,000 Italians signed a proposed reform and submitted it to the Italian legislature.²⁹ It was not until 1996 that the Italian legislature got around to enacting a law reforming rape and other sex offenses.³⁰ Certain key aspects are relevant to this Article’s inquiry: (A) How prior law classified rape and other sex crimes; (B) abrogation of the prior offenses, “violent carnal knowledge,” and “violent acts of lust;” (C) the significance of classifying sexual violence in terms of the harm now protected by the law; and (D) the 1996 law’s adoption of the term “sexual acts” to define sexual violence and how the *Corte di Cassazione* has interpreted this term. While I address these key aspects separately, understanding how they relate to this Article is essential.

A. *Reclassification of Sexual Offenses Under the 1996 Law*

The offense of sexual violence and other sex crimes were moved to the section of the penal code entitled, “*Delitti contro la persona*,” crimes against the person or the individual. Previous laws characterized these offenses as “*Delitti contro la morale pubblica e il buon costume*,” crimes against public morality and decency.³¹ The 1930 penal code included within this classification the following offenses: “[c]arnal violence, carnal intercourse committed through abuse of capacity as a public officer, violent acts of lust,

27. Rachel A. Van Cleave, *Rape and the Querela in Italy: False Protection of Victim Agency*, 13 MICH. J. GENDER & L. 273, 292-96 (2007). Briefly stated, a *querela* is a procedural requirement that a victim specifically request prosecution and is an exception to the principle of mandatory prosecution that prevails under Italian criminal procedure.

28. Rachel A. Van Cleave, *Renaissance Redux? Chastity and Punishment in Italian Rape Law*, 6 OHIO ST. J. OF CRIM. L. 335, 337-39 (2008) (analyzing a 2006 opinion in which the *Corte di Cassazione* determined that a defendant who had sexually assaulted the fourteen-year-old daughter of his girlfriend was entitled to a sentence reduction for “less seriousness” because the girl admitted that she had engaged in sexual activity with other men, and the girl admitted that when the defendant indicated his intent to sexually assault her, she ‘opted’ for oral sex thinking that this would not put her in danger of contracting a sexually transmitted disease).

29. Reforming Italy’s rape laws was one of several goals of the Italian women’s movement in the 1970s, which sought to end male dominance of all aspects of women’s lives. See e.g., Rachel A. Van Cleave, *Luogo e Spazio, Place and Space: Gender Quotas and Democracy in Italy*, 42 U. BALT. L. REV. 329 (2012). See ITALIAN FEMINIST THEORY AND PRACTICE: EQUALITY AND SEXUAL DIFFERENCE (Graziella Parati & Rebecca West eds., 2002) and ITALIAN FEMINIST THOUGHT: A READER (Paola Bono & Sandra Kemp eds., 1991), for information about the women’s movement in Italy.

30. Legge 15 febbraio 1996, n. 66, reprinted in CADOPPI, *supra* note 10, at 1028.

31. See THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE ITALIAN PENAL CODE 177 (Edward M. Wise trans., Fred B. Rothman & Co. 1978) [hereinafter Wise translation], for the only English translation of the 1930 Italian Penal Code.

abduction for purposes of marriage, and abduction for purposes of lust.”³² The notion that these offenses harmed society’s morals is further illustrated by the penal code section that provided for reparatory marriage, as a convenient way of extinguishing a conviction for these offenses in the event there was “a marriage contracted between the perpetrator of the offense and the victim,”³³ thereby restoring individual and family honor.³⁴

Reclassifying sexual violence recognized that this offense harms individual victims more than it does society.³⁵ Sexual violence is now classified with offenses such as homicide, assault, and personal injury.³⁶ Reclassifying sexual violence as an offense against individual sexual autonomy also required a new analysis of the harm to be protected. Indeed, the *Corte di Cassazione* began to shift analysis away from considering the lustful intentions of the offender and whether the offender’s conduct manifested sinful or immoral sexual instincts. Instead, the cases illustrate a greater focus on the harm to the victim’s sexual autonomy. That is, what *bene giuridico* is protected under the reformed sexual violence law?

B. “Carnal Violence” and “Violent Acts of Lust” Repealed by the 1996 Reform

The 1996 law abrogated several 1930 sex crimes.³⁷ For the purposes of this Article, the relevant provisions repealed were articles 519 and 521. Article 519 criminalized “violent carnal intercourse,” defined as “[w]hoever, by violence or threats, compels another to have carnal intercourse shall be

32. C. p.arts. 519-23 (1930) (It.), translated in the Wise translation, *supra* note 31, at 177–78.

33. *Id.* art. 544, translated in the Wise translation, *supra* note 31, at 182-83. Italy repealed article 544 in 1981. Legge 5 agosto 1981, n. 442.

34. See Van Cleave, *supra* note 12.

35. TAMAR PITCH, UN DIRITTO PER DUE 150 (1998). See Caroline Davidson, *Rape in Context: Lessons for the United States from the International Criminal Court*, 39 CARDOZO L. REV. 1191, 1197-1219 (2018), for a description of a similar evolution of International Criminal Law of sexual assault and rape.

36. C.p. arts. 575, 581, & 582, translated in the Wise translation, *supra* note 31, at 192, 194-95.

37. CADOPPI, *supra* note 10, at 1028–32 (reproducing the 1996 law reforming sexual violence law). Article 1 of the 1996 law repealed the following articles, in addition to the two discussed above: carnal intercourse committed through abuse of capacity as a public officer; abduction for purposes of marriage; abduction for purposes of lust; abduction of a person under the age of 14 years or infirm; for purposes of lust or marriage; a provision reducing punishment for any of the three abduction offenses if the offender brings the person abducted back to her family; seduction through promise of marriage committed by a married man; corruption of youth; a provision prohibiting an offender from claiming ignorance regarding the age of the victim when she was under 14; a provision setting out collateral punishments and other consequences when the offender was the parent, husband, or guardian of the victim; and two provisions regarding the *querela*. Legge 15 febbraio 1996, n. 66, art. 1.

punished by imprisonment for from three to ten years.”³⁸ Article 521 criminalized “violent acts of lust” as “[w]hoever, [by violence or threats] . . . commits on another acts of lust other than carnal intercourse . . . shall be punished for from two to six years.”³⁹ Several reasons explain the repeal of these two offenses. For instance, the rejection of the assumption under prior law that violent sexual intercourse was more serious than other violent sexual conduct that did not result in penetration.⁴⁰ Similar to jurisprudence in the United States,⁴¹ Italian courts and scholars have devoted significant attention to the question of how much penetration occurred and how much was required to find a defendant guilty of the more serious offense of violent carnal knowledge.⁴² By repealing articles 519 and 521, the 1996 law rejected the idea that the mere lack of penetration would necessarily make a violent sexual offense less serious.⁴³ In addition, a court seeking to decide which of the two offenses defined the defendant’s guilt had to determine whether there was any penetration of or by the genitalia of either the victim or the defendant.⁴⁴ This required, what has been described as, “humiliating” testimony from the injured person, often turning the victim into a “second defendant” since she had to explain with detail and precision what occurred.⁴⁵

38. ALBERTO CADOPPI ET AL., *TRATTATO DI DIRITTO PENALE, PARTE SPECIALE, MATERIALI* 250 (2011) (reproducing article 519 under the codice Rocco). See the Wise translation, *supra* note 31, for the English translation.

39. *Id.* at 250-51. See the Wise translation, *supra* note 31, for the English translation.

40. See Van Cleave, *supra* note 28, at 339 n.24 (citing Chiara Foladore, *Sulla nozione degli atti sessuali “di minore gravità” prevista dall’art. 609-bis c.p.*, XLI Cass. Pen., Apr. 2001, at 1500, 1501).

41. As to the Model Penal Code (MPC), the American Law Institute’s (ALI) current efforts to reform the MPC provisions on rape and sexual assault, continues to include the offense of rape as “forcible sexual penetration.” MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.1, at app. A (AM. LAW INST., Tentative Draft No. 3, 2017). See Davidson, *supra* note 35, at 1200 (discussing the recent ALI MPC reforms in depth). In addition, more recently, Brock Turner was not charged with rape under California law, which is the most serious sex crime. At the time, the law was understood to require penetration with the defendant’s penis. Turner penetrated the victim with his fingers. California law has since been amended to define rape as penetration with any foreign object. *People v. Turner*, No. Ho 43709, 2018 WL 3751731, at *1-9 (Cal. Ct. App. Aug. 8, 2018); CAL. PENAL CODE § 263.1 (“The Legislature finds and declares that all forms of nonconsensual sexual assault may be considered rape for purposes of the gravity of the offense and the support of the survivors.”).

42. Valentina Ventura, *La tutela della libertà sessuale del maggiorenne*, in I DELITTI CONTRO LA LIBERTÀ SESSUALE 61, 96 (Tovani and Trinci eds., 2014); Alberto Cadoppi, *Art. 609-bis c.p.*, in COMMENTARIO DELLE NORME CONTRO LA VIOLENZA SESSUALE E CONTRO LA PEDOFILIA 451–52 (4th ed. 2006); see MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.1 (“[P]hysical force in felony sex offenses . . . require[s] only a slight showing of force.”).

43. Chiara Foladore, *Sulla nozione degli atti sessuali “di minore gravità” prevista dall’art. 609-bis c.p.*, XLI Cass. Pen., Apr. 2001, at 1500, 1501.

44. Ventura, *supra* note 42, at 70.

45. See Van Cleave, *supra* note 28, at 337–39 (citing Alberto Cadoppi, *Articolo 3* in COMMENTARI DELLE NORME CONTRO LA VIOLENZA SESSUALE E DELLA LEGGE CONTRO LA PEDOFILIA 25, 27 (Cadoppi ed., 2d ed. 1999)).

Many Italian scholars have taken the position that repealing articles 519 and 524 cannot have resulted in a *tabula rasa* when it comes to understanding sexual violence and assert that the term “sexual acts” in the 1996 law intended to unify the prior offenses of carnal violence and violent acts of lust.⁴⁶ For purposes of this project, a greater understanding of how the offense “violent acts of lust” was defined before the 1996 law repealed this crime is helpful to understanding how *Cassazione* has approached defining sexual violence under the 1996 law.

The archaic term “violent acts of lust” long predates the 1930 Rocco Code as an offense intended to protect collective morals and societal notions of decency and reflected the view that sex was sinful.⁴⁷ Thus, courts applied a subjective definition to the offense based on the intentions of the defendant and conduct that manifested the offender’s lust.⁴⁸ Physical touchings considered sufficient to establish this offense were not limited to genitalia or erogenous zones since physical contact with other parts of the victim’s body could also stimulate the offender’s sexual excitement.⁴⁹ The offender’s intent to gratify or fulfill his sexual instinct was considered harmful to society’s morals and sense of decency and modesty.⁵⁰

A case decided shortly before the 1996 law was enacted provides an example of how *Cassazione* gave meaning to the term “violent acts of lust” as recently as 1995.⁵¹ The defendant, Delogu, was convicted in the trial court of “violent acts of lust” pursuant to penal code article 521 for having kissed the cheek and neck of the victim, his employee.⁵² He was sentenced to one year and four months imprisonment, which was conditionally suspended.⁵³ The appellate court granted Delogu’s request to keep the conviction off of his permanent record, and otherwise affirmed the trial court.⁵⁴ Delogu appealed to the *Corte di Cassazione* arguing that the fleeting kisses were not lustful.⁵⁵ In its decision reversing the conviction, the Court described the decision of the trial court.⁵⁶ The trial court held that the kisses by the defendant were a manifestation of his lustful intentions and his sexual appetite.⁵⁷ Furthermore, the trial court held that the element of violence was shown by the

46. Ventura, *supra* note 42, at 96; *see also* Cadoppi, *Articolo 3*, *supra* note 45, at 26–27.

47. Cadoppi, *Articolo 3*, *supra* note 45, at 28.

48. *Id.* at 38.

49. *Id.* at 38, 39.

50. *Id.* at 40.

51. *Delogu* case, *supra* note 22.

52. *Id.* at 962.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 962, 963.

57. *Id.* at 963.

sudden way in which he kissed the victim such that she had no opportunity to resist or express her lack of consent to being kissed.⁵⁸

In quoting opinions from the 1930s, 1940s, and 1950s *Cassazione* focused on the requirement that for a kiss to be punished as an act of lust, it must exhibit eroticism and be given in such a way as to indicate the offender's sexual excitement.⁵⁹ This meant that it must be on a part of the victim's body to indicate the defendant's lustful intentions.⁶⁰ According to *Cassazione* "[a] fleeting kiss without more and without insistence is not an act of lust."⁶¹

Cassazione marveled at the fact that the trial court did not consider the postmodern society⁶² in which kisses, other than on the mouth or on erogenous areas, have simply lost their immodest character.⁶³ The Court pointed to the fact that young people freely hug and kiss in public and that "red light films" are freely shown in movie theaters, exhibiting nude men and women.⁶⁴ The Court also pointed to the billboards and other advertisements in public, which display intimate body parts, concluding, "in the current environment it is not possible to hold that a kiss on the cheek and neck are violent acts of lust if given to one who does not consent."⁶⁵ It is difficult to understand the relevance of apparently consensual kisses and hugs in public that the Court refers to with the facts involving an employer treating an employee in this way. The opinion does not provide additional details about the incident, but it is clear that the victim did not want the defendant to kiss her. The relevance of the Court's reference to public displays of affection affirms the notion that the law's purpose was to protect public decency and morals, not an individual's sexual autonomy. By focusing on the collective good to be protected, as well as more permissive attitudes of sexuality, the Court made the victim's lack of consent and any harm to the victim's sexual autonomy completely irrelevant to the analysis.

The Court went on to state, "various aspects of a particular society proceed along parallel lines, each influencing the other, and it's not possible to have progress in one area while retaining old traditions in another."⁶⁶ According to the Court, "[i]n an era in which women have achieved complete freedom, working side-by-side with men in the workplace, the definition of violent acts of lust must also be modernized to include only those touches that unequivocally manifest sexual desire and thrill."⁶⁷ Once again, the

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 962, 964.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

Court's reliance on societal changes in the workplace and relationships between men and women seems to raise the bar for proving that physical contact such as an unwanted, sudden kiss amounts to an offense. Indeed, the Court seems to imply that this is the price women must pay for equality. The Court concluded by acknowledging "the disagreeable nature of the facts"⁶⁸ before them involving an employer acting this way toward an employee, but ultimately found that the facts did not support a conviction for violent acts of lust and overturned the conviction.⁶⁹

The Court's emphasis on the changes in society's mores about sexuality and immodesty represents a sharp focus on the harm that the prior offense was intended to protect; that is, collective notions of decency and morality. Rather than representing a post-modern notion of sexual norms, this opinion reflects very clearly the traditional understanding of sexual offenses, which had little to no regard for harm to the sexual autonomy of the individual victim. By considering the sexual nature of a kiss in the abstract, free of the facts involved in the specific case, the Court narrowed the notion of what offends societal decency and modesty.

Similarly, another case, decided only months after the 1996 law went into effect, also involved the prior offense of violent acts of lust, and further brings into focus the nature of the Court's analysis under the prior law. In *Corsaro*,⁷⁰ the defendant stopped the victim, his employee, and said, "every time I see you, I want to touch you. Let me touch you," but he managed only to brush her face with his lips, although it was clear that he intended to kiss her.⁷¹ In this case, the incident occurred before the 1996 law took effect, thus the Court considered whether the conduct was an attempted "violent act of lust."⁷² The Court characterized the defendant's conduct in "stopping" the victim as not sufficient to amount to violence, as required by the prior law, in particular, since the victim was easily able to avoid being kissed.⁷³ The Court held, consistent with *Delogu* and other prior cases, that a fleeting touch was not a sufficient manifestation of the defendant's lustful intentions—the harm protected by the prior law.

The next section elaborates more on the Italian notion of the *bene giuridico*, protected by the repealed offenses, under the 1996 law.

C. The "Bene Giuridico" Protected by the 1996 Reform

The Italian term for the rights entitled to state protection pursuant to the criminal law is *bene giuridico*, which Watkin translates as a legal "good,

68. *Id.*

69. *Id.* at 965.

70. Cass. Pen., sez. III, 9 ottobre 1997, *Corsaro*, reprinted in *Foro it.*, 1998, II, 505, 512.

71. *Id.* at 512.

72. *Id.* at 512–13.

73. *Id.* at 513.

benefit or an asset.”⁷⁴ This term, as used in Italian jurisprudence, can be traced back to the writings of Cesare Beccaria.⁷⁵ In addition to his philosophy opposing torture and the death penalty,⁷⁶ Beccaria’s writings supported the notion that the state’s power to punish should be both limited and exclusive.⁷⁷ According to Beccaria, the state’s power is limited in the sense that the state should not punish for sins, but only for crimes defined by law.⁷⁸ That is, the state should not punish conduct that offends only religious or moral values.⁷⁹ This distinction between sins and crimes was guided by the principle that the state is justified in inflicting punishment only for conduct that “violates or endangers the rights of others.”⁸⁰

The offenses of “violent carnal intercourse” and “violent acts of lust” came within the first chapter of Title IX of the Penal Code, entitled, “crimes against sexual liberty” indicating some understanding of these offenses as harming individuals.⁸¹ Nonetheless, it appears inconsistent to entitle this chapter “crimes against sexual liberty” within the title setting out “crimes against public morality and decency.” In particular, this inconsistency makes it difficult to determine the *bene giuridico* to be protected by the crimes of carnal violence and violent acts of lust, under Italian law before the 1996 reform. Trinci explains that the fascist legislature did not consider sexual liberty to be an individual right, but rather a right that was used to realize particular social and economic goals.⁸² Specifically, protecting an individual’s (typically, a woman’s) sexual liberty was the way to protect more important interests beyond those of the individual, such as, family honor and the authority of the father or the husband. The Court’s analysis in *Delogu* is a representative example of this focus on protecting societal morality and modesty.

Classifying sexual violence as a crime against an individual in 1996 indicated a shift in the understanding of the *bene giuridico* to be protected by the law. Instead of protecting public morals and decency, a “collective”⁸³ *bene giuridico*, the offense of sexual violence is intended to protect the

74. Van Cleave, *supra* note 27, at 281 (citing THOMAS GLYN WATKIN, *THE ITALIAN LEGAL TRADITION* 122 (1997)).

75. See generally the Wise translation, *supra* note 31 (discussing Beccaria’s influence); see also Van Cleave, *supra* note 27, at 280-82 (discussing Beccaria’s influence and the meaning of *bene giuridico* in the context of sex crimes).

76. CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (Henry Paolucci trans., 1963).

77. Van Cleave, *supra* note 27, at 281.

78. CARL LUDWIG VON BAR ET AL., *A HISTORY OF CONTINENTAL CRIMINAL LAW* 414 (Thomas S. Bell et al. trans., 1916).

79. *Id.* at 415.

80. *Id.*

81. ALESSANDRO TRINCI, INTRODUZIONE AD UNO STUDIO “AGGREGATO” DEI DELITTI CONTRO LA LIBERTÀ SESSUALE, *in* I DELITTI CONTRO LA LIBERTÀ SESSUALE 1, 15 (Tovani and Trinci eds., 2014).

82. *Id.*

83. Marco Galdieri, *L’atto assume rilevanza penale se lede la libertà di autodeterminazione*, 37 *GUIDA AL DIRITTO* 90, 91 (2006).

sexual liberty and sexual autonomy of the individual victim. As discussed below, scholarly commentary about the change in classification asserts that the term “sexual acts” in the 1996 law was used to unify the two prior offenses of violent carnal intercourse and violent acts of lust. Yet, it is difficult to conclude that this is consistent with the change in the *bene giuridico* to be protected. If, by use of the term “unify,” commentators contend that the 1996 law intended to enact only one crime, “sexual violence,” rather than continue to define two separate offenses, this makes sense. However, several Italian commentators have argued that in defining one offense, the legislature intended to decriminalize the least serious situations, like kisses and other touchings, such as pats.⁸⁴

In commenting on the *Delogu* case, Stefania Tabarelli de Fatis explains that, under the 1996 sexual violence law, the *bene giuridico* has changed to protecting the sexual autonomy of individuals and suggests that a similar case under the 1996 law could result in a different outcome.⁸⁵ Decisions by the Court applying the 1996 law, discussed below, confirm this analysis.

D. “Sexual Acts” and Forced Kisses Under the 1996 Law

The term “sexual acts” under the reformed law is not otherwise defined in the criminal code. As discussed above, most Italian scholars have claimed that the term was intended to unify the two previously separate offenses of violent carnal intercourse and violent acts of lust.⁸⁶ Under the prior law, violent carnal intercourse was punished more severely than violent acts of lust and required the evidence to show that the defendant had penetrated the victim’s vagina, although the *Corte di Cassazione* had concluded that the offense also included oral and anal penetration.⁸⁷ The offense of “violent acts of lust” was undefined in the prior Penal Code, other than specifying that “violent acts of lust” did not include violent carnal knowledge, as that was a separate offense. The *Delogu* case, described above is an illustrative example of the Court’s focus on the collective decency, which these offenses protected. Both offenses were within the section of the Penal Code entitled “crimes against public morality and good custom.”⁸⁸ The 1996 reform placed the offense of sexual violence within the portion of the Penal Code entitled “crimes against the person.”

A number of Italian scholars assert that the offense of sexual violence was intended to be narrower than “violent acts of lust” and bemoan the fact

84. Cadoppi, *Art. 609-bis c.p.*, *supra* note 42.

85. Tabarelli de Fatis, *supra* note 24, at 980 (article 609-bis refers to an invasion of the sexual sphere of another).

86. Cadoppi, *Articolo 3*, *supra* note 45, at 42.

87. Francesco Macrì, *La giurisprudenza di legittimità sugli atti sessuali tra interpretazione estensiva e analogia in maiem partem*, *DIRITTO PENALE E PROCESSO*, 2007, at 109-10 n.1, 109, 110 n.10. (Cassazione cases: Cass., sez. III 23 marzo 1988, in *Giust. Pen.*, 1989, II, 432).

88. C.p. 519, 520, and 521 (It. 1931), the so-called “codice Rocco.”; CADOPPI ET AL., *supra* note 38.

that trivial cases involving sudden unwanted kisses continue to take up the time and resources of the judicial system.⁸⁹ While beyond the scope of this Article, there is an interesting story about how Italian scholars (*la dottrina*)⁹⁰ have concluded that, only in limited situations, may a kiss constitute sexual assault, while the *Corte di Cassazione* has not adhered to this approach.

A decision by the *Corte di Cassazione* shortly after the 1996 law was enacted illustrates a sharp contrast to the analysis of the Court in the *Delogu* case. In a 1998 decision,⁹¹ the Court considered an appeal from a conviction of violent acts of lust, under the repealed law involving circumstances similar to those in *Delogu*.⁹² In this case, the defendant, Di Francia, approached the victim, held her arms at her shoulders, and pulled her toward him while repeating the word “*amore*” (love) while trying to kiss her on her mouth.⁹³ The victim managed to turn her head and he kissed her on her cheek before she pushed him away while he continued to say “*amore*.”⁹⁴ The incident occurred before the 1996 law was enacted, and therefore the Court considered the prior law as well as the newer law since the defendant argued that if his conduct would not be a crime under the 1996 law, he should not be punished even under the prior law.⁹⁵

While the Court refers to the *Delogu* decision, it emphasized the significance of the reclassification of sexual violence as a crime against the individual.⁹⁶ The Court held that “[t]his offense [was] no longer about protecting collective notions of modesty and decency, but about protecting an individual’s right to determine his or her sexual activity.”⁹⁷ That is, the *bene giuridico* is different.⁹⁸ Therefore, according to the Court, the defendant’s conduct must be evaluated based on the harm to the victim’s sexual autonomy and dignity.⁹⁹ The Court stated that sexual acts should be defined objectively rather than based on the subjective lustful intentions of the defendant, as was the case under the prior law.¹⁰⁰ There must be a “bodily contact, which is not necessarily limited to genital areas, but includes all areas that science, psychology and socio-anthropology consider erogenous, such as to

89. G. Fiandaca, *La rilevanza penale del “bacio” tra anatomia a cultura* Foro it., 1998, II, 505, n. 1–2, I.

90. JOHN MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 60 (4th ed. 2019).

91. Cass. Pen., sez. III, 27 Aprile 1998, *Di Francia*, reprinted in Foro it., 1998, II, 505.

92. Fiandaca, *supra* note 89, at n. 1–2, I.

93. Cass. Pen., sez. III, 27 Aprile 1998, *Di Francia*, reprinted in Foro it., 1998, II, 505, 509.

94. *Id.*

95. *Id.* at 506–07.

96. *Id.* at 510.

97. *Id.* at 510.

98. *Id.* at 511–12.

99. *Id.* at 510.

100. *Id.* at 511.

demonstrate [the offender's] sexual instinct."¹⁰¹ The Court indicated that this definition under the 1996 law is narrower than the old crime of violent acts of lust and that such narrowing was justified because when the crime of *molestie sessuali* was considered by the legislature, this provision was ultimately not included in the 1996 law and the least serious types of conduct might amount to other offenses, such as *molestia*, or obscenity.¹⁰²

Thus, in *Di Francia*, the Court gave effect to the change in the *bene giuridico* to be protected under the 1996 law by focusing on the harm to the victim based on an invasion of her sexual sphere. Moreover, the Court considered the full context of the defendant's conduct which, like *Delogu*, involved an employer trying to kiss his employee. Rather than pointing to the changes in Italian society regarding sexual modesty and decency, the Court focused on the harm to the victim and the need for a more objective definition of sexual acts, one which considers science, psychology, and socio-anthropology. The Court emphasized that the offense of sexual violence is no longer tied to cultural and social mores, but is instead focused on an individual's right to sexual autonomy.¹⁰³ In addition, the Court emphasized the importance of considering the full context in which a sudden, unwanted kiss occurs. Specifically, the Court stated that "circumstances such as time, place, the manner in which [a kiss] was given, as well as the circumstances of the two people involved since [a kiss] could manifest numerous intentions, as well as where on the body [of the victim] it was given...by an employer to an employee, none of which is irrelevant to the analysis."¹⁰⁴ Thus, in eschewing an analysis that considers only the subjective lustful intentions of the offender, and the harm to public modesty, the Court has indicated that, while the location of the kiss on the victim's body is relevant, the full context of the encounter must also be considered in evaluating whether the conduct intrudes on the victim's sexual sphere and amounts to the offense of sexual violence.

The fact that the Court points to the employer/employee relationship raises another aspect of the 1996 reform relevant to this analysis. The 1996 law defines sexual violence as "whoever, by violence or threats *or abuse of authority* compels another to do or submit to sexual acts shall be imprisoned from five to ten years."¹⁰⁵ While a full analysis of the phrase "abuse of authority" is beyond the scope of this article, it pertains to the context to which the Court in *Di Francia* refers; specifically, the fact that the employer sought to kiss his employee. In *Delogu*, the Court's decision—that the facts of the case did not support the offense of "violent acts of lust"—rested in part on

101. *Id.*

102. *Id.* at 505, 511. C.p. 660 (It.) (annoying or disturbing persons). C.p. XXX (obscenity), translated in the Wise translation, *supra* note 31, at 182–83.

103. Cass. Pen., sez. III, 27 Aprile 1998, *Di Francia*, reprinted in *Foro it.*, 1998, II, 505, 510.

104. *Id.*

105. C.p. 609-bis (It.) (emphasis added).

its conclusion that the “fleeting kiss, without further insistence,” was not “violent” for purposes of that offense.¹⁰⁶ While the prior law included an offense entitled “carnal intercourse committed through abuse of capacity as a public officer,”¹⁰⁷ the 1996 law includes a broader concept of “abuse of authority” as one method, like violence or threats, to accomplish sexual violence under 609-*bis*. Emphasizing the employer/employee relationship in *Di Francia* would seem to allow for consideration of the employer’s authority over the employee and minimize or eliminate the need to demonstrate that the offender accomplished the sexual act through violence or threats.

In a 1998 decision, the Court further clarified when sudden, unwanted kisses and other touchings come within the term “sexual acts” for purposes of the sexual violence law.¹⁰⁸ This case involved a 14-year-old victim¹⁰⁹ whom the offender, over the course of about seven months, kissed on the lips, touched her breasts, thighs, and bottom. On appeal, the Court cited to its *Di Francia* decision and emphasized that the crime of sexual violence is intended to protect the sexual autonomy of the victim.¹¹⁰ Therefore, in evaluating whether the offender engaged in “sexual acts,” the Court considered whether the touchings by the defendant intruded on the sexual sphere of the victim.¹¹¹ The Court concluded that the nature of the offender’s conduct did intrude on the victim’s sexual sphere and was coercive since the offender employed the victim’s mother.¹¹²

In the 2006 case¹¹³ discussed by Professors Cadoppi and Vitiello,¹¹⁴ a police chief was convicted of sexual violence when he coerced his subordinate to submit to kisses on her cheek and neck. Upon finding that the case was one of “less seriousness,”¹¹⁵ the trial court sentenced the defendant to one year and two months of incarceration, and the appellate court affirmed.¹¹⁶ The police chief had commanded his female assistant to drive to

106. *Delogu* case, *supra* note 22; see Tabarelli de Fatis, *supra* note 24, at 975 (explaining the Court’s conclusion that sudden, unexpected conduct by an offender does not satisfy the element of “violence” required by the law).

107. C.p. 520 (It. 1930), translated in the Wise translation, *supra* note 31, at 182-83.

108. Cass. Pen., sez. III, 4 dicembre 1998, *De Marco*, reprinted in *La Giustizia Penale*, 1999, Part II, 584 [hereinafter *De Marco* case].

109. The 1996 law sets the age of consent at fourteen therefore article 609-*bis* was the basis for *De Marco*’s conviction. Article 609-*ter* sets out aggravating circumstances, which trigger a more severe punishment from six to twelve years. This includes when the victim is under the age of fourteen.

110. *De Marco* case, *supra* note 108, at 586.

111. *Id.* at 585.

112. *Id.*

113. Cass. Pen., sez. III, 26 gennaio 2006, n. 19808, reprinted in 37 *GUIDA AL DIRITTO* 88 (Sept. 23, 2006).

114. Cadoppi & Vitiello, *supra* note 7.

115. C.p. 609-*bis*, para. 3 (It.). See Van Cleave, *supra* note 28, at 337–39, for more analysis of this paragraph, which provides for a reduced sentence in cases of less seriousness.

116. Cass. Pen., sez. III, 26 gennaio 2006, n. 19808, reprinted in 37 *GUIDA AL DIRITTO* 88 (Sept. 23, 2006).

a beach.¹¹⁷ Once she turned off the engine, he suddenly grabbed her and tried to kiss her, but she pushed him away and covered his mouth with her hand.¹¹⁸ He then ordered her to drive to another isolated location with a panoramic view, where, for the second time, he attempted to kiss her, holding her arms and kissing her on the neck, despite her clear objection.¹¹⁹ The Court reaffirmed the notion that the 1996 law is not intended to criminalize conduct that was previously considered to be offensive to public morality and decency.¹²⁰ While the Court acknowledged that the term “sexual acts” generally means the sum of the prior criminal conduct of “violent carnal knowledge” and “violent acts of lust,” the Court, as in the *Di Francia* case, emphasized that conduct which qualifies as a “sexual act” is contact with another that harms or endangers the liberty and autonomy of a victim’s sexual sphere.¹²¹

While the Court recognized that scholars have concluded that acts by an offender, which are accomplished by surprise or [suddenness] are not “violent” for purposes of the criminal law, the Court reaffirmed that the element of violence does not require actual constraint of the victim such that she is unable to resist, but includes sudden and rapid conduct which overcomes the victim’s opposition [or lack of consent].¹²² In this case, the Court concluded that the lower courts were correct in finding that the offender’s sudden and rapid conduct resulting in kissing his subordinate justified his conviction for sexual violence.¹²³ The Court also referred to the “abuse of authority” language in 609-*bis* as one method by which an offender compels another to submit to sexual acts and explained that the full context is to be considered to determine whether there was coercion.¹²⁴ The fact that the offender, the victim’s superior officer, commanded the victim to go to the isolated locations, where he suddenly grabbed her and tried to kiss her, also supported the conviction.¹²⁵ The Court did not address the defendant’s argument that his conduct was merely a “pass” and not harmful to the victim’s sexual autonomy.¹²⁶

In commenting on this case, Marco Galdieri, points out that the Court’s analysis is consistent with its focus on the different *bene giuridico* protected by the 1996 law as compared to the repealed offense of “violent acts of lust.”¹²⁷ However, Galdieri nonetheless criticizes the Court’s decision,

117. *Id.* at 89.

118. *Id.*

119. *Id.*

120. Cass. Pen., sez. III, 26 gennaio 2006, n. 19808, reprinted in 37 GUIDA AL DIRITTO 88 (Sept. 23, 2006).

121. *Id.*

122. *Id.*

123. *Id.* at 89.

124. *Id.*

125. *Id.*

126. *Id.* at 88.

127. Galdieri, *supra* note 83.

signaling that the Court has diverged from the opinion of a majority of legal scholars (*la dottrina*) by concluding that one who tries to give a kiss may be convicted of sexual violence.¹²⁸ A number of Italian scholars have argued that under the 1996 law, the term “sexual acts,” can include only kisses on a victim’s erogenous zones, or so-called “profound” kisses on the victim’s mouth.¹²⁹ Indeed, co-authors, Cadoppi and Vitiello, describe the officer’s conduct toward his subordinate as “clumsy attempts [which] ended once his second kiss was rebuffed, suggesting he got the point, if belatedly.”¹³⁰ While acknowledging that the defendant “violated his victim’s autonomy by attempting to kiss her twice,”¹³¹ Professor Vitiello concludes that “an unwanted kiss is likely to arise in too many ambiguous situations to leave the blundering male open to criminal prosecution.”¹³² The fact that conduct that is harmful to another person’s sexual autonomy occurs with great frequency, would support an argument for invoking the criminal law to address such conduct. In addition, the assumption that unwanted kisses are likely to arise in ambiguous situations belies the types of cases that the Italian Supreme Court has considered since 1996 and belies the number of situations that have been reported since the beginning of the #MeToo era.

A 2012 decision by the *Corte di Cassazione* is another illustration of the Court’s focus on protecting the sexual autonomy of the victim.¹³³ In this case, the Court concluded that the offender’s lips merely brushing the face of the victim can support a conviction for sexual violence when this occurs suddenly without the victim’s consent.¹³⁴ The defendant claimed that the kiss on the cheek of the victim was simply a sign of affection since they had known each other for seven years and maintained a cordial relationship.¹³⁵ In fact, the defendant was the doorman of the apartment building where the victim lived with her parents.¹³⁶ The lower court found the victim credible and she recounted that the offender went to her apartment when her parents were not home and tried to kiss her on the mouth, but upon seeing her resistance, he quickly kissed her cheek.¹³⁷ He was sentenced to one year and two months under paragraph three of article 609-*bis*, based on a conclusion that the offense was one of “less seriousness.” In addition, the punishment was suspended.¹³⁸ On appeal, the defendant argued that the facts did not

128. *Id.*

129. Cadoppi, *supra* note 84, at 467.

130. Cadoppi & Vitiello, *supra* note 7, at 217.

131. *Id.* at 216.

132. *Id.*

133. Cass. Pen., sez. III, 26 settembre–15 novembre, 2012, n. 44480, *reprinted in* 5 *RESPONSABILITÀ CIVILE E PREVIDENZA* n. 167, 1549 (2013).

134. *Id.* at 1550.

135. *Id.* at 1549.

136. *Id.*

137. *Id.* at 1550.

138. Valentina Mereu, *La rilevanza penale del bacio “rubato” sulla guancia*, 5 *RESPONSABILITÀ CIVILE E PREVIDENZA* 1551 (2013).

constitute sexual violence since all that was involved was a “simple kiss on the cheek.”¹³⁹ The Court dismissed this argument and affirmed the conviction.¹⁴⁰

Mereu, an Italian scholar, has criticized this decision because the Court affirmed a criminal conviction for an unwanted kiss without any evidence of violence, threat, or abuse of authority.¹⁴¹ Mereu also criticizes the Court for affirming a conviction for sexual violence based on a sudden kiss without the victim’s consent, arguing that the Court has, in effect, changed the elements required to establish sexual violence.¹⁴² The Court held that the rapid manner by which the defendant kissed the victim compelled her to submit.¹⁴³ Mereu further criticizes the Court for its reference to the defendant’s goal of satisfying his own lustful instincts.¹⁴⁴ She claims that this is a retreat to pre-1996 analysis, which focused on protecting public decency and modesty.¹⁴⁵ However, the Court’s reference to the defendant’s intention was in the context of describing how the defendant’s conduct progressed from asking the victim for kisses, to trying to kiss her on her mouth and seeing that she did not want this, and then suddenly kissing her on her cheek.¹⁴⁶ In other words, the defendant knew that the victim did not want him to kiss her, yet he made clear his intent to kiss her despite this fact. Thus, the Court was focused on protecting the sexual autonomy of the victim.

More recently, the Court has devoted significant attention to setting out the facts and factual contexts relevant to evaluating whether a sudden, unwanted kiss is a “sexual act” for purposes of 609-*bis*. In a 2015 decision, the Court considered an appeal by a doctor convicted of sexual violence.¹⁴⁷ The defendant, R., a doctor at a nursing home, briskly strode into a small break room where S., a nurse, was sitting at a table folding napkins.¹⁴⁸ R approached S from behind and then kissed her suddenly and forcefully on the lips.¹⁴⁹ S pushed him away saying, “how dare you!”¹⁵⁰ The Court affirmed R’s conviction and set out relevant factors when giving meaning to the term “sexual acts.”¹⁵¹ The Court reaffirmed prior definitions, which included “physical contact, even sudden and extemporaneous, between the

139. *Id.*

140. Cass. Pen., sez. III, 26 settembre 2012, n. 44480, *reprinted in* 5 RESPONSABILITÀ CIVILE E PREVIDENZA n. 167, 1549, 1550 (2013).

141. *Id.* at 1561.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Cass. Pen., sez. III, n. 964/2015, *available at* <http://www.italgiure.giustizia.it/sncass/>.

148. *Id.* at 3.

149. *Id.* at 16.

150. *Id.* at 20–21.

151. *Id.* at 17–18.

individuals . . . which endangers the sexual autonomy of the victim . . . and the intention of the defendant to satisfy his sexual pleasure.”¹⁵² The Court explained that this involves an objective definition of the type of physical contact that invades one’s sexual sphere, not necessarily limited to genital areas, but may include [other] erogenous zones.¹⁵³

The Court acknowledged that it is impossible to define in advance all sexual acts that do not directly and clearly involve the victim’s erogenous zones.¹⁵⁴ Therefore, the entire context of the defendant’s conduct must be considered when determining whether the conduct compromised the sexual autonomy of the victim.¹⁵⁵ Considering the context of the defendant’s conduct includes considering the nature of the physical contact and where on the victim’s body the kiss was given, the way in which the kiss was given (i.e., with intensity or not), the physical context of the encounter (in public, in the workplace, in private, the time of day), the relationship between the parties, and other facts relevant to the harm to the victim’s sexual autonomy.¹⁵⁶ In particular, the Court relied on the lower court’s determination that during the time both R and S had been colleagues, they only ever greeted each other with “good morning” and “good evening,” supporting the conclusion that this “sudden and ambushing kiss” violated the victim’s sexual autonomy.¹⁵⁷ Again, in criticizing the Court’s opinion in this case, at least one scholar has lamented the attention devoted to the “problematic knot of defining the least serious conduct that comes within” article 609-*bis*.¹⁵⁸

What emerges from these cases, as well as some of the scholarly critiques, is first how the overall goal (or *bene giuridico*) of the sexual violence law is to protect the sexual autonomy of victims. The *Corte di Cassazione* has determined that defining “sexual acts” be informed by what infringes on a victim’s sexual autonomy, not by relying on pre-1996 analysis that centered on societal decency and modesty.¹⁵⁹ It appears that the *Corte di Cassazione* has clarified that both objective and subjective considerations are relevant to this analysis.¹⁶⁰ In the case of the doctor, R., above, the Court has specified that physical contact is required and that such contact with genitalia and genital areas is sufficient to constitute a sexual act, as is contact with

152. *Id.* at 17.

153. *Id.* at 18.

154. *Id.* at 19.

155. *Id.*; see also Francesco Macri, *La Violenza Sessuale (art. 609-bis c.p.) nella Giurisprudenza della Suprema Corte del 2015*, *DIRITTO PENALE CONTEMPORANEO* (2016), http://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/macri_1_16.pdf.

156. Cass. Pen., sez. III, n. 964/2015, available at <http://www.italgiure.giustizia.it/sncass/>.

157. *Id.* at 20-21.

158. Macri, *supra* note 155.

159. See e.g., Cass. Pen., sez. III, n. 964/2015, available at <http://www.italgiure.giustizia.it/sncass/>.

160. *Id.*

other erogenous zones.¹⁶¹ The Court has eschewed the approach of scholars to exclude from consideration as sexual acts kisses that are not on the victim's mouth and not "profound."¹⁶² The Court also considers a subjective component, which evaluates the general intent of the offender to engage in an act invasive and harmful of the victim's sexual autonomy.¹⁶³ This approach does not involve an inquiry into the specific intent of the offender to achieve sexual arousal or gratification, as this would retreat to pre-1996 analysis that tied the offender's specific intent with the goal of protecting societal decency and modesty. In addition, the Court has determined that the sudden way in which the defendant kisses the victim may satisfy the "violent" element of the offense, since the victim is unable to avoid the kiss.¹⁶⁴ Finally, the Court has clarified that the full context of the encounter is relevant to this inquiry.¹⁶⁵

The following section of this Article compares the approach by the *Corte di Cassazione* with laws in the United States. A review of the laws in both California and Michigan illustrate a much narrower approach to the issues of (1) what body parts of the victim touched by the offender might give rise to a crime; (2) what evidence regarding the intent of the offender is required; and (3) what is required to satisfy an element of force or violence.¹⁶⁶ It appears clear that the types of incidents described above, as well as many of those described in Part V are unlikely to result in criminal convictions under US law.

IV. BRIEF COMPARISON TO SEXUAL BATTERY LAWS IN THE U.S.

California law defines sexual battery much more narrowly than Italian law, as "[a]ny person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse."¹⁶⁷ This is considerably narrower than what might constitute sexual violence under Italian law by requiring that the defendant or an accomplice unlawfully restrain the victim and that the touching be for the specific purpose of the defendant's sexual arousal. In Italy, the Court has explicitly not required this type of specific purpose.¹⁶⁸

161. *Id.* at 18.

162. Cadoppi, *Art. 609-bis c.p.*, *supra* note 42, at 467.

163. Cass. Pen., sez. III, n. 964/2015, at 18, available at <http://www.italgiure.giustizia.it/sncass/>.

164. *Id.* at 20.

165. *Id.* at 21.

166. A comprehensive review of all sexual battery and sexual contact laws is beyond the scope of this project.

167. CAL. PENAL CODE § 243.4(a).

168. Cass. Pen., sez. III, n. 964/2015, at 18, available at <http://www.italgiure.giustizia.it/sncass/>.

The California statute also defines “intimate part” more narrowly than under Italian law, as “the sexual organ, anus, groin, or buttocks of any person, and the breast of a female,”¹⁶⁹ clearly excluding kisses on the mouth, cheek, or neck as occurred in a number of the Italian cases described above. This definition also excludes other possible “erogenous zones,” which the Italian Supreme Court has recognized as “touchings,” and as such, may interfere with or harm the sexual autonomy of the victim and amount to the crime of sexual violence, depending on the context. While California also includes misdemeanor sexual battery, the only difference is that there is no element of unlawful constraint of the victim for conviction of the misdemeanor.¹⁷⁰ The same term and definition of “intimate part” is used to describe the misdemeanor offense.¹⁷¹ The punishment for this misdemeanor is up to six months imprisonment in the county jail, or a fine up to \$2,000, or both.¹⁷² This is significantly less than the punishment that could be imposed in Italy for sexual violence, that is “less serious,” of fourteen months.¹⁷³ However, in the cases reviewed above, when the *Corte di Cassazione* upheld a conviction, the punishment was usually suspended, and the defendants were usually granted requests that the offense not appear on their permanent criminal records.¹⁷⁴ Interestingly, under California’s misdemeanor sexual battery provision, if the defendant is the victim’s employer, the defendant’s fine may increase up to \$3,000, while jail time remains the same.¹⁷⁵

It is pretty clear that most of the Italian cases described above would not have resulted in convictions, and probably not even arrests or prosecutions under California law. Unlike how the Italian Supreme Court has interpreted the crime of “sexual violence”—by emphasizing the goal of protecting the sexual autonomy of the victim—the California law focuses on the specific intentions of the offender and limits the offense to touchings of “intimate parts” of the victim’s body, limited to genitalia, female breasts, groin, or buttocks.¹⁷⁶ By comparison to the Italian approach in the context of sudden kisses, consideration of the victim is limited to whether such kisses were “against [her] will.”¹⁷⁷ As the Italian cases illustrate, when the kiss is so sudden and unexpected, there may not be an opportunity for the victim to

169. CAL. PENAL CODE § 243.4(g)(1).

170. “Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery.” *Id.* § 243.4(e)(1).

171. *Id.*

172. *Id.*

173. C.p. 609-bis para. 3 (It.)

174. See e.g., Cass. Pen., sez. III, n. 964/2015, available at <http://www.italgiure.giustizia.it/sncass/>.

175. *Id.*

176. *Id.*

177. *Id.*

express that the kiss is unwanted.¹⁷⁸ Indeed, the *Corte di Cassazione* has determined that the sudden nature of the kiss can establish the violence otherwise required for the offense.¹⁷⁹ It seems unlikely that this would be the case under California law as to either sexual battery or misdemeanor sexual battery.¹⁸⁰ Similarly, the #ThatsHarassment public service announcement described at the beginning of this Article would not result in misdemeanor sexual battery charges under California law because the boss' kiss was not on a statutorily defined "intimate part" of his employee.

Michigan law would likely lead to results similar to those in California and differs from Italian law in similar ways. Michigan law includes different degrees of sexual contact that includes fourth degree sexual conduct, which is a misdemeanor. This can be established by "sexual contact" achieved through force or coercion.¹⁸¹ Force or coercion may be established "[w]hen the actor achieves the sexual contact through concealment or by the element of surprise."¹⁸² This would appear to cover some of the examples described above based on the sudden and unexpected nature of many of the kisses found to be "sexual acts" under Italian law. However, Michigan law defines the term "sexual contact" to "include the intentional touching of the victim's . . . intimate parts."¹⁸³ The term "intimate parts," "includes the primary genital area, groin, inner thigh, buttock, or breast of a human being."¹⁸⁴ Thus, like California, under Michigan law, a sudden, forced kiss on the victim's mouth, cheek, or neck would not establish this lesser, misdemeanor offense. Further, Michigan law requires "that the intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (i) revenge. (ii) to inflict humiliation. (iii) out of anger."¹⁸⁵ This is similar to how California law requires evidence that the offender had the purpose of "sexual arousal, sexual gratification, or sexual abuse."¹⁸⁶

The American Law Institute has not yet approved¹⁸⁷ the Model Penal Code provision "criminal sexual contact"¹⁸⁸ and the definition of the term

178. See e.g., Cass. Pen., sez. III, n. 964/2015, available at <http://www.italgiure.giustizia.it/sncass/>.

179. *Id.*

180. CAL. PENAL CODE §§ 243.4(a), 243.4(e)(1).

181. MICH. PENAL CODE § 750.520e.

182. *Id.* at § 750.520e (1)(b)(v). Force or coercion is not required if the victim is "at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person." *Id.* at § 750.520e (1)(a).

183. *Id.* at § 750.520a (q).

184. *Id.* at § 750.520a (f).

185. *Id.* at § 750.520a (q).

186. CAL. PENAL CODE § 243.4(a).

187. See Am. Law Inst., Status Details of *Model Penal Code: Sexual Assault and Related Offenses*, AM. L. INST., <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/>, for the status of the ALI's reform of article 213 of the Model Penal Code.

188. MODEL PENAL CODE § 213.6(3) (AM. LAW INST., Draft 2015).

“sexual contact.”¹⁸⁹ However, the definition of sexual contact seems much broader than the California and Michigan laws reviewed above, to include “any touching of any body part of another person, whether clothed or unclothed, by any body part, body fluid, or object.”¹⁹⁰ The offense of criminal sexual contact is simply sexual contact without consent.¹⁹¹ Sexual contact in this context would appear to permit convictions for situations similar to those described above upheld by the Italian Supreme Court. However, the definition of the term sexual contact includes the requirement that the touching be “for the purpose of sexual gratification, sexual humiliation, sexual degradation, or sexual arousal.”¹⁹²

The objections raised by Caddopi, Vitiello, and other commentators to how the Italian Supreme Court has approached sudden, forced, and unwanted kisses, do not address the impact on the victim, other than to assert that this can be better addressed through the offense of battery. Indeed, the assertion that these are trivial situations involving stumbling passes, completely discounts the impact on the victims. Where, as in the U.S., there is the potential for draconian sentences for sexual crimes, as well as the non-criminal consequences of having to register as a sex offender, attention should be devoted to changing these laws. To argue that the current consequences for sex crime convictions are too severe, and therefore, the criminal law should not address sudden, unwanted kisses, does a disservice to the victims. In addition, the logical response is to focus on making the criminal consequences more rational and working to rid the criminal justice system of explicit and implicit bias.

In light of what the #MeToo movement has revealed about sexual misconduct and sexual violence, the approach of the Italian Supreme Court is much more protective of sexual autonomy and liberty than states like California and Michigan. The descriptions in the next section illustrate that these incidents are not rare, trivial, or ambiguous. Instead the volume of #MeToo reporting highlights patterns of behavior by many men as well as significant harm to the victims.

V. #METOO, SUDDEN KISSES, AND SEXUAL AUTONOMY

Incidents of sudden, unwanted kisses have been among the many reports of sexual misconduct since the #MeToo movement gained momentum. These incidents have ranged from conduct involving politicians, internship supervisors, and coworkers across multiple industries.¹⁹³ Upon the one year anniversary of #MeToo, one source calculated that between 429 to 800

189. *Id.* at § 213.0(6)

190. *Id.*

191. *Id.* at § 213.6(3)

192. *Id.* at § 213.0(6).

193. Griffin, Recht & Green, *supra* note 2. This website sets out in a variety of charts and graphs the reports of sexual misconduct including by the sectors of politics and government, entertainment, arts and music, sports, and other industries.

people, mostly men, had been accused of sexual misconduct.¹⁹⁴ The misconduct alleged ranges from inappropriate comments, sudden, unwanted kisses and hugs, to rape.¹⁹⁵ This section describes some incidents to demonstrate the impact on the victims and to counter the assertion and assumption that such occurrences are rare and trivial enough to merit no consideration that they amount to sexual violence. In addition, these accounts reveal patterns of behavior by some powerful men that often begin with sudden, forced, and unwanted kisses.

One case involving a Canadian politician, David Laxton resulted in sexual assault charges.¹⁹⁶ The accuser had known Laxton when she was a server at a restaurant Laxton frequented.¹⁹⁷ She later saw him at a grocery store where she was working.¹⁹⁸ After she told him that she was looking for other employment, he offered to assist.¹⁹⁹ She then met him in his office at the Yukon government building where Laxton's administrative director helped her with her resume and reviewed some job openings.²⁰⁰ After the administrative director left, Laxton hugged the accuser and kissed her on her mouth.²⁰¹ Upon escorting her out, Laxton hugged her and kissed her again on her mouth. The accuser stated that she "froze. [She] didn't go there to be touched. [She] didn't go there to be kissed."²⁰² When the accuser reported this incident two months later, Laxton resigned his position as speaker of the Yukon legislature.²⁰³ At a two-day trial, Laxton testified that he had kissed and hugged the accuser before.²⁰⁴ The judge concluded that the hugs and kisses were "brief and were not accompanied by any other touching that might more conclusively point to a sexual purpose."²⁰⁵ Like the element in the California law, this Canadian judge required evidence of the defendant's sexual purpose. The court also rejected the lesser charge of common assault, finding that Laxton "honestly but mistakenly believed he had consent."²⁰⁶

While the Italian cases described above are not directly on point, it is likely that an Italian court would consider the circumstances of this occurring

194. *Id.* It appears that most of these incidents occurred in the U.S.

195. *Id.* It is beyond the scope of this paper to review all #MeToo reports involving sudden kisses. This Bloomberg site lists an overwhelming number of news articles describing the various reports during the first year of the #MeToo Era.

196. See Douglas Quan, *Is an Unwanted Hug and Kiss Sexual Assault? Not Always, Judge Rules in Trial of Ex-Yukon MLA*, NAT'L POST. (Oct. 6, 2017), <https://nationalpost.com/news/is-an-unwanted-hug-and-kiss-sexual-assault-not-always-judge-rules-in-trial-of-ex-yukon-mla>, for a description of this case.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

in a government office and the fact that the accuser was there seeking employment assistance, even if the two had previously kissed and hugged. On the other hand, in the case of the doctor, R., the Court devoted analysis to the fact that the doctor and the victim had only ever greeted each other by saying good morning and good evening.²⁰⁷ Nonetheless, the Canadian court did not consider the impact on the sexual autonomy of the accuser, and the *Corte di Cassazione* opinions interpreting the 1996 law lead me to conclude that the Italian Court would have given greater consideration to the defendant's intrusion on the accuser's sexual autonomy.

Another example provides additional information about the harm that this type of conduct causes. An anonymous unpaid intern described an incident with a male superior at the company.²⁰⁸ They had been at a professional networking event and subsequently went out to eat with a few other people.²⁰⁹ When the intern excused herself to use the restroom, the "higher up" followed her into the one-person bathroom and told her that he checks her out at the office and can't stop thinking about her.²¹⁰ He then leaned toward her and tried to kiss her. She pushed him away and went outside.²¹¹ She rejoined the group for dinner.²¹² She explained that she was worried for her future career prospects at this company or at other companies if she complained.²¹³ She described how "her skin crawled" when she had to interact with him at the office.²¹⁴

Multiple women have described encounters with former CBS executive, Leslie Moonves, that involved sudden, forced, and unwanted kisses.²¹⁵ A female doctor who once treated Les Moonves described how, in an examining room, he grabbed her and tried to kiss her twice.²¹⁶ Dr. Peters explained in a subsequent article, in which she did not name Mr. Moonves, that she had agreed to an early morning appointment to accommodate his

207. Cass. Pen., sez. III, n. 964/2015, available at <http://www.italgiure.giustizia.it/sncass/>.

208. PrettyReckless, *My Boss at My Internship Kissed Me and I Didn't Know What to Do*, HUFF POST (Aug. 9, 2016), https://www.huffingtonpost.com/entry/my-boss-at-my-internship-kissed-me-and-i-didnt-know_us_57a9f774e4b02251db401b8b (this was a social media post and does not seem to have resulted in any further reporting or consequences to the unnamed boss).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, THE NEW YORKER (Aug. 6, 2018), <https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct>.

216. William D. Cohan, *Les Moonves Admits to Unwanted Kissing of His Doctor 19 Years Ago*, VANITY FAIR (Sept. 9, 2018), <https://www.vanityfair.com/news/2018/09/les-moonves-admits-to-unwanted-kissing-of-his-doctor-19-years-ago>.

schedule.²¹⁷ Initially, they reviewed his medical history and discussed his current health issue while they were seated at a small table.²¹⁸ They then moved to the examination table, where Dr. Peters described that “[Mr. Moonves] grabbed me as I stepped forward. He pulled himself against me and tried to force himself on me. He did this twice; when I rebuffed him, he stood beside the examination table and satisfied himself . . . and left.”²¹⁹ Mr. Moonves disputed how Dr. Peters characterized this incident but admitted that he did try to kiss a doctor.²²⁰ Dr. Peters described her reaction, “I felt ashamed,” she wrote.²²¹ “I hadn’t screamed—I was supposed to be offering ‘extra-special’ service to this man because he was rich and powerful and good for my institution.”²²²

There are at least seven other reported incidents involving Les Moonves and sudden, forced kisses.²²³ Illeana Douglas described an incident when she and Mr. Moonves were reviewing a script for the show “Queen,” when he suddenly asked her if she was single.²²⁴ She replied, “[y]es, no, maybe” and attempted to turn the conversation back to the script.²²⁵ Moonves interrupted her, asking to kiss her.²²⁶ Douglas again attempted to focus on the script.²²⁷ She described that “[i]n a millisecond, he’s got one arm over me, pinning me . . . and was violently kissing [me],” holding her down on the couch with her arms above her head.²²⁸ She described feeling paralyzed and “like a trapped animal.”²²⁹ He began to push up her skirt and then paused asking her, “So, what do you think?”²³⁰ She explained that she thought she would joke her way out of the situation just to get away.²³¹ When he got up, she began to go toward the door.²³² He blocked her way, backed her up against a wall and said, “[w]e’re going to keep this between me and you, right?”²³³ She agreed and was then able to leave.²³⁴ Douglas described the incident as “so invasive” and one that “has stayed with [her] the rest of [her] life.”²³⁵ As with the

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Quoted in Cohan, supra* note 216. Dr. Peters had agreed to a 7:00 a.m. appointment with Mr. Moonves for his convenience.

223. Farrow, *supra* note 215.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

incident with Dr. Peters, Moonves acknowledged trying to kiss Douglas but “denies any characterization of ‘sexual assault,’ intimidation, or retaliatory action.”²³⁶ Ronan Farrow described six additional incidents of Moonves forcing himself on women, violently kissing them.²³⁷ The similarities of these incidents indicate a disturbing pattern of a man in a position of authority thrusting kisses on women. Sometimes the women are able to leave, but the Farrow articles describe how, on a number of occasions, Moonves continued his sexually aggressive behavior.²³⁸

Another example of a powerful man engaging in a pattern of behavior of thrusting sudden, forced kisses on women is President Donald Trump. In addition to the incident described by Rachel Crooks, a woman who worked on President Trump’s campaign has filed a lawsuit alleging that President Trump attempted to kiss her on her mouth, but she turned her head and he kissed the side of her mouth.²³⁹ Alva Johnson stated that as President Trump was exiting an RV before a campaign rally in August of 2016, “he grabbed her hand and prepared to kiss her; she turned her head, so his lips hit the side of her mouth.”²⁴⁰ Ms. Johnson stated that it “was super creepy” and that she “felt violated immediately because [she] wasn’t expecting it or wanting it.”²⁴¹ She stated that she “can still see his lips coming straight for her face.”²⁴²

VI. CONCLUSION

In the U.S., we can learn a great deal from how the Italian *Corte di Cassazione* has interpreted the crime of “sexual violence” as it applies in the context of sudden, forced, and unwanted kisses. The Italian Court has reaffirmed the goal, or *bene giuridico*, of protecting victims’ sexual autonomy and has chosen not to adopt a definition of “sexual acts” that is limited to anatomy, as do California and Michigan with their narrow definitions of

236. *Id.*

237. See Ronan Farrow, *As Leslie Moonves Negotiates His Exit From CBS, Six Women Raise New Assault and Harassment Claims*, THE NEW YORKER (Sept. 9, 2018), <https://www.newyorker.com/news/news-desk/as-leslie-moonves-negotiates-his-exit-from-cbs-women-raise-new-assault-and-harassment-claims> (last visited Mar. 4, 2019); Farrow, *supra* note 215.

238. *Id.* Both articles describe instances of Moonves holding women’s heads down and pushing his penis into their mouths.

239. Trudy Ring, *Former Campaign Staffer Sues Trump, Alleging Unwanted Kiss*, THE ADVOCATE (Feb. 25, 2019), <https://www.advocate.com/politics/2019/2/25/former-campaign-staffer-sues-trump-alleging-unwanted-kiss>; see also Esther Wang, *Former Trump Campaign Staffer Files Lawsuit Alleging Donald Trump Kissed Her Without Her Consent*, JEZEBEL (Feb. 25, 2019), <https://theslot.jezebel.com/former-trump-campaign-staffer-files-lawsuit-alleging-do-1832867548> (this article includes a link to the complaint filed by Johnson at <https://www.tzlegal.com/wp-content/uploads/2019/02/Press-Release-2019.02.25-Filed-Complaint.pdf>).

240. *Id.*

241. *Id.*

242. *Id.*

“intimate parts.” The Italian Court has dispensed with pre-1996 interpretations that focused on the offender’s specific intent of satisfying his sexual instincts to avoid a focus on society’s sexual mores. Finally, the Italian Court has concluded that the circumstances surrounding a sudden, forced kiss can support the element of violence required by the law due to the victim’s inability to express the unwanted nature of such kisses.

We might consider each of these aspects of Italian law in determining whether to make adjustments to sexual battery or sexual contact laws. Making adjustments to sexual battery and contact laws should occur simultaneously with rationalizing our criminal justice system with respect to moderating punishment, narrowing sex offender registration laws, and ridding the system of explicit and implicit bias. The experiences of victims subjected to sudden, forced, and unwanted kisses, as well as the patterns displayed by men, illustrate that these instances are neither rare nor trivial. Focusing on the goal of protecting sexual autonomy should guide these reforms as it has guided the *Corte di Cassazione*.