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# A Kiss Is Just a Kiss, or Is It? A Comparative Look at Italian and American Sex Crimes

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# A Kiss Is Just a Kiss, or Is It? A Comparative Look at Italian and American Sex Crimes

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## I. INTRODUCTION

Over the course of recent decades, both American and Italian law have made efforts to deal with numerous challenging cases involving rape and other sexual offenses. In particular, two Italian cases emphasize the important issues at play. In the first, a man kissed a young female and was convicted of a violation of Italy's sexual offense statute (roughly akin to rape).[1] In the second, the offender's conduct consisted of slapping the victim's bottom.[2] Two aspects of those cases are surprising. First, the cases demonstrate significant advances in Italian society in these matters. This is, after all, the country where a judge made international headlines just over a decade ago when he announced a rule that a man could not possibly rape a woman wearing tight blue jeans.[3] Second, the defendants in both cases were charged with sexual violence, the Italian offense most similar to rape.[4]

By contrast, even though American law has responded to many feminist concerns about sexual autonomy, one might readily question whether such conduct would be prosecuted as sex offenses under American law. [5] Though these cases might fall under certain state

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[1] Cass. pen., sez. III, 26 jan. 2006, n.19808, Guida al Diritto, n. 37, 2006, 88.

[2] Cass. pen., sez. III., 23 sept. 2004, n.37395, Riv. Pen. 2004, 1189.

[3] *See* Alessandra Stanley, *Ruling on Tight Jeans and Rape Sets Off Anger in Italy*, N.Y. TIMES, Feb. 16, 1999, at A6.

[4] *See* CODICE PENALE [C.P.] art. 609-*bis* (Italy).

[5] In *Bailey v. State*, 764 N.E.2d 728, 731–32 (Ind. Ct. App. 2002), the Court of Appeals of Indiana held that grabbing was sexual battery, demonstrating that Vitiel-

laws covering lower classes of sex offenses, neither case would likely amount to rape. Two American cases further demonstrate how much Italian law differs from American law in this area. In the first case, a seventeen-year-old boy was videotaped engaging in consensual oral sex with a fifteen-year-old girl at a holiday party.[6] The second case involves basketball superstar Kobe Bryant and allegations that he raped a hotel employee.[7] Although the Bryant case never went to trial, various versions of the facts were widely reported.[8] As the facts emerged, they mirrored those of the kind of case—now more publicly discussed—in which a woman has not consented to intercourse but the man believes that she has.

This Article, a joint effort between scholars in both Italian and American criminal law, contrasts these cases. Part II develops the Italian cases, including their disposition in Italy. In Part III, Vitiello discusses how American courts would resolve these cases. In Part IV, Vitiello discusses normative concerns and, especially in light of America's heightened punishments for sexual offenders, questions whether American jurisdictions should treat these as sexual offenses. Part V develops the two American cases. In Part VI, Cadoppi explores how Italian law would resolve the two American cases. Finally, in Part VII, Cadoppi asks the normative question: do the Americans or the Italians have the better view?

## II. IS A KISS JUST A KISS?

### *A. Italian Criminal Case Number 19808*[9]

In 1994 in Sanremo, Italy, an assistant chief of the state police commanded his colleague to meet him at an isolated beach at night.[10] The accused, "G.G.," shut off the engine of his service vehicle and attempted to kiss his colleague, "R.C."[11] She resisted and placed her hand over his mouth in order to stop him.[12] He then commanded

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lo's intuitive response was wrong. *Contra* Scott-Gordon v. State, 579 N.E.2d 602, 604 (Ind. 1991) (grab of the buttocks was not alone sufficient to meet the force element of the statute).

[6] Wilson v. State, 631 S.E.2d 391, 392 (Ga. Ct. App. 2006).

[7] *See infra* notes 268–271 and accompanying text.

[8] *See infra* notes 272–276 and accompanying text.

[9] Cass. pen., sez. III, 26 jan. 2006, n.19808, Guida al Diritto, n. 37, 2006, 88.

[10] *Id.* at 88.

[11] *Id.* at 89.

[12] *Id.*

her to drive to a place with a panoramic view, where he grabbed her and kissed her neck.[13] Again, she objected.[14]

G.G. was charged with violating article 609-*bis* of the Italian Penal Code.[15] Prior to 1996, rape was a crime against public morality, not a crime against the person.[16] Like changes in rape law elsewhere, article 609-*bis* was a victory for feminists and raised public awareness about violence towards women.[17] The law is now unequivocally a crime against the person. Unlike traditional rape laws, article 609-*bis* does not require penetration.[18] Instead, the offense is committed whenever a person "with violence or threat or by means of abuse of authority, forces someone to perform or undergo sexual acts."[19] Convicted in 2000 and sentenced to sixteen months in prison, G.G. appealed his conviction.[20] He contended, in part, that the evidence was insufficient because his acts were mere "advances" and that R.C.'s autonomy was not impaired.[21]

On appeal, the court focused on how to interpret the "sexual acts" language of the article. The interpretation was broad and included any conduct involving carnal touching.[22] More specifically, a sexual act can include anything that results in bodily contact between an actor and his passive subject, even if fleeting and not otherwise endangering the subject's sexual self-determination.[23] Thus, article 609-*bis* encompasses not just acts involving the genitals, but includes those involving any erogenous areas. A court may determine what an erogenous zone is by reference to medical, psychological, and sociological-anthropological sciences.[24] Although such an interpretation means that a person from a culture whose members routinely kiss upon meeting may not be guilty of the offense, the facts before the court clearly indicated that G.G. was performing a sexually aggressive act.

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[13] *Id.*

[14] *Id.*

[15] Cass. pen., sez. III, 26 jan. 2006, n.19808, Guida al Diritto, n. 37, 2006, 88.

[16] C.P. art. 519.

[17] For an analysis of the Italian law, see generally Alberto Cadoppi, *Commento art. 609-bis C.P.*, *in* COMMENTARIO DELLE NORME CONTRO LA VIOLENZA SESSUALE E CONTRO LA PEDOFILIA 439 (Alberto Cadoppi ed., 4th ed. 2006).

[18] C.P. art. 609-*bis*.

[19] *Id.*

[20] Cass. pen., sez. III, 26 jan. 2006, n.19808, Guida al Diritto, n. 37, 2006, 88.

[21] *Id.*

[22] *Id.* at 89.

[23] *Id.*

[24] *Id.*

Further, the court found the necessary "violence" required in article 609-*bis*.[25] According to some criminal literature, surprise alone would not be enough to satisfy the elements of the offense; however, the Supreme Court disagreed.[26] The court held that the necessary violence element may be satisfied in situations where the actor puts the victim in a position where she cannot resist.[27] Furthermore, the court found that the element is also met when the rapid completion of the criminal action combines with an act that overcomes her will.[28] Thus, the court concluded that G.G. did more than kiss R.C. suddenly, an act that would have merely surprised her. Surprise, alone, would not divide a simple kiss from a prohibited act of sexual violence. G.G. did more than merely kiss; after she placed her hand over his mouth, he continued to force himself upon her.[29]

### *B. Italian Criminal Case Number 37395*[30]

The second noteworthy case involved the sexually inappropriate conduct of "A.M.," a magistrate of the Court of Cassation in Rome.[31] A.M. was charged with various violations of article 609-*bis* involving different women.[32] But the gravamen of his offenses was the "lustful touching of the buttocks."[33] While that was his sexual act, he engaged in other behavior that made the sexuality of the touching explicit.[34] A.M. was convicted of various offenses, resulting in a maximum term of imprisonment.[35]

Among his arguments on appeal, A.M. contended that the term "sexual act" in article 609-*bis* could not include his conduct and that the statutory element instead required "carnal conjunction" and "violent acts of lust."[36] Further, he contended that the definition of the statutory element, "sexual act," is not agreed upon in common usage

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[25] Cass. pen., sez. III, 26 jan. 2006, n.19808, Guida al Diritto, n. 37, 2006, 89.

[26] *Id.*; *see also* Giuliano Balbi, *Violenza sessuale*, *in* VII ENCICLOPEDIA GIURIDICA 9, (1999); Stefania Tabarelli De Fatis, *Sulla rilevanza penale del bacio come atto di libidine prima e dopo la riforma dei reati sessuali*, 1997 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 975.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Cass. pen., sez. III, 23 sept. 2004, n.37395, Riv. Pen. 2004, 1189.

[31] *Id.* at 1189.

[32] *Id.* at 1191.

[33] *Id.* at 1189.

[34] *Id.* at 1195.

[35] *Id.* at 1189.

[36] Cass. pen., sez. III, 23 sept. 2004, n.37395, Riv. Pen. 2004, 1189, 1190.

or in scientific literature and that his conviction therefore violated constitutional principles of definiteness.[37]

Rejecting the first argument, the court looked at the change in the law, which featured an intentional emphasis on the sexual autonomy of the victim.[38] Thus, sexual acts may involve constraining a passive victim through violence, threat, or abuse of authority.[39] But more relevant to the case before the court, a sexual act may be any act that results in physical contact between the actor and the passive subject that involves the subject's sexuality and is likely to endanger the subject's self-determination.[40]

Next, the court broadly defined "sexual." Not limited to an act involving the genitals of the actor and victim, "sexual" includes touching those areas that medical science deems erogenous.[41] This interpretation is consistent, in the court's view, with the underlying shift in policy in the 1996 statute.[42] Therefore, the court reached its conclusion despite the fact that acts involving the parties' genitals are almost always sexual while other acts, such as a slap on the buttocks, may not always be sexual in nature. Instead, the court determined that the sexual nature of an act must be assessed in its overall context. Viewed in that light, the court found A.M.'s conduct to be "sexual" in nature.

Similar to the American constitutional doctrine of "vagueness," Article 25 of the Italian Constitution requires that a law be drawn sufficiently precisely to allow citizens to be able to determine the line between legal and illegal conduct.[43] Thus, A.M. argued that lumping rape and sexual violence in one generic term, "sexual acts," lacked sufficient definiteness.[44] That breadth leaves the interpretation of prohibited conduct to the judge's discretion.

The court rejected A.M.'s arguments.[45] The court considered the legislature's decision to make article 609-*bis* a crime against personal freedom rather than a crime against public morality, then concluded that the legislature's intent was to protect against acts impair-

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[37] *Id.*
[38] *Id.* at 1190.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 1192.
[42] Cass. pen., sez. III, 23 sept. 2004, n.37395, Riv. Pen. 2004, 1189, 1192.
[43] *Id.* at 1191.
[44] *Id.*
[45] *Id.* at 1191–92.

ing a person's self-determination.[46] This legislative decision provided courts guidance on how to interpret the phrase "sexual act"; that is, the court should make punishable acts that violate the freedom of sexual self-determination. Requiring greater specificity would run the risk of allowing offenders to avoid prosecution for conduct erosive of self-determination. Further, the Constitutional Court has often upheld legislation where the legislature has used phrases with commonly understood meanings.[47] Language may be sufficiently precise by reference to non-legal concepts. As a result, the term "sexual act" becomes sufficiently precise to withstand constitutional scrutiny.[48]

## III. HOW WOULD AN AMERICAN COURT TREAT THE CONDUCT OF G.G. AND A.M.?

To answer the question posed above, some consideration must be given to variations in state law. This Article will consider New Jersey, Alabama, Indiana, and California, so as to canvass one jurisdiction each from the east coast, south, midwest and west coast. As developed in this Part, while G.G.'s conduct could be sexual battery, no reported case involving similar conduct in those jurisdictions could be located,[49] other than one case in Indiana where an offender was convicted of sexual battery for slapping a woman's buttocks.[50] Nonetheless, such cases appear to be extremely rare. A cursory glance at case law in other states[51] suggests a dearth of prosecutions for similar conduct, with one notable exception. That exception involves adult offenders who have sexual contact with minors.[52]

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[46] *Id.* at 1192.

[47] *See id.* at 1192.

[48] *See id.*

[49] *See infra* note 129 and accompanying text.

[50] *See* Bailey v. State, 764 N.E.2d 728, 730 (Ind. Ct. App. 2002).

[51] I examined leading treatises and Criminal Law case books on the assumption that those texts would include the unusual case. That review did not reveal any cases similar to G.G. See, e.g., JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW (4th ed. 2007); J DRESSLER, UNDERSTANDING CRIMINAL LAW (5th ed. 2009) [hereinafter DRESSLER, UNDERSTANDING CRIMINAL LAW]; WAYNE R. LAFAVE, CRIMINAL LAW (4th ed. 2003); SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS, (8th ed. 2007);JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS (6th ed. 2008).

[52] *See, e.g.*, State v. Rodriguez, 174 P.3d 1100 (Or. Ct. App. 2007), *rev'd in part*, 217 P.3d 659 (Or. 2009).

Unlike Italian law, American jurisdictions typically divide sex crimes into distinct offenses.[53] Article 609-*bis*, by contrast, conflates any sexual assault with rape.[54] Modern American jurisdictions single out rape as the most serious sexual offense, but now have a variety of sexual offenses.[55]

### *A. The Development of American Sexual Assault Law*

A brief detour may help clarify the contours of American rape law. Prior to the mid-twentieth century, most jurisdictions grouped a variety of "rape" crimes together.[56] That is, rape occurred when the male forced intercourse, when the female was under a specified age, when the victim was mentally incapable of giving consent, when the female was unconscious, or when the male misled the female into believing that he was her husband.[57] Judges might be given wide latitude on the appropriate sentence; for example, California allowed the judge to sentence the offender to a term of anywhere from three years to life in prison.[58]

By the mid-twentieth century, some jurisdictions abandoned the single-category approach to rape.[59] A jurisdiction might, for example, have defined aggravated rape as where the female resisted to the utmost and her resistance was overcome by force or where the victim was quite young, while other forms of rape were considered simple rape.[60] Penalties for the two forms differed considerably, with aggravated rape often exposing the offender to the death penalty.[61] Some states subdivided the crime even further.[62] For example, New York created a classification of misdemeanor rape that applies when the

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[53] *See, e.g.*, ALA. CODE § 13A-6-66 (West, Westlaw through 2009 Sess.); CAL. PENAL CODE § 243.4 (West, Westlaw through 2009 legislation); IND. CODE ANN. § 35-42-4-8 (West, Westlaw through 2009 1st Spec. Sess.); N.J. STAT. ANN. § 2C:14-2 (West 2005).

[54] C.P. art. 609.

[55] *See infra* notes 94–108 and accompanying text.

[56] MODEL PENAL CODE & COMMENTARIES § 213.1 cmt. 1 (1980).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*; Raymond T. Bye, *Recent History and Present Status of Capital Punishment in the United States*, 17 J. CRIM. L. & CRIMINOLOGY 234, 241–42 (1926) (noting that in 1925, 18 states and the federal government authorized capital punishment for the rape of an adult female).

[62] MODEL PENAL CODE & COMMENTARIES § 213.1 cmt. 1.

female is under the age of consent and the male is under twenty-one years old.[63]

American jurisdictions typically enumerated other sexual offenses, including sodomy.[64] The pattern regarding sodomy laws around the country varied a bit more than did ordinary rape law.[65] Additionally, provisions outlawing "crimes against nature" often included both consensual and non-consensual behavior and both homosexual and heterosexual conduct.[66] Despite a marital exemption from rape laws, some jurisdictions criminalized oral and anal copulation even between spouses.[67]

While state law prohibited a wide variety of sexual behavior, sexual touching that did not involve penetration was not criminalized as a sexual crime, with limited exceptions such as cunnilingus.[68] Most crimes required at least penetration with the penis.[69] Sexual battery did not exist, except for assault with intent to rape or to commit sodomy.[70] Instead, exotic touching might have been treated as an assault, but jurisdictions did not have a distinct sexual assault offense.[71]

By the end of the twentieth century, a good deal had changed.[72] Two major factors explain the changes in American law governing substantive sexual offenses. The first factor in the development of American criminal law was the publication of the *Model Penal Code*.[73] The second and more important factor was the influence of the women's rights movement on sexual offender laws.[74]

Some commentators are critical of the *Model Penal Code*'s approach to sex crimes.[75] Indeed, one commentator has argued that the Code's provisions "should be pulled and replaced."[76] For exam-

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[63] *Id.*

[64] *Id.* § 213.2 cmt. 1.

[65] *See, e.g.*, *id.* § 213.2 cmt. 1 n.5.

[66] *Id.* § 213.2 cmt. 1.

[67] *Id.*

[68] MODEL PENAL CODE & COMMENTARIES §§ 213.2, 213.4 cmt. 1.

[69] *Id.* § 213.4 cmt. 1.

[70] *Id.* § 213.4 n.80.

[71] *Id.*

[72] LAFAVE, *supra* note 51, at 847–50 (4th ed. 2003) (contrasting the traditional and modern approaches to rape).

[73] *See* discussion *infra* notes 82–86 and accompanying text.

[74] *See* discussion *infra* notes 87–92 and accompanying text.

[75] *See, e.g.*, Deborah W. Denno, *Why the Model Penal Code's Sexual Offender Provisions Should Be Pulled and Replaced,* 1 OHIO ST. J. CRIM. L. 207 (2003).

[76] *Id.* at 207.

ple, it left in place the marital exemption from rape.[77] The Code also reduced the degree of the felony under certain circumstances, such as when the woman was a "voluntary social companion" who had previously allowed the man "sexual liberties."[78] For some offenses, the Code made the woman's prior promiscuity an affirmative defense.[79] Further, it kept in place a requirement that the victim make a prompt complaint.[80] Finally, it provided that no one may be convicted of a felony under the sexual offenses provision unless the victim's testimony is corroborated.[81]

Despite these shortcomings, the *Model Penal Code* recognized a distinct offense of sexual assault.[82] The gravamen of the offense was "sexual contact" with another when the perpetrator knows that the contact was offensive to the other person (or, which occurred in a variety of settings, such as where the perpetrator knows that his victim is unaware of the sexual act or the victim is under a certain age).[83] The Code defines "sexual contact" in terms of its purpose to arouse or gratify sexual desire.[84] The Code was quite modern in its recognition that traditional assault was inadequate to protect the distinct interest at stake when the touching was sexual in nature. The offense is designed to protect against "an invasion of individual dignity."[85] As the comments indicate, this provision of the Code has been influential, with many states adopting a sexual offense distinct from traditional assault.[86]

The more important influence on substantive sex offenses was the women's rights movement. Significant reforms began during the 1970s.[87] As I have summarized elsewhere,

> Those reforms include the elimination of the spousal immunity in many jurisdictions, the elimination of special cautionary instructions and the corroboration requirement, and the elimination of the requirement of resistance or, at least, the elimination of the

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[77] *See id.* at 213.

[78] MODEL PENAL CODE & COMMENTARIES § 213.1 cmt. 2 (1980).

[79] *Id.* § 213.6(3).

[80] *Id.* § 213.6(4).

[81] *Id.*

[82] *Id.* § 213.4.

[83] *Id.*

[84] MODEL PENAL CODE & COMMENTARIES § 213.4 cmt. 2.

[85] *Id.* § 213.4 cmt. 1.

[86] *Id.*

[87] Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L. J. 651, 657 (2008).

> requirement of resistance to the utmost. Further, . . . in some instances reforms expanded the conduct that is criminal and limited the mens rea requirements for rape. Those reforms were sometimes the product of legislative enactment or judicial interpretation of existing rape law.[88]

Those reforms reflect a major rethinking about the nature of sexual offenses.

No longer is rape conceived of as a crime of violence. Instead, it is an invasion of a woman's "inner space," of her privacy and her autonomy.[89] Whereas sex offenses arose in an era that discouraged sexual autonomy outside marriage, modern sex law values and protects it.[90] While debate continues as to whether reforms have gone far enough,[91] one can find numerous cases prosecuted today that would have gone without a remedy as recently as thirty years ago.[92] In some instances, prosecutors would have refused to prosecute, but in many other instances, the legal requirements made prosecution impossible.

Once the law recognizes the importance of sexual autonomy, adoption of a sexual assault statute is a logical gap-filling extension of the law. For example, a statute might provide for a lesser-included offense for situations where a jury might not want to convict a defendant of rape, such as perhaps in a case of date rape. Further, a sexual assault statute serves to distinguish sexual assault from, for example, a fight between two men. Instead, the crime focuses on the sexual nature of the touching and underscores that certain kinds of touching are of a different order from a punch in the nose. Sexual groping offends one's dignity and sense of selfhood, even if not necessarily one's physical safety.[93]

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[88] *Id.*

[89] DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 51, at § 33.03[2] .

[90] *Id.*; *see also* Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 6 (1998).

[91] *See, e.g.*, STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW ix, 10 (1998). Part of the problem is cultural and not legal. Even when the criminal law has expanded to allow the conviction of an actor, "[s]ocial attitudes are tenacious, and they can easily nullify the theories and doctrines found in the law books." *Id.* at 17; *see also* Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform,* 46 CLEV. ST. L. REV. 409, 410 (1998) ("[F]eminists can take legitimate pride in the fact that rape law has undergone significant reform in just the past decade or two, largely as a result of their efforts.").

[92] *See* Vitiello, *supra* note 87, at 651–52 (describing some of the changes in the law that have made prosecution for rape more likely today both substantively and practically).

[93] *See* MODEL PENAL CODE § 213.4 (1980) (defining any sexual contact as "any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire").

### *B. State Sexual Assault Law Today and How It Would Apply to G.G. and A.M.*

Most modern jurisdictions have adopted some form of sexual assault statute, including all of the jurisdictions examined for this Article.[94] For example, Alabama's code includes a sexual abuse statute, criminalizing the act of subjecting another person to sexual conduct by forcible compulsion.[95] The statute defines "sexual conduct" as any touching done for the purpose of gratifying the sexual desire of either party.[96] The Alabama Court of Criminal Appeals has interpreted the statute to include touching of intimate parts of the body, which is interpreted to mean any part of the body that a reasonable person would consider "private."[97]

Indiana's sexual battery statute contains a provision similar to Alabama's law. It punishes "a person, who with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is . . . compelled to submit to the touching by force or the imminent threat of force."[98]

New Jersey has a similar named offense of sexual assault, but it is implicated when an actor commits an act of sexual contact with a victim "less than 13 years old and the actor is at least four years older than the victim."[99] The New Jersey statute also includes a lesser offense of criminal sexual contact.[100] It occurs when one commits "an act of sexual contact with the victim" under various circumstances, including those in which the actor uses physical force or coercion, but the victim does not sustain severe injuries.[101] Sexual contact is defined broadly to include "an intentional touching by the victim or actor, either directly or through the clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor."[102] The law de-

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[94] *See, e.g.*, ALA. CODE § 13A-6-66 (West, Westlaw through 2009 Sess.); CAL. PENAL CODE § 243.4 (West, Westlaw through 2009 legislation); IND. CODE ANN. § 35-42-4-8 (West, Westlaw through 2009 1st Spec. Sess.); N.J. STAT. ANN. §2 C:14-2 (West 2005).

[95] ALA. CODE § 13A-6-66 (West, Westlaw through 2009 Sess.).

[96] *Id.* § 13A-6-60(3).

[97] Parker v. State, 406 So. 2d 1036, 1038–39 (Ala. Crim. App. 1981).

[98] IND. CODE ANN. § 35-42-4-8(a)(1).

[99] N.J. STAT. ANN. § 2C:14-2(b).

[100] *Id.* § 2C:14-3.

[101] *Id.*

[102] *Id.* § 2C:14-1(d).

fines "intimate parts" as including the "sexual organs, genital areas, anal area, inner thigh, groin, buttock or breast of a person."[103]

California includes a misdemeanor sexual battery offense that appears broader than the laws of Alabama, Indiana, and New Jersey.[104] In California, misdemeanor sexual battery is committed when a person "touches an intimate part" of another person and the touching is "against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse."[105] California defines "intimate part" as the sex organs, anus, groin, or buttocks of any person, and the breast of a female.[106] Further, the touching may be direct or through the clothing of either party.[107] Unlike the other states canvassed, California does not require forcible compulsion.[108] This distinction is extremely important in situations where, for example, an offender grabs his victim without any independent threat or forcible act beyond the sexual touching itself.

Courts in Indiana have faced the question of what constitutes forcible compulsion. In 1991, the Indiana Supreme Court found insufficient evidence of force in a case in which the defendant grabbed a co-worker's buttocks and announced that he had received a "free feel."[109] In finding the evidence insufficient to support the conviction for touching by force, the court observed that not all unwanted touching constitutes touching by force.[110]

More recently, an Indiana appellate court distinguished *Scott-Gordon*.[111] In *Bailey v. State*,[112] the court upheld the offender's conviction. The court focused on additional facts that it found relevant: Bailey had previously asked if he could come home with her and "pull down her pants,"[113] and the victim previously witnessed Bailey masturbating in a park.[114] Additionally, the victim had made clear to

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[103] *Id.* § 2C:14-1(e).

[104] CAL. PENAL CODE § 243.4 (West, Westlaw through 2009 legislation).

[105] *Id.* § 243.4(e)(1).

[106] *Id.* § 243.4(g)(1).

[107] *Id.* § 243.4(e)(2).

[108] *Compare id.* § 243.4 *with* ALA. CODE § 13A-6-66 (West, Westlaw through 2009 Sess.) *and* IND. CODE ANN. § 35-42-4-8 (West, Westlaw through 2009 1st Spec. Sess.).

[109] Scott-Gordon v. State, 579 N.E.2d 602, 604 (Ind. 1991).

[110] *Id.*

[111] Bailey v. State, 764 N.E.2d 728, 730–31 (Ind. Ct. App. 2002).

[112] *Id.* at 729.

[113] *Id.*

[114] *Id.* at 730.

Bailey that she wanted him to leave her alone.[115] That sufficed to show that Bailey forced his victim to submit to his touching.[116] While the court did not explicitly frame it this way, the opinion suggested that as long as the defendant is on notice that his advances are unwelcome, subsequent contact will satisfy the force element.

The court went further, holding in the alternative that imminent threat of force element was met because sexual battery should be judged from the perspective of the victim when a fact finder is "determining whether the presence or absence of forceful compulsion existed."[117] Judged from this perspective, the court found that the victim had a reason to fear Bailey.[118]

Bailey's gross misconduct notwithstanding, the appellate court's decision is open to criticism, as the dissent points out.[119] The dissent summed up the most obvious problem with the majority's approach as follows:

> [B]ailey simply ran from behind Adams and grabbed or touched her on the buttocks. The record is void of any evidence that Adams was even aware of Bailey's approaching her from behind before the touching occurred, let alone that she was compelled or forced by Bailey to submit to the touching.[120]

Other courts have faced a similar interpretive problem in a closely related context. Both the New Jersey[121] and California[122] Supreme Courts have had to resolve whether an offender commits rape or, in New Jersey, "forcible sexual assault," which requires "an act of sexual penetration,"[123] when the only act of force is the force inherent in the act of intercourse itself. In a widely reported case, a unanimous New Jersey Supreme Court effectively read "force" out of its statute.[124] In *M.T.S.*, a seventeen-year-old boy engaged in heavy petting with a fifteen-year-old girl, resulting in an act of penetration to which the girl did not consent.[125] The juvenile court found the boy guilty of forcible sexual assault despite the absence of any force beyond that

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[115] *Id.* at 729–30.
[116] *Id.* at 731.
[117] *Bailey*, 764 N.E.2d at 731.
[118] *Id.* at 732.
[119] *See id.* at 732–33 (Darden, J., dissenting).
[120] *Id.* at 733.
[121] *See* State *ex rel.* M.T.S., 609 A.2d 1266, 1269–70 (N.J. 1992).
[122] *See* People v. Griffin, 94 P.3d 1089, 1094 (Cal. 2004).
[123] N.J. STAT. ANN. § 2C:14-2(c)(1) (West 2005).
[124] *See M.T.S.*, 609 A.2d at 1277.
[125] *See id.* at 1267–68.

inherent in the act of intercourse itself.[126] Notwithstanding the inclusion of a force element and the absence of a consent element in the statute, the New Jersey Supreme Court found that the necessary force is met whenever a person achieves penetration in the absence of affirmative and freely-given permission.[127] California did not go as far as New Jersey in reducing the force element and conflating it with consent. But in rape cases, the California Supreme Court has held that nothing in the term "force" suggests that the necessary force for rape must be "*substantially* different from or *substantially* greater than" the force normally inherent in sexual intercourse.[128]

While both of these cases involved penetration as opposed to the other sexual touching present in the two Italian cases discussed above, they remain informative and relevant. They may lend some guidance on how a court would interpret the force element in sexual battery cases where the sexual battery includes sexual touching without penetration. Prior to the late twentieth century and the adoption of sexual assault offenses, it is doubtful that American law would have been broad enough to cover the kind of conduct in the two Italian cases.[129]

That said, modern sexual assault statutes appear broad enough to include A.M.'s slap on the buttocks as a prohibited act of sexual assault. Such an act seems like the kind of invasion of one's privacy and individual dignity that the *Model Penal Code* targeted in its sexual assault offense.[130] This kind of touching comes within the definition of sexual contact set out in all four of the statutes canvassed above.[131] For example, under Alabama law, a slap on the buttocks would constitute "sexual conduct," or touching "done for the purpose of gratifying the sexual desire of either party."[132] Almost certainly, the touching of the buttocks would come within the Alabama Court of Criminal Appeals's holding that the statute includes the touching of

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[126] *See id.* at 1269.

[127] *Id.* at 1277.

[128] People v. Griffin, 94 P.3d 1089, 1094 (Cal. 2004).

[129] A question posted on the Criminal Law professors' listserv, asking whether anyone was aware of a case like that of G.G. or A.M., produced no similar cases with the exception of one instance discussed below (involving a juvenile victim). *See infra* notes 156–177 and accompanying text.

[130] *See* MODEL PENAL CODE & COMMENTARIES § 213.4 cmt. 1 (1980).

[131] *See* ALA. CODE § 13A-6-60(3) (West, Westlaw through 2009 Sess.); CAL. PENAL CODE § 243.4(e)(1) (West, Westlaw through 2009 Sess.); IND. CODE ANN. § 35-42-4-8 (West, Westlaw through 2009 1st Spec. Sess.); N.J. STAT. ANN. § 2C:14-1(d) (West 2005).

[132] *See* ALA. CODE § 13A-6-60(3).

any part of the body that a reasonable person would consider "private."[133] The other statutes reviewed above also cover this situation. The touching of intimate body parts is included in both the California and New Jersey statutes.[134] Further, both of them include some reference to sexual gratification; that is, the touching is sexually driven and not, for example, a congratulatory pat on the buttocks common among coaches and athletes.[135] The element of sexual gratification would be proven, as in A.M.'s case, by the specific context in which the touching took place.

It is more difficult to ascertain whether the required element of force would be met under Alabama, Indiana, and New Jersey law. California's law seems most obviously met: it requires only that the touching be against the will of the person touched,[136] a fact that can be inferred from context as well as from the victim's testimony. The California law also includes the buttocks within its definition of the "intimate part" of the other person's body.[137] As the *Scott-Gordon* and *Bailey* cases demonstrate, Indiana law requires something more than a mere grabbing of the buttocks. In addition to the lack of consent, the state must also show some element of force or threat of force. The *Bailey* court found the threat of force element satisfied by past acts generating fear in the victim and by conduct judged from the victim's perspective,[138] but the dissent highlighted difficulties with this approach.[139] Similarly, a court in Alabama would have to determine whether the offense requires any force in addition to the sexual act itself. Absent a prosecution for the kind of conduct involved in A.M.'s case, one can only speculate how the New Jersey courts would resolve the question.

The case law is limited in this area. As *Bailey* and *M.T.S.* demonstrate (or in the case of *M.T.S.*, at least in the context of a crime similar to rape), some courts have been willing to read force expansively. But both *Bailey* and *M.T.S.* are open to criticism on statutory construction grounds.[140] Their broad reading of statutory elements to

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[133] *See* Parker v. State, 406 So. 2d 1036, 1039 (Ala. Crim. App. 1981).

[134] CAL. PENAL CODE § 243.4(e)(1); N.J. STAT. ANN. § 2C:14-1(d).

[135] MODEL PENAL CODE § 213.4 cmt. 2 (1980).

[136] CAL. PENAL CODE § 243.4(e)(1).

[137] *Id.* § 243.4(g)(1).

[138] Bailey v. State, 764 N.E.2d 728, 731–32 (Ind. Ct. App. 2002).

[139] *Id.* at 732–33 (Darden, J., dissenting).

[140] After all, the New Jersey legislature avoided using the term consent and instead used the element of force as the gravamen of the offense. *See* N.J. STAT. ANN. § 2C:14-2(c) (West 2005). The court's interpretation turned this upside down. *See* State *ex rel*

protect the underlying policy of the statute might lead a court to resolve any uncertainty against the offender in a case like A.M.'s, especially in light of his prior history of inappropriate sexual behavior. No doubt, the relative employment status of A.M. and his victims might also be deemed relevant to the force inherent in the situation.[141]

G.G.'s case presents a more questionable situation. An unwanted kiss would not appear to qualify as a sufficient touching under California or New Jersey law. The California statute requires the offender to touch "an intimate part" of another person.[142] But California defines this term as including "the sexual organ, anus, groin, or buttocks of any person, and the breast of a female."[143] California's failure to mention the lips or neck as an intimate part of the body would seem sufficient to prevent GG from qualifying under the law. Similar restrictions appear in New Jersey's statute.[144]

Less clear is whether a kiss might be a sufficient touching under Alabama and Indiana law. As indicated above, in Alabama, a sex offense is committed when a person "subjects another person to sexual conduct by forcible compulsion."[145] The statute defines "sexual conduct" as requiring touching for the purpose of "gratifying the sexual desire of either party."[146] The Alabama appellate court has defined "intimate parts" as "any part of the body which a reasonable person would consider private."[147] One might argue that the lips are an intimate part of the body, but reported cases in Alabama interpreting the "intimate parts" language have not involved cases where the conduct was as limited as kissing. For example, in one reported case, the defendant touched a fully clothed woman on her breastbone in a public place.[148] In another case, while pressing his knees on the woman's knees to pin her down, the defendant reached under the

M.T.S., 609 A.2d 1266, 1276–77 (N.J. 1992); *see also Bailey*, 764 N.E.2d at 733 (Darden, J., dissenting) (suggesting the difficulty with the majority's interpretation of the element of force).

[141] *Cf. Bailey*, 764 N.E.2d at 733 (Darden, J., dissenting) (discussing the relevance of an employer-employee relationship in a finding of force or threat of force).

[142] CAL. PENAL CODE § 243.4(e)(1) (West, Westlaw through 2009 Sess.).

[143] *Id.* § 243.4(g)(1).

[144] N.J. STAT. ANN. § 2C:14-1(d)–(e).

[145] ALA. CODE § 13A-6-66(a)(1) (West, Westlaw through 2009 Sess.).

[146] *Id.* § 13A-6-60(3).

[147] *See, e.g.*, Hutcherson v. State, 441 So. 2d 1048, 1052 (Ala. Crim. App. 1983) (quoting Parker v. State, 406 So. 2d 1036, 1039 (Ala. Crim. App. 1981)).

[148] *Hutcherson*, 441 So. 2d at 1049.

victim's dress and touched her thighs and stomach.[149] Obviously, a kiss can certainly be intended as an attempt to gratify one's sexual desire or to arouse it in the other person, but research uncovered no reported cases where Alabama courts had to resolve the question.

Indiana law presents the same legal issues as Alabama law. Its sexual battery offense, described above, requires a touching done with an "intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person."[150] As with the Alabama statute, in a case involving a kiss, a court would have to decide whether the kiss was done with the requisite intent to arouse.

A harder question would be whether a kiss constitutes sufficient force to satisfy the elements of sexual battery. Here, the inquiry above arises again. Whether a simple kiss, even an unexpected kiss, can be considered forcible raises the question of whether something more than the force inherent in the sexual act is required for a finding of force. In cases like *Bailey* and *M.T.S.*, courts have found that no other force is necessary.[151] For example, in *M.T.S.,* the court found that the defendant was guilty of rape based on the force necessary for the act of intercourse, but stipulated that the holding applies only when a reasonable person would be on notice that he lacked the other person's consent.[152] This may not be present in a case of a simple kiss. In *Bailey,* the two-judge majority found that the necessary force or threat of force was present because of a prior history between the victim and the defendant, which gave the victim a reason to fear the defendant on the particular occasion of his unwanted touching.[153]

G.G.'s case involved somewhat more force than that involved in a kiss. In resisting the defendant's kiss, the victim pulled away from him and placed her hand over his mouth. [154] After that, he again grabbed the victim and kissed her neck.[155] Under both Alabama and Indiana law, a court faced with the facts of G.G.'s case would have to determine whether the defendant's act of continuing to attempt to kiss the victim after she placed her hand over his mouth and signaled her disapproval constituted sufficient force under the law. In what-

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[149] *Parker*, 406 So. 2d at 1038.

[150] IND. CODE ANN. § 35-42-4-8 (West, Westlaw through 2009 1st Spec. Sess.).

[151] *See* Bailey v. State, 764 N.E.2d 728, 732 (Ind. Ct. App. 2002); State *ex rel* M.T.S., 609 A.2d 1266, 1278–79 (N.J. 1992).

[152] *M.T.S.*, 609 A.2d at 1277.

[153] *Bailey*, 764 N.E.2d at 732.

[154] Cass. pen., sez. III, 26 jan. 2006, n.19808, Guida al Diritto, n. 37, 2006, 89.

[155] *Id.*

ever manner the courts were to resolve the issue, it would be harder for the defendant to argue that he did not use force as compared to a case in which his only act was an initial unwanted kiss.

Research did not reveal a case in any of the four jurisdictions surveyed where the state brought a prosecution based solely on a kiss. The closest case, located through a posting on a Criminal Law professor listserv, was from Oregon.[156] *State v. Rodriguez*[157] involved a female defendant convicted of first degree sexual abuse,[158] an offense calling for a mandatory minimum punishment of seventy-five months in prison.[159] Rodriguez worked with at-risk youths.[160] She was twenty-four years old when she began working at the facility where she met the twelve-year-old victim.[161] She became closely involved in the life of the victim and his family.[162] Rumors circulated about the close relationship between the victim and defendant.[163] They frequently hugged and the defendant often put her arm around the boy when they walked together.[164] She allowed him to sit on her lap and he often kissed her on the cheek.[165] E-mails they exchanged confessed their love for one another.[166] Further, they took trips together, including two overnight trips.[167] They were also frequently alone together, including in the defendant's apartment.[168]

In the absence of any evidence of intercourse, the sexual abuse charge was based on a single brief encounter between the two partic-

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[156] *See* State v. Rodriguez, 174 P.3d 1100 (Or. Ct. App. 2007), *rev'd in part* 217 P.3d 659 (Or. 2009). My thanks to Ohio State Law Professor Doug Berman for bringing my attention to this case and for his extremely helpful blog, Sentencing Law and Policy. *See generally* Sentencing Law and Policy, http://sentencing.typepad.com/ (last visited Feb. 12, 2010).

[157] *Rodriguez*, 174 P.3d at 1101.

[158] OR. REV. STAT. ANN. § 163.427(1)(a)(A) (West, Westlaw through 2009 Sess.).

[159] *Id.* § 137.700(2)(a)(P). The severe punishment was part of a ballot measure approved by Oregon voters. State v. Skelton, 957 P.2d 585, 590 n.6 (Or. Ct. App. 1998). As many scholars have written, ballot measures are a poor way to determine criminal sentences. *See, e.g.*, FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA *passim* (2001).

[160] *Rodriguez*, 174 P.3d at 1101.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Rodriguez*, 174 P.3d at 1101.

[167] *Id.*

[168] *Id.*

ipants.[169] The act of first degree sexual abuse consisted of the following conduct, lasting approximately one minute:

> On February 14, 2005, a staff member named Villalobos saw defendant and the victim in the game room at the club. There were approximately 30 to 50 youths and at least one other staff member in the room. The victim, who had since turned 13, was sitting on a chair. Defendant, who had since turned 25, was standing behind him, caressing his face and pulling his head back; the back of his head was pressed against her breasts. Villalobos crossed the room and pointed defendant and the victim out to Malunay, another staff member, who had his back to them. Malunay turned and saw defendant run her hands along the victim's face and through his hair while the back of his head was against her breasts.[170]

The jury had to find that the defendant's conduct amounted to sexual contact, defined as "any touching of the sexual or other intimate parts . . . for the purpose of arousing or gratifying the sexual desire of either party."[171] Despite the limited amount of time involved in the encounter, the defendant did not challenge the sufficiency of the evidence of sexual contact.[172] Instead, the issue in the trial court, which found in her favor, and in the Oregon appellate court, was whether the mandatory minimum sentence of seventy-five months was cruel and unusual because it was disproportionate.[173] The appellate court reversed the trial court and found that the sentence would not "shock the moral sense of all reasonable people as to what is right and proper under the circumstances."[174]

Not only did the court have before it the absence of a claim of sufficiency of the evidence, but it also did not think that the issue was, when viewed in the abstract, that the defendant's conduct was so minor that the sentence would have been excessive.[175] Instead, the court focused on all of the circumstances, including the nature of the relationship between the defendant and victim (the victim, a young at-risk child, and the defendant, an adult in a position of trust and re-

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[169] *Id.* at 1101–02.
[170] *Id.*
[171] OR. REV. STAT. ANN. § 163.305(6) (West, Westlaw through 2009 Sess.).
[172] *Rodriguez*, 174 P.3d at 1103.
[173] *Id.* at 1103–05.
[174] *Id.* at 1106.
[175] *Id.* at 1105–06.

sponsibility, which the court concluded involved a serious abuse of trust).[176]

Even this case is not as extreme as G.G.'s two kisses. *Rodriguez* presents the special problem of sexual conduct in the context of an adult-child relationship, even if the sexual roles are reversed from the more stereotypical situation of an older male offender and a young female victim. Further, although not explicit in the court's opinion, a full reading of the opinion suggests that the judges assumed that the defendant and the victim had engaged in much more inappropriate conduct, probably sexual intercourse.[177] Thus, this is not a case in which a brief caress, without more, gave rise to criminal liability.

### *C. Punishment Under State Sexual Assault Law*

Before discussing the normative question, whether the Italian approach is sound, one must address what kind of punishment G.G. or A.M. might face if convicted of sex offenses under American law.

In Alabama, sexual abuse is a Class C felony[178] with a penalty of imprisonment for not less than one year and one day and not more than ten years.[179] A sex offender is required to register for the crime of sexual abuse and is limited with whom he or she can live.[180] A person convicted of certain offenses, including sexual battery, must register with the sheriff in the county of his or her residence and reregister if he or she moves to another county.[181] Further, unlike some more draconian state laws, the Alabama registry of sex offenders is open only to law enforcement officers and agencies.[182]

In California, the punishment for misdemeanor sexual battery may not exceed two thousand dollars or six months in county jail, with higher penalties if the offender was the victim's employer.[183] The California Penal Code requires the registration of every person convicted of specified felony sex offenses, as well as other offenses de-

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[176] *Id.* at 1106.

[177] *See id.* at 1101 ("Defendant took the victim with her on several trips to Bend and Spokane, [including two] overnight trips. The two were frequently alone together in her car, at her apartment, and at his home. They were seen alone together in her office at the club with the door closed.").

[178] ALA. CODE § 13A-6-66 (West, Westlaw through 2009 Sess.).

[179] *Id.* § 13A-5-6(a)(3).

[180] *Id.* § 13A-11-204(b).

[181] *Id.* § 13A-11-200.

[182] *Id.* § 13A-11-202.

[183] CAL. PENAL CODE § 243.4(e)(1) (West, Westlaw through 2009 legislation).

fined in the code.[184] In California, offenders who commit sexual battery or child sexual abuse are subject to registration requirements.[185] The offender must register as long as the offender lives in California.[186] The offender must register with the chief of police of the city "within five working days of coming into, or changing . . . residence" or location within the city.[187] The offender must register annually, within five working days of his or her birthday, to update his or her registration, providing his or her name, address, temporary location, and place of employment including the name and address of the employer.[188] Even more recently, as the result of an ill-conceived ballot initiative,[189] California has added a requirement that an offender convicted of a "registerable sex offense"[190] must submit to GPS monitoring for any term of parole.[191] Further, California's Department of Justice maintains a publicly accessible Web site that provides extensive data about each registrant.[192]

If these acts qualify as sexual battery in Indiana, the punishment would be imprisonment from six months to three years, with the advisory sentence being one and one-half years.[193] But Indiana has the least onerous registration requirement, applicable only if the person is convicted of child molestation under Indiana Code section 35-42-4-3.[194]

In New Jersey, a person convicted of sexual assault is also subject to registration.[195] The registrant may file a motion to be removed

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[184] 22 WEST'S CAL. JUR. 3D § 44 (2009).

[185] *See* CAL. PENAL CODE § 290 (describing registration requirements for persons convicted of sexual abuse under section 243.4 and for persons convicted under section 288 of lewd and lascivious behavior with a child under the age of fourteen).

[186] WEST'S CAL. JUR. 3D, *supra* note 184.

[187] *Id.*

[188] *See* CAL. PENAL CODE §§ 290, 290.012, 290.015.

[189] Bill Ainsworth, *Law to Boost Sex Offender Monitoring Falling Short*, SAN DIEGO UNION-TRIBUNE, Feb. 14, 2008, at A1, *available at* http://www.signonsandiego.com/uniontrib/20080214/news_1n14jessica.html.

[190] A "registerable sex offense" is one that requires registration under California Penal Code section 290(c). CAL. PENAL CODE § 3000.07 (West, Westlaw through 2009 legislation).

[191] *Id.* § 3000.07(a).

[192] *Id.* § 290.4; *see also* Vitiello, *supra* note 87, at 668–74 (providing a detailed discussion of the various registration requirements under California law).

[193] IND. CODE ANN. § 35-50-2-7 (West, Westlaw through 2009 legislation). In Indiana sexual battery is a Class D felony barring aggravated circumstances. *Id.* § 35-42-4-8(a).

[194] *Id.* § 35-42-4-11.

[195] N.J. STAT. ANN. § 2C:7-2 (West 2005 & Supp. 2008).

from the New Jersey State Registry if fifteen years have passed since the offender's last offense.[196]

The expansion of substantive sex offenses has occurred separately from the expansion of criminal penalties and other disabilities, like registration requirements.[197] The former, as in Italy, was driven by feminist concerns about the insensitivity of the law to women's plight.[198] The expansion of penalties, by contrast, has been an overheated reaction to the infrequent abduction and murder of young children, with resulting penalties applying far beyond the pathological sexual predator.[199]

Thus, were G.G. or A.M. convicted in an American jurisdiction, they might be subject to a wide variety of punishments and other disabilities, depending on the degree of the offense. Certainly, as indicated above, convicting A.M. is more plausible today than would be convicting G.G.

## IV. DO THE ITALIANS (OR THE AMERICANS) HAVE IT RIGHT?[200]

Should A.M.'s[201] and G.G.'s[202] conduct be criminalized? With regard to A.M., I have considerable ambivalence but believe unequivocally that G.G.'s conduct should not be criminal.

I should start with an admission and my first lesson as someone engaging in comparative law. Despite over thirty years of legal scholarship, this is my first comparative law article. My first lesson is no doubt obvious to any comparativist: comparing specific cases is uninformed unless one looks at the larger context—here, at the entire justice system. For example, as I develop below, much of my hesitation about criminalizing both A.M. and G.G. derives from analyzing both punishment of sex offenders in the United States and alternative remedies, including civil suits and workplace regulations, to deal effectively with unwanted sexual behavior.

As indicated above, broadly worded sexual assault statutes might encompass A.M.'s behavior.[203] But finding analogous cases is prob-

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[196] *Id.* § 2C:7-2(f).

[197] *See* Vitiello, *supra* note 87, at 651.

[198] *Id.* at 655–58.

[199] *Id.* at 674–85.

[200] That is, according to Professor Vitiello, do the Italians or Americans have it right?

[201] *See supra* Part II.B.

[202] *See supra* Part II.A.

[203] *See supra* notes 130–139 and accompanying text.

lematic. The two closest cases, both from Indiana, *Bailey v. State*[204] and *Scott-Gordon v. State*,[205] suggest some of the legal issues that a prosecutor might face in a case like A.M.'s. Not all jurisdictions have an offense as broadly defined as California's misdemeanor sexual battery, which criminalizes any unwanted sexual touching.[206] Instead, many jurisdictions, like Indiana, require an element of force.[207] In *Scott-Gordon*,[208] the Indiana Supreme Court recognized that the simple act of slapping a person's buttocks did not include a separate act of force. In *Bailey*, an Indiana appellate court distinguished *Scott-Gordon*.[209] In a somewhat strained reading of the state statute, the appellate court found the "force" element satisfied because of prior contact between the victim and defendant that put him on notice that his conduct was against her will.[210]

No doubt A.M.'s conduct would amount to battery and, in the jurisdictions that have it, something akin to California's misdemeanor sexual battery offense. But whether he should be guilty under statutes like those in Indiana,[211] New Jersey,[212] or Alabama[213] is a much harder question. The court in *Bailey* strained to find the force element satisfied, although it did so in a case which featured a troubling set of facts: Bailey had accosted the victim on prior occasions, including one in which the victim saw him masturbating.[214] Nevertheless, extending liability for "forcible" assault, without any act of force beyond the force of the sexual act itself, violates traditional principles of statutory construction, especially in criminal cases, where American courts typically follow the principle of lenity.[215] Such a strained reading of the statute, whereby the court borders on substituting its judgment for that of the legislature, also raises questions of separation of powers.

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[204] 764 N.E.2d 728 (Ind. Ct. App. 2002).

[205] 579 N.E.2d 602 (Ind. 1991).

[206] CAL. PENAL CODE § 243.4(e)(1) (West, Westlaw through 2009 legislation).

[207] IND. CODE ANN. § 35-42-4-8 (West, Westlaw through 2009 legislation).

[208] *Scott-Gordon*, 579 N.E.2d at 604.

[209] *Bailey*, 764 N.E.2d at 731–32.

[210] *Id.* at 732.

[211] IND. CODE ANN. § 35-42-4-8 (West, Westlaw through 2009 legislation).

[212] N.J. STAT. ANN. § 2C:14-3 (West 2005 & Supp. 2008).

[213] ALA. CODE § 13A-6-66 (West, Westlaw through 2009 Sess.).

[214] *Bailey*, 764 N.E.2d at 730.

[215] *See, e.g.*, United States v. Bass, 404 U.S. 336, 347–48 (1971); *see also* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 885 (2004) (stating that the rule of lenity "directs courts to construe statutory ambiguities in favor of criminal defendants").

Statutory interpretation aside, the far harder question is whether A.M. should be considered a sexual offender. Absent criminal liability, an offender like A.M. might be subject to civil liability in the United States. Thus, the victims might readily seek civil damages for battery, including punitive damages,[216] thereby providing deterrence and punishment for the offender. In addition, although such cases are few and far between, A.M. might be subject to criminal charges for simple battery.[217]

My hesitation in extending sexual offender laws (beyond, perhaps, misdemeanor sexual battery, like California's law) is based on the extreme penalties and collateral consequences of a finding that a person is a sex offender. While I recognize that A.M's behavior is distinct from a traditional battery because it implicates his victims' sexual autonomy, I remain troubled by A.M.'s case. The expansion of the law governing rape and related sex offenses, mainly a response to the feminist movement, took place largely independently of the movement to expand punishments for sex offenders.[218] Punishments for sex offenders have been driven by gruesome cases that make headlines in the news, involving offenders with long histories as sexual predators.[219] But the resulting statutes apply broadly, often to offenders who do not represent significant risks of continued misconduct.[220] Nonetheless, beyond being subject to long prison terms, these offenders may be subject to lifetime registration requirements, to having their personal information readily available to anyone who goes online to a state-sponsored Web site,[221] and to restrictions on where they can live (for example, not within a specified distance from a school or playground).[222]

Does the underlying conduct really deserve the kinds of punishments that are now provided in many state criminal codes? I think not; they are excessive.[223] If such sentences and other disabili-

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[216] *See, e.g.*, *Fall*, 33 F. Supp. 2d at 742; *see also* Smith v. Wade, 461 U.S. 30, 31 (1983) (demonstrating the ability to recover punitive damages under 42 U.S.C. § 1983).

[217] *See, e.g.*, IND. CODE ANN. § 35-42-2-1 (West, Westlaw through 2009 legislation).

[218] *See* Vitiello, *supra* note 87, at 653–54.

[219] *Id.* at 667.

[220] *Id.* at 669–72.

[221] *Id.* at 672.

[222] *Id.*

[223] Despite the Supreme Court of Georgia's holding in *Humphrey v. Wilson*, 652 S.E.2d 501, 510–11 (Ga. 2007), American courts seldom overturn criminal sentences as excessive. *Cf.* Ewing v. California, 538 U.S. 11, 29–31 (2003) (upholding a sentence of twenty-five years to life in prison for a third felony, a theft offense).

ties, like registration requirements, are beyond the offenders' deserts, do they serve other penal purposes? In many cases, they do not. Harsh penalties for sex offenders have been driven by statistically aberrational cases[224] and apply to a wide range of sexual activity not posing similar grave risks of harm.[225] Legislatures have enacted sex offender punishments based on misperceptions of the nature of sex offenders and their likely recidivism rates.[226] Neither adult nor teenage sex offenders constitute wholly homogenous groups, and many do not suffer from sexual pathologies.[227] Indeed, sex offenders are "relatively unlikely to commit future sexual offenses."[228] Further, researchers have been able to identify factors that correlate with recidivism, making predictions about the need for incarceration more accurate.[229] Placing some low-risk offenders in prison may even increase the likelihood that they will re-offend.[230]

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[224] *Cf.* LAWRENCE A. GREENFELD, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 27 (1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/soo.pdf ("Since the latter half of the 1980's, the percentage of all murders with known circumstances in which rape or other sex offenses have been identified by investigators as the principal circumstance underlying the murder has been declining from about 2% of murders to less than 1%.").

[225] *See, e.g.*, *Humphrey*, 652 S.E.2d at 502. But for the court's disposition of the case, Wilson, a seventeen-year-old male, would have spent ten years in prison and been subject to lifetime registration requirements for receiving consensual fellatio from a fifteen-year-old girl. *Id.* at 502–03. The underlying conduct—sex between underage individuals—is remarkably common in the United States. *See* FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING 52 (2004).

[226] *See* ZIMRING *supra* note 225, at 28 (stating that "recent legislation and policymaking" are partly based on the assumption that sex offenders specialize in sex offenses, but that "[m]ost repeat criminals are generalists whose criminal histories comprise a variety of different types of offense[s]"); *see also id.* at 29 ("When serious sex offenders are compared with those who commit theft or violent crimes, the prevalence of a distinct pathology is greater among sex offenders, but there is nevertheless substantial heterogeneity in almost every category of severe sex crime.").

[227] *Id.* at 29.

[228] *See* John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 570–72 (2006).

[229] *See* MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. e (Tentative Draft No. 1, 2007) ("[A]ctuarial measures for predicting the risk of recidivism posed by individual offenders have become more powerful over time."); R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. CONSULTING & CLINICAL PSYCHOL. 1154, 1158–59 (2005) (discussing the "predictors" of sexual recidivism); Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recidivism?*, 3 U. ST. THOMAS L.J. 521, 532–33 (2006) (discussing "[f]our major factors . . . significantly related to recidivism"); Christopher T. Lowenkamp & Edward J. Latessa, *Increasing the Effectiveness of Correc-*

The prosecution of A.M. may have had special significance in Italy, where, at least consistent with the cultural stereotype, men frequently got away with slapping women's buttocks.[231] Judges might have believed that an expansive interpretation of article 609-*bis* was justified to make a statement that Italy would no longer tolerate that kind of behavior. In effect, the judges might have been motivated by a special need to deter a particular kind of offensive behavior. If that speculation is correct, American courts would not have a similar motive to send a message about that particular kind of behavior that, while certainly present, is not epidemic among American men.[232]

I am more certain that G.G.'s conduct should not be criminalized. As a simple matter of statutory construction, one can argue that G.G.'s conduct does come within some sexual offense laws.[233] Further, G.G. violated his victim's autonomy by attempting to kiss her twice and attempting to move her head to view the beautiful vistas. But that hardly ends the inquiry. The concerns that I raised above—for example, the excessive penalties for sex offenders—are even more troubling in a case like G.G.'s than in one like A.M.'s. My hesitation is that an unwanted kiss is likely to arise in too many ambiguous situations to leave the blundering male open to criminal prosecution.

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*tional Programming Through the Risk Principle: Identifying Offenders for Residential Placement*, 4 CRIMINOLOGY & PUB. POL'Y 263, 270–71 (2005) (finding that an offender's "risk score demonstrate[s] fair predictive validity" of reincarceration and that "recidivism rates increase substantially with each category of risk"); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 406–08 (2006) ("Recent research . . . indicates that the predictive validity of actuarial [or statistical] instruments has significantly improved in the past twenty years. . . . In the past several years . . . a number of violence risk assessment tools have become available . . . ."); Robert A. Prentky et al., *Introduction*, 989 ANNALS N.Y. ACAD. SCI. ix, xi (2003) ("[T]here has been a dramatic increase in the development, validation, and revision of risk assessment procedures during the past decade."); Stinneford, *supra* note 228, at 570–72 (2006) (discussing the factors associated with increased risk of reoffending based on the findings of studies involving nearly 60,000 sex offenders).

[230] *See, e.g.*, Lowenkamp & Latessa, *supra* note 229, at 283–84 (finding "substantial" increases in recidivism rates for low and moderate risk offenders admitted into residential treatment programs and discussing the "importance of studying the different effects of programs [on] distinct groups of offenders").

[231] *See generally* Ella Ide, *Charm of Italian Men is Lust in Translation*, TELEGRAPH (London), Feb. 14, 2008, at A1, *available at* http://www.telegraph.co.uk/global/main.jhtml?xml=/global/2008/02/14/exlustitalia.xml.

[232] Lisa Litterio, *Beware of the Natives in Italy*, THE CRUSADER (College of the Holy Cross), Nov. 5, 2004, at A1, *available at* http://media.www.thehccrusader.com/media/storage/paper568/news/2004/11/05/Features/Beware.Of.The.Natives.In.Italy-795900.shtml (discussing the more socially aggressive nature of Italian men as compared to American men).

[233] *See supra* Part IV.

Thus, G.G. may have believed that his victim was interested in him. While his victim had to make her lack of consent clear twice, G.G.'s clumsy attempts seem to have ended once his second kiss was rebuffed, suggesting that he got the point, if belatedly.

Of course, G.G. may have had a mens rea defense; that could be sufficient to protect him as being a fool, rather than a sex offender. Mens rea defenses, at least in the United States, are a bit tricky: in rape cases, where states allow a mistake-of-fact defense, it remains an affirmative defense, with the burden on the offender to prove that his mistake was reasonable.[234] That means that a sex offender may be found guilty based on a civil negligence standard without subjective awareness of his mistake or without having taken a higher degree of risk than the level needed for civil liability.[235] At the end of the day, I remain convinced that a kiss is just a kiss.[236] We are at risk of over-criminalizing so many aspects of our lives; at least, short of a strong need for social protection, we should leave kissing out of the purview of the criminal law even if it comes within the literal language of broadly drafted sex offender statutes.

## V. TWO NOTEWORTHY AMERICAN CASES

Sexual mores have changed dramatically in the United States since the 1950s. A majority of teenagers under the age of legal consent are sexually active.[237] Despite that, some prosecutors have shown an increased interest in pursuing statutory rape cases in recent years.[238] One commentator explains this continued interest in criminal prosecutions as a product of concern about the high number of teen pregnancies.[239] Others justify the increased use of the criminal law in sex cases involving minors by reference to concern about the

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[234] *See infra* notes 268–272 and accompanying text.

[235] Commonwealth v. Sherry, 437 N.E.2d 224, 233 (Mass. 1982) ("[D]efense of mistake of fact [for the crime of rape] requires that the accused act in good faith and with reasonableness.").

[236] I have no doubt that 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. Apart from the infrequency of such conduct, I suspect that even without a specific sex offense, traditional crimes like simple battery can provide sufficient protection.

[237] ZIMRING, *supra* note 225, at 52–53.

[238] Rigel Oliveri, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 475 (2000).

[239] Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape,* 48 BUFF. L. REV. 703, 706 (2000).

potential abuse of minors at the hands of adults.[240] Neither of those concerns explains the first noteworthy case that made headlines in the United States.

*A. Genarlow Wilson*

Seventeen-year-old Genarlow Wilson was one of a number of teenagers who rented adjoining motel rooms for an unsupervised New Year's Eve party.[241] During the course of the evening, Wilson was videotaped engaging in two sex acts.[242] The videotape showed him engaging in intercourse with one girl and an act of fellatio with another girl.[243] Both girls were under the age of consent, resulting in one charge of rape and one count of aggravated child molestation.[244] At trial, Wilson was acquitted of rape but found guilty of the molestation charge, resulting in a mandatory sentence of ten years in prison without the possibility of parole.[245]

Wilson argued on appeal that the ten-year prison term violated equal protection.[246] Specifically, under Georgia law, a seventeen-year-old who engages in intercourse with a female minor over the age of fourteen would be guilty of a misdemeanor.[247] By comparison, a seventeen-year-old who engages in an act of sodomy with a minor is guilty of a felony, subject to the mandatory minimum sentence.[248] The Georgia appellate court rejected this argument.[249]

Wilson subsequently filed a habeas corpus petition in state court, which found that the sentence constituted cruel and unusual punishment.[250] The state supreme court affirmed the trial court's finding that the sentence was grossly disproportionate under both the

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[240] MODEL PENAL CODE § 213.3 cmt. 3 & n.4 (1980).

[241] Wilson v. State, 631 S.E.2d 391, 392 (Ga. Ct. App. 2006).

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *Id.* at 392–3.

[247] GA. CODE ANN. § 16-6-3(b) (West, Westlaw through 2009); *Wilson*, 631 S.E.2d at 392–93.

[248] *Wilson*, 631 S.E.2d at 392. The Georgia legislature has amended that provision, making the seventeen-year-old offender's conduct a misdemeanor today. *See* GA. CODE ANN. § 16-6-4 (West, Westlaw through 2009); H.B. 123, 2009–2010 Leg., Reg. Sess. (Ga. 2009) (enacted).

[249] *Wilson*, 631 S.E.2d at 393.

[250] Humphrey v. Wilson, 652 S.E.2d 501, 502 (Ga. 2007).

Eighth Amendment to the United States Constitution and the Georgia Constitution.[251]

Beyond the scope of this Article is whether the holding was consistent with the precedent of the Supreme Court of the United States.[252] Suffice it to say that many observers undoubtedly were relieved that the court intervened and ordered the release of a young man whose behavior seemed foolhardy but hardly the kind of serious criminal conduct that should send him to prison for ten years.[253] For purposes of this Article, the case shows the long prison sentences meted out to some sexual offenders.[254]

### *B. Kobe Bryant*

The second headline case involves National Basketball Association superstar Kobe Bryant, perhaps of special interest to an Italian audience because he grew up in Italy, where his father, also a former NBA player, resumed his career playing for several Italian teams.[255]

In 2003, the state of Colorado filed a criminal complaint alleging that Kobe Bryant committed forcible sexual penetration of a woman against her will.[256] The episode took place in Bryant's hotel room.[257] After a nineteen-year-old hotel employee gave Bryant a tour of the hotel, they went to his room where they engaged in intercourse.[258]

The case drew national attention, but never went to trial.[259] Prosecutors dropped the charges, in part because the young woman

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[251] *Id.* at 505.

[252] *See, e.g.*, Ewing v. California, 538 U.S. 11 (2003) (upholding a sentence of twenty-five years to life in prison for a third felony, a theft offense).

[253] Brenda Goodman, *Man Convicted as Teenager in Sex Case Is Ordered Freed by Georgia Court*, N.Y. TIMES, Oct. 27, 2007, at A9.

[254] Since the U.S. Supreme Court's holding in *Lawrence v. Texas*, 539 U.S. 558 (2003) found a constitutional right to privacy sufficiently broad to encompass consensual homosexual conduct, virtually all sexual acts between consenting adults are protected. Notable exceptions are acts of incest and plural marriages. By contrast, *State v. Rodriguez*, 174 P.3d 1100 (Or. Ct. App. 2007), *rev'd in part*, 217 P.3d 659 (Or. 2009) and *Wilson v. State*, 631 S.E.2d 391 (Ga. Ct. App. 2006) demonstrate severe penalties when one of the participants is a minor, even when the minor gives "factual" consent.

[255] Wayne Coffey, *Father Time: Kobe'* [sic] *Dad an Ageless Wonder in ABA*, NEW YORK DAILY NEWS, Jan. 16, 2005, at 106.

[256] People v. Bryant, 94 P.3d 624, 627 (Colo. 2004).

[257] Associated Press, *Suit Settlement Ends Bryant Saga*, MSNBC NEWS, Mar. 3, 2005, http://nbcsports.msnbc.com/id/7019659.

[258] Kirk Johnson et al., *As Accuser Balks, Prosecutors Drop Bryant Rape Case*, N.Y. TIMES, Sept. 2, 2004, at A1.

[259] *Id.*

also brought civil charges.[260] Her civil suit settled, without the terms of settlement being made public.[261]

Accounts of the case suggest that it fits within a common fact pattern: the publicized version of the events suggests a situation in which the man mistakenly believed that the woman had consented to intercourse, partially due to her consent to some acts short of intercourse.[262] As Bryant later admitted publicly, he believed that the intercourse was consensual but indicated that he "recognize[s] now that she did not and does not view this incident the same way I did."[263]

Had the case been tried, it would have presented one of the most important questions in current American rape law. As rape law expanded during the 1970s and 1980s through the influence of feminist groups, prosecutors began at least occasionally prosecuting cases of acquaintance rape.[264] In such cases, guilt may turn on directly conflicting testimony as to the participants' behavior; that is, the man may describe a completely different set of facts than the woman presents.[265] But in some cases, even accepting the woman's version of the facts, guilt or innocence may turn on whether a mistake of fact exists as to the presence of consent.[266] And here, American jurisdictions vary in their approaches to the legal question.[267]

In theory, the law ought to follow the general rule governing mistakes of fact, now reflected in *Model Penal Code* section 2.04(a),[268] that a mistake of fact is relevant insofar as it negates the relevant mens rea of the offense. The House of Lords took that approach in *Regina v. Morgan*.[269] But American courts refused to follow *Morgan*.[270] Instead, American courts have followed one of two approaches to the

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[260] *Id.*

[261] Associated Press, supra note 257.

[262] *Compare* Interview by Dan Loya & Doug Winters with Kobe Bryant in Eagle County, Cal. (July 2003), *available at* http://www. thesmokinggun.com/archive/0924041kobea1.html (last visited Feb. 12, 2009) (discussing Bryant's perspective on the events) *with* Associated Press, *Rape Case Against Bryant Dismissed*, MSNBC NEWS, Sept. 2, 2004, *http://nbcsports.msnbc.com/id/5861379* (discussing victim's perspective on the events).

[263] Tom Kenworthy & Patrick O'Driscoll, *Judge Dismisses Bryant Rape Case*, USA TODAY, Sept. 2, 2004 at 1A.

[264] *See, e.g.*, Commonwealth v. Sherry, 437 N.E.2d 224 (Mass. 1982).

[265] *See, e.g.*, *id.* at 227.

[266] *Id.*

[267] *See* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 51, at § 33.05 (describing different approaches of courts to mistake of fact situations).

[268] MODEL PENAL CODE & COMMENTARIES § 2.04(1)(a) (1985).

[269] *See generally* [1976] A.C. 182 (H.L.) (appeal taken from Eng.) (U.K.).

[270] *See, e.g.*, *Sherry*, 437 N.E.2d at 233.

question: Some have held that the defendant must prove that his mistake is reasonable,[271] while others have held that if the woman initially says no, the defendant proceeds at his own risk.[272]

The question is a difficult one. To borrow a phrase from Catherine MacKinnon, if the man has a reasonable mistake defense, "a woman is raped but not by a rapist[.]"[273] A woman's sense of autonomy may be equally violated whether the man knew that he was proceeding without her consent or not. And yet, rape is graded a serious felony, often a crime of violence, with commensurate criminal penalties and other disabilities—including, as discussed above, registration for life.[274] Elsewhere, the debate over some subjective awareness of serious crimes is largely settled, absent some compelling policies to the contrary, and even where the criminal law abandons subjective mens rea, it requires more than mere negligence, the civil tort standard.[275]

## VI. HOW WOULD AN ITALIAN COURT TREAT WILSON AND BRYANT?

Under Italian law, Wilson would certainly be acquitted. The age of consent in Italy is fourteen and there are no exceptions related to the nature of the sexual acts committed.[276]

A case like Kobe Bryant's may be more debatable in its judicial outcome, even though Italian law, at least in theory, is quite clear in this respect. Under Italian criminal code, rape is no exception to the general rules regarding mens rea.[277] This means that any mistake of fact on the part of the actor negates the relevant mens rea (dolo), including, in principle, even an unreasonable mistake. Of course things might be more questionable when it comes to trials and judicial decisions. If the defendant argues that he believed that the woman was consenting, the judge—there is no jury in Italian trials

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[271] *See, e.g.*, People v. Stitely, 108 P.3d 182, 208 (Cal. 2005).

[272] *See, e.g.*, Commonwealth v. Simcock, 575 N.E.2d 1137, 1140 (Mass. App. Ct. 1991).

[273] Catherine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence,* 8 SIGNS 635, 654 (1983).

[274] *See* Vitiello, *supra* note 87, at 672.

[275] *See* MODEL PENAL CODE & COMMENTARIES § 2.02 (1985); DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 51, at 140– 42.

[276] *See* C.P. art. 609-*quater*.

[277] *See* C.P. art. 43. For an example of case law on rape defining mens rea, see Cass. pen., sez. III, 30 mar. 2000, Rivista penale 2000, 687.

concerning rape[278]—simply might not believe his allegations. But if the judicial findings confirm the mistake alleged by the defendant, his defense will be successful. Given the publicly available information regarding Bryant's case, he would likely be acquitted in an Italian court because of mistake of fact.

## VII. DO THE ITALIANS (OR THE AMERICANS) HAVE IT RIGHT?[279]

Turning to more general points, both Italian and American laws on sexual offenses show some relevant defects. Italian law, from 1996 on, contains one single offense of rape.[280] This means that all kinds of acts of a sexual nature give rise to the same single offense of rape. A simple kiss on the cheek and the most heinous form of violent sexual penetration will lead to a conviction for the same sexual offense.[281] The different amount of force is not even relevant, because rape can be committed by a sudden and fleeting slap on the buttock or by threatening the victim with a knife.[282]

The lack of variety of sexual offenses under Italian law creates confusion and unfair judicial outcomes. Italian courts do not want to leave Italian sex offenders unpunished and their victims unprotected, and they tend to convict in cases that fall short of what most consider rape. This explains why cases such as G.G. and A.M. find such surprising decisions in court. Italian law should develop a more structured system of sexual offenses, categorizing them from the most lenient to the most serious ones. With such a framework in place, Italian courts would certainly come to more understandable decisions.

With regard to American law, I agree with Professor Vitiello. On the one hand, some of the offenses seem to be too harshly drafted, such as seen in Professor Vitiello's discussion of Georgia law above;[283]

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[278] *See* CODICE DI PROCEDURA PENALE [C.P.P.] arts. 5–6 (Italy); Law No. 287 of 10 apr. 1951, art. 3, Gazz. Uff. No. 102, 7 may 1951 (Italy); Royal Decree No. 12 of 30 jan. 1941, arts. 42-*bis* to 43, Gazz. Uff. No. 28, 4 feb. 1941.

[279] That is, according to Professor Cadoppi, do the Italians or Americans have it right?

[280] The other sex offenses can be considered "satellites" of the only sex offense described by C.p. art. 609-*bis*.

[281] For some examples of cases where the Supreme Court discussed whether kisses could lead to a conviction for rape, see Cass. pen., sez. III, 13 feb. 2007, n. 25112, Rev. Pen. 2007, 989, 990; Cass. pen., sez. III, 5 oct. 2006, n. 37561, Guida al Diritto 2007, 71, 71; Cass. pen., sez. III, 4 dec. 1998, n. 212821, Giust. Pen. 1999, II, 584, 585; Cass. pen., sez. III, 27 apr. 1998, DiFrancia, Guist. Pen. 1999, II, 135, 139.

[282] *See* Cadoppi, *supra* note at 17, at 499–504 (analyzing the case law and commenting on the Italian provisions on rape).

[283] See *supra* notes 241–251.

on the other hand, general principles such as mens rea should not be altered in the context of rape, because such exceptions can lead to discrimination among various types of offenders. Of course, there is room for minor offenses where the *actus reus* or the mens rea is less serious; such offenses could provide for criminal negligence as the minimum subjective element.

But the consequences of sexual offenses in American law—as Professor Vitiello has demonstrated elsewhere and here as well—are very harsh, and they apply normally both to serious and less serious sexual offenses.

I personally agree that victims of sexual crimes must be protected by the criminal justice system; thus, I agree with some provisions, such as the registration of sexual offenders. But such measures should only apply to the most serious cases and to the most vicious offenders, especially to offenders with a high risk of recidivism.

With these specifications, Italian law should provide for some more effective measures in order to reduce the rate of recidivism in these matters. The Italian legislature is now discussing introducing some form of "chemical castration," which should be applied only in particular cases and with the consent of the offender.[284]

The criminal law should be tailored to reflect criminal behaviors, and criminal sanctions and measures should be fair and proportional to the crime and to the need of society. When laws depart from such a rule, they create injustice and lead citizens to lose confidence in the criminal justice system as a whole.

[284] *See* Modifiche al codice penale e altre disposizioni per la lotta contro la pedofilia, S. 458, XVI Leg., arts. 6–7 (2008) (Italy).