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A Kiss is Just a Kiss, or is it? A Comparative Look at Italian and American Sex Crimes

By Alberto Cadoppi* and Michael Vitiello**

I. Introduction

This article began as a conversation between two criminal law scholars during the summer of 2007 at the University of Parma's seminar on Current Developments in European Law.¹ During his lecture, Professor Cadoppi described some of the challenging sexual offender cases under Italian law. In the course of their subsequent conversations, Professors Cadoppi and Vitiello began comparing some of the headline cases in American criminal law and realized that their conversation was the beginning of an article on comparative sexual offenses, Italian and American style.

Cadoppi's lecture developed two especially poignant cases: 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); in the second, the offender's conduct consisted of slapping the victim's bottom. Vitiello's surprise focused on two aspects of those cases: the first was how far Italy has come from the days when women routinely put up with the sexually aggressive behavior of Italian men. After all, this is the country where a judge, not long ago, made international headlines by announcing a

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¹ Department of Criminal Sciences University of Parma in co-sponsorship with the Temple University Beasley School of Law, Summer Advanced Seminar for United States Academics and Judges on Current Developments in European Law available at <http://www.penale.unipr.it/seminar.htm> (discussing information on the ten day advanced summer seminar on trends in European law and policy).

rule that a man could not possibly rape a woman wearing tight blue jeans.² The second was that both of the cases were charged as sexual violence, the Italian offense most similar to rape.³

Even though American law has responded to feminist concerns about sexual autonomy, Vitiello expressed the largely intuitive response that such conduct would not be prosecuted as sex offenses under American law.⁴ More importantly, he doubted that either case would amount to rape and further that he had doubts whether either case should be treated as a violation of sex offender laws. Cadoppi agreed and thought that the Italian courts had the cases wrong through a bad interpretation of the relevant statute.

As the dialogue progressed, Vitiello posed two American cases to see how far Italian law differed from American law. The first was then working its way through the Georgia state courts and involved a then-seventeen year old who had factually consensual oral sex with a fifteen year old girl at a holiday party, conduct was captured on a cell phone camera. The other involved basketball superstar Kobe Bryant and allegations that he raped a hotel employee. Although the case never went to trial, various versions of the facts were widely reported. As the facts seemed to emerge, the case presented the now more publicly discussed kind of case in which a woman has not consented to intercourse but the man believes that she has.

By the end of the discussion, Cadoppi and Vitiello agreed to do a comparative article. The structure of that article is as follows: section II develops the Italian cases, including their disposition in Italy. In section III, Vitiello then discusses how those cases would be resolved under American law. In section IV, he discusses normative concerns and, especially in light of

² Cass. III 6.11.1998, Cristiano, in *Cassazione Penale*, 1999, p. 2194 ss. See Alessandra Stanley, Ruling on Tight Jeans and Rape Sets Off Anger in Italy, N.Y. Times, Feb. 16, 1999, available at <http://query.nytimes.com/gst/fullpage.html?res=9406E0D7133AF935A25751C0A96F958260&sec=&spon=&pagewanted=all> (last visited Dec. 22, 2008).

³ Art. 609-bis codice penale (hereinafter c.p.) available at <http://www.caritas.it/Documents/25/2177.pdf> (last visited Dec. 22, 2008).

⁴ See *Bailey v. State*, 764 N.E. 2d 728 (Ind. App. 2002) (where an Indiana appellate court decision demonstrates that Vitiello's intuitive response was wrong). But see, *Scott-Gordon v. State*, 579 N.E. 2d 602 (Ind. 1991) (where a grab of the buttocks was not alone sufficient to meet the force element of the statute).

America's stepped up punishments for sexual offenders, questions whether those offenses should be treated as sexual offenses in American jurisdictions.

Section V develops the two American cases. In section VI, Cadoppi explores how the two American cases would be resolved under Italian law. In section 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

In 1994, an assistant chief of the state police commanded his colleague to meet him at nighttime at an isolated beach. The accused, "G.G.," shut off the engine of his service vehicle and made a pass at his colleague "R.C." He attempted to kiss her. She resisted and placed her hand over his mouth in order to stop him. He then commanded her to drive to a place with panoramic view where he grabbed her and kissed her neck. She openly objected.⁵

G.G. was charged with violating Italian Criminal Statute Article 609-*bis* c.p.⁶ Prior to 1996, rape was a crime against public morality, not a crime against the person.⁷ Like changes in rape law elsewhere, Article 609-*bis* c.p. was a victory for feminists and raised public awareness about violence towards women.⁸ The law is now unequivocally a crime against the person. Unlike traditional rape laws, Article 609-*bis* c.p. does not require penetration. 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."⁹

⁵ Cass., sez. ter., 26 jan 2006, n.19808, available at <http://www.penale.it/page.asp?mode=1&IDPag=306> (last visited Dec. 22, 2008) or in *Guida al diritto*, n. 37, 2006, p. 88

⁶ *Id.*

⁷ V. art. 519 c.p.,

⁸ For an analysis of the Italian law see A. CADOPPI (directed by), *Commentario delle norme contro la violenza sessuale e contro la pedofilia*, IV ed., Padova, 2006, p. 439 ss.

⁹ *Id.*; see also C.P. 609-*bis* c.p., (full citation at note 3)

Convicted in 2000 and sentenced to sixteen months in prison, G.G. appealed his conviction. He contended, in part, that the evidence was insufficient because his acts were mere “advances,” and that R.C.’s autonomy was not impaired. The court denied the appeal.¹⁰

The court focused on how to interpret the “sexual acts” language of the article. The interpretation was broad, including any conduct involving carnal touching. More specifically, a sexual act can include any one that results in bodily contact between an actor and his passive subject, even if fleeting and otherwise endangering the subject’s sexual self-determination.¹¹ Thus, Article 609-*bis c.p.* encompasses not just acts involving the genitals, but includes any erogenous areas. A court may determine what is an erogenous zone by reference to medical, psychological and sociological-anthropological sciences.¹²

On that reasoning, a person from a culture whose members routinely kiss upon meeting would not be guilty of the offense. But on the facts before the court, G.G. obviously was performing a sexually aggressive act.

Further, the court found the necessary “violence” required in Article 609-2. According to some criminal literature surprise alone would not be enough to satisfy the elements of the offense but the Supreme Court disagrees.¹³ But the necessary violence may be met in situations other than the obvious ones where the actor puts the victim in a position where she cannot resist.¹⁴ The element is also met when the rapid completion of the criminal action combines with an act that overcomes her will.¹⁵

¹⁰ See Cass., sez. ter., 26 jan 2006, n.19808. (full citation at note 5)

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

Thus, G.G. did more than kiss R.C. suddenly, an act that would have surprised her. Fairly obviously, that 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 on her

(B) Italian Criminal Case Number 37395

The second noteworthy case involved the sexually inappropriate conduct of “A.M.”, a magistrate of the Court of Cassation in Rome.¹⁶ A.M. was charged with various violations of Article 609-*bis* c.p., involving different women. But the gravamen of his offenses was the “lustful touching of the buttocks.” While that was his sexual act, he engaged in other behavior that made the sexuality of the touching explicit. A.M. was convicted of various offenses, which resulted in a one-year term of imprisonment.¹⁷

Among his arguments on appeal, A.M. contended that the term “sexual act” in Article 609-*bis* c.p. could not include his conduct. Instead, he argued that the statutory element required “carnal conjunction” and “violent acts of lust.”¹⁸ Further, he contended that the statutory element, “sexual act,” is a concept not agreed upon in common usage or in scientific literature. As a result, his conviction violated constitutional principles of definiteness.¹⁹

In rejecting the first argument, the court looked at the change in the law, with an intentional emphasis on sexual autonomy of the victim. Thus, sexual acts may involve constraining a passive victim through violence or threat or abuse of authority.²⁰ But more relevant to the case before the court, a sexual act may be any act that results in physical contact

¹⁶ Cass., sez. ter., 23 Sept. 2004, n. 37395, available at <http://www.altalex.com/index.php?idnot=3250> (last visited Dec. 22, 2008) or in *Rivista penale*, 12, 2004, p. 1189 ss.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

between the actor and the passive subject involving the victim's sexuality and is likely to endanger that person's self-determination.²¹

The court gave a broad definition to "sexual." Not limited to an act involving the genitals of the actor and victim, "sexual" includes touching those areas that science considers erogenous.²² This interpretation is consistent, in the court's view, with the underlying shift in policy in the 1996 statute.²³ While acts involving the parties' genitals are typically sexual, the fact that other acts, like a slap on a person's buttocks may not always be sexual, did not prevent the court from its conclusion. Instead, the sexual nature of an act must be assessed in its overall context. Viewed in that light, A.M.'s conduct was "sexual" in nature.²⁴

Similar to the American constitutional doctrine of "vagueness," Article 25 of the Italian Constitution require that a law be drawn sufficiently precisely to allow citizens to be able to determine the line between legal and illegal conduct.²⁵ Further, Article 3 requires equal treatment. Thus, A.M. argued that lumping rape and sexual violence in a generic term, "sexual acts," lacked sufficient definiteness. That breadth leaves for the judge's discretion the interpretation of conduct prohibited.²⁶ It also creates the possibility of gross disparities of treatment of different defendants in violation of Article 3.²⁷

The court rejected A.M.'s arguments. Making Article 609-*bis* c.p. a crime against personal freedom, moving it from a crime against public morality, indicated the legislature's

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

intent to protect against acts impairing a person's self-determination. Doing so gave courts guidance on how to interpret "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.²⁸ Further, the Constitutional Court has often upheld legislation where the legislature has used phrases with commonly understood meanings. Language may be sufficiently precise by reference to non-legal concepts. As a result, the term "sexual act" then becomes sufficiently precise to withstand constitutional scrutiny.²⁹

III. How Would an American Court Treat G.G. and A.M.?

To answer the question posed above, "How Would an American Court Treat G.G. and A.M.?", I asked my research assistants to examine the rape and sexual battery offenses from four different states around the country. I selected New Jersey, Alabama, Indiana and California, to canvass one jurisdiction from the east coast, south, mid-west and west coast. As developed in this section, while in theory G.G.'s conduct could be sexual battery, I could find no case involving similar conduct among the reported cases in those jurisdictions.³⁰ Somewhat to my surprise, I found one case in Indiana where an offender was convicted of sexual battery for slapping a woman's buttocks.³¹ Nonetheless, such cases appear to be controversial³² and extremely rare. A cursory glance at case law in other states suggests a dearth of prosecutions for similar conduct, with one notable exception. That exception involves adult offenders who have sexual contact with minors.³³

28 *Id.*

29 *Id.*

30 *See discussion infra* note 103.

31 *Bailey v. State*, 764 N.E. 2d 728 (Ind. App. 2002).

32 *See discussion infra* note 77.

33 *See discussion infra* note 62.

Unlike Italian law, American jurisdictions typically divide sex crimes into distinct offenses. Article 609-*bis c.p.*, in effect, conflates rape with other sexual assaults. Modern American jurisdictions single out rape as the most serious sexual offense, but now have a variety of sexual offenses.

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. That is, rape might occur when the male had forcible 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.³⁴ 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.³⁵

By the mid-twentieth century, some jurisdictions abandoned the single-category approach to rape. A jurisdiction might define aggravated rape as one where the female resisted to the utmost and her resistance was overcome by force or where the victim was quite young, for example, under ten or twelve years old.³⁶ Other forms of rape were considered simple rape. Penalties differed considerably, with aggravated rape, especially in Southern states, exposing the offender to the death penalty.³⁷ Some states sub-divided the crime even further. For example, New York created a misdemeanor rape when the female was under the age of consent, but the male was under twenty-one years old.³⁸

³⁴ MODEL PENAL CODE § 213.1 (Official Draft 1962) *reprinted in* MODEL PENAL CODE AND COMMENTARIES: Part II §§ 210.0- 213.6, § 213.1 cmt. n.1 at 277 (American Law Institute 1980).

³⁵ *Id.*

³⁶ *Id.* at 278.

³⁷ *Id.*

³⁸ *Id.*

American jurisdictions typically had other sexual offenses, including sodomy laws. The pattern around the country varied a bit more than did rape law.³⁹ But provisions outlawing “crimes against nature” often included consensual and non-consensual behavior, and homosexual and heterosexual conduct.⁴⁰ Further, despite a marital exemption from rape laws, some jurisdictions criminalized oral and anal copulation even between spouses.⁴¹

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. Most crimes required penetration of the penis, no matter how slight. Cunnilingus was one obvious exception. But sexual battery did not exist, except for assault with intent to rape or to commit sodomy.⁴² Instead, exotic touching might be treated as an assault, but jurisdictions did not have a distinct sexual assault offense.⁴³

By the end of the twentieth century, a good deal had changed. Two major factors explain the changes in American law governing substantive sexual offenses. One factor in the development of American criminal law was the publication of the Model Penal Code. The other, no doubt far more important, factor was the influence of the women’s movement on sexual offender laws.

Many commentators are critical of the Model Penal Code’s approach to sex crimes. Indeed, one commentator has argued that the Code’s provisions “should be pulled and replaced.”⁴⁴ For example, it left in place the marital exemption from rape. The code reduced the

³⁹ MODEL PENAL CODE § 213.2 (Official Draft 1962) *reprinted in* MODEL PENAL CODE AND COMMENTARIES: Part II §§ 210.0- 213.6, § 213.2 cmt. n.1 at 357-58 (American Law Institute 1980).

⁴⁰ *Id.* at 358.

⁴¹ *Id.* at 360.

⁴² MODEL PENAL CODE § 213.4 (Official Draft 1962) *reprinted in* MODEL PENAL CODE AND COMMENTARIES: Part II §§ 210.0- 213.6, § 213.4 cmt. n.1 at 398 (American Law Institute 1980).

⁴³ *Id.*

⁴⁴ 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).

degree of the felony under certain circumstances, when the woman was a “voluntary social companion” who had previously allowed the man “sexual liberties.”⁴⁵ For some offenses, the code made the woman’s prior promiscuity an affirmative defense.⁴⁶ Further, it kept in place a requirement that the victim make a prompt complaint.⁴⁷ Finally, it provides that no one may be convicted of a felony under Article 213 unless the victim’s testimony is corroborated.⁴⁸

Despite those criticisms, the Model Penal Code recognized a distinct offense of sexual assault. The gravamen of the offense was “sexual contact” with another that the man knew was offensive to the other person (or occurred in a variety of settings, where he knows that his victim is unaware of the sexual act or the victim is under a certain age).⁴⁹ The code defines “sexual contact” in terms of its purpose to arouse or gratify sexual desire.⁵⁰ The code was quite modern in its approach to sexual assault, in its recognition that traditional assault was inadequate to protect the distinct interest at stake when the touching was sexual in nature. The offense protects against “an invasion of individual dignity.”⁵¹ As the Comments indicate, this provision of the

⁴⁵ MODEL PENAL CODE § 213.1 (Official Draft 1962) *reprinted in* MODEL PENAL CODE AND COMMENTARIES: Part II §§ 210.0- 213.6, § 213.1 cmt. n.2 at 280 (American Law Institute 1980).

⁴⁶ MODEL PENAL CODE § 213.6(3) (Official Draft 1962) *reprinted in* MODEL PENAL CODE AND COMMENTARIES: Part II §§ 210.0- 213.6, § 213.6(3) at 411-12 (American Law Institute 1980).

⁴⁷ MODEL PENAL CODE § 213.6(4) (Official Draft 1962) *reprinted in* MODEL PENAL CODE AND COMMENTARIES: Part II §§ 210.0- 213.6, § 213.6(4) at 412 (American Law Institute 1980).

⁴⁸ MODEL PENAL CODE § 213.6(5) (Official Draft 1962) *reprinted in* MODEL PENAL CODE AND COMMENTARIES: Part II §§ 210.0- 213.6, § 213.6(5) at 412 (American Law Institute 1980).

⁴⁹ MODEL PENAL CODE § 213.4 (Official Draft 1962) *reprinted in* MODEL PENAL CODE AND COMMENTARIES: Part II §§ 210.0- 213.6, § 213.4 at 397-98 (American Law Institute 1980).

⁵⁰ MODEL PENAL CODE § 213.4 (Official Draft 1962) *reprinted in* MODEL PENAL CODE AND COMMENTARIES: Part II §§ 210.0- 213.6, § 213.4 cmt. n.2 at 400 (American Law Institute 1980).

⁵¹ MODEL PENAL CODE § 213.4 (Official Draft 1962) *reprinted in* MODEL PENAL CODE AND COMMENTARIES: Part II §§ 210.0- 213.6, § 213.4 cmt. n.1 at 399 (American Law Institute 1980).

code has been influential, with many states adopting an assault offense, distinct from traditional assault.⁵²

The more important influence on substantive sex offenses was the Women's movement. Significant reforms began during the 1970's. 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 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.⁵³

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.⁵⁴ Whereas sex offenses arose in an era that discouraged sexual autonomy outside marriage, modern sex law values and protects sexual autonomy.⁵⁵ While debate continues whether reforms have gone far enough,⁵⁶ one can find numerous cases prosecuted today that would have gone without a remedy thirty or forty years

⁵² *Id.* at 400.

⁵³ Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L. J. 651, 658 (2008).

⁵⁴ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 140-42 (LexisNexis 4th ed. 2006).

⁵⁵ *Id.* at 622; Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 6 (1998).

⁵⁶ See, e.g., Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, at ix, 10 (1998). Part of the problem is cultural and not legal, That is, 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.").

ago.⁵⁷ 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 extension of the law. Such statutes fill a few gaps in the law. For example, it might provide a lesser included offense in a case in which a jury might not want to convict a defendant of rape. That might be the situation in a case of date rape. Further, it treats differently the crime from a fight between two men, who may be guilty of assault or battery. Instead, the crime focuses on the sexual nature of the touching and underscores that certain kinds of touching really are of a different order from a punch in the nose. Sexual groping offends one's dignity and sense of selfhood, not necessarily one's safety.⁵⁸

That said, most modern jurisdictions have adopted some form of sexual assault. All of the jurisdictions examined for this article have enacted sexual assault statutes. For example, Alabama's code includes a sexual abuse statute, criminalizing a person who subjects another to sexual conduct by forcible compulsion.⁵⁹ The statute defines "sexual conduct" as any touching done for the purpose of gratifying the sexual desire of either party.⁶⁰ The state supreme court 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."⁶¹

Indiana's sexual battery has a provision similar to Alabama's law. Its statute punishes "a person, who with intent to arouse or satisfy the person's own sexual desires or the sexual desires

⁵⁷ Vitiello, *supra* note 52, at 651-52.

⁵⁸ MODEL PENAL CODE § 213.4 (Official Draft 1962) *reprinted in* MODEL PENAL CODE AND COMMENTARIES: Part II §§ 210.0- 213.6, § 213.4 at 399-400 (American Law Institute 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").

⁵⁹ ALA. CODE § 13A-6-66 (1975) (amended 2006).

⁶⁰ ALA. CODE § 13A-6-60(3).

⁶¹ *Parker v. State*, 406 So.2d 1036 (Ala. Crim. App. 1981).

of another person, touches another person when that person is compelled to submit to the touching by force or the imminent threat of force.”⁶²

New Jersey has a similar named offense of sexual assault, but it involves an actor who 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.”⁶³ The New Jersey code also includes a lesser offense of criminal sexual contact. 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.⁶⁴ 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.”⁶⁵ The law defines “intimate parts” as including sexual organs, genital areas, anal area, inner thigh, groin, buttock or breast of a person.⁶⁶

California includes a misdemeanor sexual battery that appears broader than Alabama, Indiana, and New Jersey’s laws. 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.”⁶⁷ California defines “intimate part” as the sex organs, anus, groin, or buttocks of any person, and the breast of a female.⁶⁸ Further, the touching may be direct or through the clothing

⁶² IND. CODE ANN. §35-42-4-8 (West 2004).

⁶³ N.J. STAT. ANN. §2C:14-2(b) (West 2005).

⁶⁴ N.J. STAT. ANN. §2C:14-3 (West 2005).

⁶⁵ N.J. STAT. ANN. §2C:14-1(d) (West 2005).

⁶⁶ N.J. STAT. ANN. §2C:14-1(e) (West 2005).

⁶⁷ CAL. PENAL CODE §243.4(e)(1) (West 2008).

⁶⁸ CAL. PENAL CODE §243.4(g)(1).

of either party.⁶⁹ Unlike the other states canvassed, California does not require forcible compulsion. One can imagine situations in which an offender grabs his victim without any independent threat or forcible act beyond the sexual touching itself.

Courts in Indiana have faced that question. 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."⁷⁰ 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.⁷¹

More recently, an Indiana appellate court distinguished *Scott-Gordon*. In *Bailey v. State*,⁷² the court upheld the offender's conviction. The court focused on the additional facts that it found relevant, that Bailey had made lewd comments to his victim on a prior occasion, at which point she had two prior encounters with Bailey, one in which he asked if he could come home with her and "pull down her pants,"⁷³ and the other in which she saw him masturbating in a park.⁷⁴ Thus, prior to the grabbing of her buttocks, the victim had made clear that she wanted him to leave her alone. That sufficed to show that Bailey forced his victim to submit to his touching.⁷⁵ While not framed quite this way, the court seemed to say that as long as the defendant was on notice that his advances would be unwelcome, his subsequent conduct satisfied the force element.

⁶⁹ CAL. PENAL CODE §243.4(e)(2).

⁷⁰ *Scott-Gordon v. State*, 579 N.E. 2d 602 (Ind. 1991).

⁷¹ *Id.* at 604.

⁷² *Bailey*, 764 N.E. 2d at 728.

⁷³ *Id.* at 729.

⁷⁴ *Id.* at 730.

⁷⁵ *Id.* at 731.

The court went further, in effect, holding in the alternative that the fear 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.”⁷⁶ Judged from that perspective, the court found that the victim had a reason to fear Bailey.⁷⁷

Apart from Bailey’s gross conduct, the appellate court’s decision is open to criticism, as the dissent points out.⁷⁸ The dissent summed up the most obvious problem with the majority’s approach as follows: “Bailey 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.”⁷⁹

Other courts have faced that a similar interpretative problem in a closely related context. Both the New Jersey⁸⁰ and California⁸¹ supreme courts have had to resolve whether an offender commits rape or, in the New Jersey, “forcible sexual assault,” which requires “an act of sexual penetration,”⁸² 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 read “force” out of its statute. 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. Tried in the juvenile court, the boy was found guilty of forcible sexual assault despite the absence of any force beyond that

⁷⁶ *Id.*

⁷⁷ *Id.* at 732.

⁷⁸ *Id.* at 733 (Darden, J., dissenting).

⁷⁹ *Id.*

⁸⁰ *State in the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992).

⁸¹ *People v. Griffin*, 94 P.3d 1089, 1094 (Cal. 2004).

⁸² N.J. STAT. ANN. §2C:14-2(c)(1).

inherent in the act of intercourse itself.⁸³ Despite the inclusion of a force element and the absence of a consent element, the court found that the necessary force was met whenever a person achieves penetration in the absence of affirmative and freely given permission.⁸⁴

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 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.⁸⁵

While both of those cases involved penetration, they offer some guidance here. They may lend some guidance on how a court would interpret the force element in sexual battery cases where the sexual battery does not include penetration, but other kinds of sexual touching, as involved in the two Italian cases discussed in this article.

Prior to the late twentieth century and the adoption of sexual assault offenses, I doubt that American law would have been broad enough to cover the kind of conduct in the two Italian cases. Unable to canvass all of the reported American sex offense cases, I posted a question on the Criminal Law professors’ listserv, asking whether anyone was aware of a case like that of G.G. or A.M. With one instance discussed below (involving a juvenile victim), no one knew of a similar case.⁸⁶

That said, modern sexual assault statutes appear broad enough to include A.M.’s slaps on the buttocks as within the acts prohibited by 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. This kind of touching comes within the definition of sexual contact set out in all four of the statutes canvassed above. For example, under Alabama law, the slap on the buttocks

⁸³ *M.T.S.*, 609 A.2d at 1277-78.

⁸⁴ *Id.* at 1277.

⁸⁵ *Griffin*, 94 P.3d at 1094.

⁸⁶ *See* discussion *infra* note 103.

would constitute “sexual conduct,” touching done for the purpose of gratifying the sexual desire of either party, in this case the male.⁸⁷ Almost certainly, the touching of the buttocks would come within the state supreme court’s holding that the statute includes the touching of any part of the body that a reasonable person would consider “private.”⁸⁸

The other statutes reviewed above seem to cover the situation as well. Touching of intimate body parts is included in all of those statutes. Further, all of them include some reference to sexual gratification; that is, the touching is not simply a pat on the buttocks common among coaches and athletes (or at least that was historically).⁸⁹ The element of sexual gratification would be proven, as in A.M.’s case, by the specific context in which the touching took place.

Harder would be whether the element of force would be met, as required, for example by Alabama, Indiana and New Jersey. California’s law seems most obviously met: it requires only that the touching be against the will of the person touched, a fact that can be inferred from context as well and from the victim’s testimony. It also includes the buttocks within its definition of the “intimate part” of the other person’s body.

As the *Scott-Gordon* and *Bailey* cases demonstrate, Indiana law requires something more than a mere grabbing of the buttocks. Apart from the lack of consent, the state must show some element of force or threat of force. While the *Bailey* court found the threat of force element alternatively from acts in the past raising fear in the victim and from conduct judged from the victim’s perspective, the dissent highlighted difficulties with that approach, one that might not be followed by the state’s supreme court. Similarly, a court in Alabama would have to determine whether the offense requires any force in addition to the sexual act itself.

⁸⁷ ALA. CODE § 13A-6-60(3).

⁸⁸ *Id*; see also Parker, 406 So.2d 1036.

⁸⁹ MODEL PENAL CODE § 213.4 (Official Draft 1962) reprinted in MODEL PENAL CODE AND COMMENTARIES: Part II §§ 210.0- 213.6, § 213.4 cmt. n.2 at 400-01 (American Law Institute 1980).

The case law is limited in this area. As *Bailey* and *M.T.S.* demonstrate, (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. Both *Bailey* and *M.T.S.* are open to criticism on statutory construction grounds,⁹⁰ their broad reading of statutory elements to 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 found relevant to the force inherent in the situation.⁹¹

G.G.'s case presents a more questionable case. An unwanted kiss would not appear to qualify under California or New Jersey's laws. The California statute requires the offender to touch "an intimate part" of another person. But California defines that term as including the sexual organ, anus, groin, or buttocks of any person, and the breast of a female.⁹² The failure to mention the lips or neck as an intimate part of the body would seem sufficient to prevent application of the law to *G.G.* Similar restrictions appear in New Jersey's statute.⁹³

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.⁹⁴ The statute defines "sexual conduct" as requiring touching done for gratifying the sexual desire of either party.⁹⁵ The Alabama appellate

⁹⁰ After all, the New Jersey legislature avoided using the term consent and used the element of force as the gravamen of the offense. The court's interpretation turned that upside down. *See Bailey*, 764 N.E.2d at 733 (Darden, J., dissenting) (suggesting the difficulty with the majority's interpretation of the element of force).

⁹¹ *Cf. Bailey*, 764 N.E.2d at 733 (discussing the relevance of an employer-employee relationship in a finding of force or threat of force).

⁹² CAL. PENAL CODE §243.4(g)(1).

⁹³ N.J. STAT. ANN. §2C:14-1(d-e).

⁹⁴ ALA. CODE §13A-6-66.

⁹⁵ ALA. CODE §13A-6-60(3).

court has defined “intimate parts” as any part of the body that a reasonable person would consider private.⁹⁶

One might argue that the lips are an intimate part of the body. But reported cases in Alabama, at least, where the courts have interpreted “intimate parts” of the body have not involved cases where the conduct was as limited as kissing. For example, in one reported case, the defendant apparently touched a fully clothed woman on her breastbone in a public place.⁹⁷ In another case, while pressing his knees on the woman’s knees to pin her down, the defendant reached under her dress and touched her thighs and stomach.⁹⁸ Obviously, a kiss, even short of a “French kiss,” can certainly be intended to be of an attempt to gratify one’s sexual desire or to arouse it in the other person. But we found no reported cases where Alabama courts had to resolve the question.

Indiana law would appear to present the same legal issues as would Alabama. 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. . .”⁹⁹ As with the Alabama statute, in a case involving a kiss, a court would have to decide whether a kiss was done with the requisite intent to arouse, and, again, in theory and depending on the kind of kiss, a kiss certainly may be done to arouse.

A harder question would be whether a kiss constitutes sufficient force to satisfy the elements of sexual battery. Here, we are back to the inquiry above. Whether a defendant’s conduct that amounts to nothing more than a kiss, even an unexpected kiss, can be considered forcible begs the question whether something more than the force inherent in the sexual act is required for a finding of force. At least in cases like *Bailey* and *M.T.S.*, courts have found that no

⁹⁶ See, e.g., *Hutcherson v. State*, 441 So.2d 1048 (Ala. Crim. App. 1983); See also *Parker*, 406 So.2d 1036.

⁹⁷ *Hutcherson*, 441 So.2d at 1049.

⁹⁸ *Parker*, 406 So.2d at 1038.

⁹⁹ IND. CODE ANN. §35-42-4-8.

other force was necessary. In both cases, the court looked to additional factors in deciding that the defendant's conduct was sufficient.¹⁰⁰ In *M.T.S.*, the court found that a defendant was guilty of rape based on the force necessary for an act of intercourse but only if a reasonable person would be on notice that he lacked the other person's consent.¹⁰¹ That 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. The victim's prior encounters gave her a reason to fear the defendant on the particular occasion of his unwanted touching.¹⁰²

But G.G.'s case involved somewhat more force than the mere force involved in a kiss. In resisting his kiss, the victim pulled away from him and placed her hand over his mouth.¹⁰³ After that, he again grabbed her and kissed her neck. Under both Alabama and Indiana law, a court faced with the facts of G.G.'s case would have to determine whether his act of continuing to attempt to kiss her after she placed her hand on his mouth and signaled her disapproval was sufficient force under the law. But however the courts were to resolve the issue, it would be harder for the defendant to argue that he did not use force than in a case in which his only act was an initial and unwanted kiss.

We could not find a case in any of the four jurisdictions surveyed where the state brought a prosecution based on merely a kiss. The closest case that I could find, thanks to a posting on a Criminal Law professor listserv, was a case from Oregon.¹⁰⁴ *State v. Rodriguez*¹⁰⁵ involved a

¹⁰⁰ See *Bailey* 764 N.E.2d at 732; See also *M.T.S.* 609 A.2d at 1278-79.

¹⁰¹ *M.T.S.*, 609 A.2d at 1277.

¹⁰² *Bailey*, 764 N.E.2d at 731.

¹⁰³ Cass., sez. ter., 26 jan 2006, n.19808.

¹⁰⁴ See *State v. Rodriguez*, 174 P.3d 1100 (Or. App. 2007). My thanks to Ohio State Law Professor Doug Berman for bringing my attention to and for his extremely helpful blog Feedblitz.

female defendant convicted of first degree sexual abuse,¹⁰⁶ an offense calling for a mandatory minimum punishment of 75 months in prison.¹⁰⁷ Rodriguez worked with at-risk youth. She was twenty-four years old when she began working at the facility where she met the twelve year-old victim. She became closely involved in his and his family's life.¹⁰⁸

Rumors circulated about the close relationship between the victim and defendant. They frequently hugged and the defendant often put her arm around him when they walked together. She allowed him to sit on her lap and he kissed her on the cheek frequently. E-mails between them confessed their love for one another. Further, they took trips together, including two overnight trips. They were also frequently alone together, including in the defendant's apartment.¹⁰⁹ Apart from suspicion that they were having intercourse, the evidence did not support that conclusion.

Instead, the sexual abuse charge was based on a single, brief encounter between the two participants. 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

105 174 P.3d 1100.

106 OR. REV. STAT. ANN. § 163.427(1)(a)(A) (West 2003).

107 OR. REV. STAT. ANN. § 137.700(2)(a)(P). The severe punishment was part of a ballot measure approved by Oregon voters. As many scholars have written, ballot measures are a poor way to determine criminal sentences. *See, e.g.,* FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA *passim* (Oxford University Press 2001).

108 *Rodriguez*, 174 P.3d at 1101.

109 *Id.*

her hands along the victim's face and through his hair while the back of his head was against her breasts.¹¹⁰

The jury had to find that defendant's conduct amounted to sexual contact, defined as elsewhere as "any touching of the sexual or intimate parts" "for the purpose of arousing or gratifying the sexual desire of either party."¹¹¹ Despite the limited amount of time involved, the defendant did not challenge the sufficiency of the evidence of sexual contact. 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 75 months was cruel and unusual because it was disproportionate.¹¹² 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."¹¹³

Not only did the court not have before it a claim of sufficiency of the evidence, but it also did not think that the issue was whether viewed in the abstract, the defendant's conduct was so minor that the sentence would have been excessive. Instead, the court focused on all of the circumstances, including the nature of the relationship between the defendant and victim (a young at-risk child; the defendant, an adult in a position of trust and responsibility, which the court concluded involved a serious abuse of trust).¹¹⁴

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 and child, even if the sexual roles are reversed from the more stereotypical situation. 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

110 *Id.* at 1102.

111 OR. REV. STAT. ANN. § 163.305(6) (West 2003).

112 *Rodriguez*, 174 P.3d at 1103-04.

113 *Id.* at 1106.

114 *Id.*

victim had engaged in much more inappropriate conduct, probably sexual intercourse.¹¹⁵ Thus, this is not a case in which a brief caress, without more, gave rise to criminal liability.

Before discussing the normative question, whether the Italian approach is sound, I need to address one other question, 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 felony¹¹⁶ with a penalty of imprisonment for not less than one year and **one day and not more than ten** years.¹¹⁷ The sex offender would be required to register for the crime of sexual abuse and be limited with whom the defendant can live.¹¹⁸ A person convicted of certain offenses, including sexual battery, must register with the sheriff in the county of residence and re-register when he or she moves to another county.¹¹⁹ Further, unlike some more draconian state laws, the Alabama registry of sex offenders is open only to law enforcement officers and agencies.¹²⁰

In California the punishment for misdemeanor sexual battery may not exceed two thousand dollars, or six months in county jail or both, with higher penalties if the defendant was the victim's employee.¹²¹ The California Penal Code requires the registration of every person convicted of specified felony sex offenses and other offenses defined in the code.¹²² In

¹¹⁵ See, e.g., *Id.* at 1101 ("Defendant took the victim with her on several trips to Bend and Spokane, two of which were 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").

¹¹⁶ ALA. CODE § 13A-6-66.

¹¹⁷ ALA. CODE § 13A-5-6(a)(3) (2008).

¹¹⁸ ALA. CODE § 13A-11-204(b) (2007).

¹¹⁹ ALA. CODE § 13A-11-200 (2005).

¹²⁰ ALA. CODE § 13A-11-202 (2005).

¹²¹ CAL. PENAL CODE § 243.4(e)(1) (West 2008).

¹²² 22 CAL. JUR. 3D *Criminal Law: Post-trial Proceedings* § 38 (2008).

California sexual battery and child sexual abuse are both subject to registration.¹²³ The offender must register as long as the offender lives in California.¹²⁴ 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.¹²⁵ The offender must register annually, within five working days of his or her birthday to update his or her registration providing, “their name, address, temporary location, and place of employment including the name and address of the employer.”¹²⁶ Even more recently, as the result of an ill-conceived ballot initiative,¹²⁷ California has added a requirement that an offender convicted of a “registerable sex offense”¹²⁸ must submit to GPS monitoring for any term of parole.¹²⁹ Further, the state’s Department of Justice maintains a website that provides extensive data about each registrant and to which the public has free access.¹³⁰

If these acts qualify for sexual battery in Indiana, the punishment would be imprisonment from six months to three years, with the advisory sentence being one and a half years.¹³¹ But Indiana has the least onerous registration requirement, applicable only if the person is convicted of child molestation under §35-42-4-3.¹³²

¹²³ See CAL. PENAL CODE § 243.3 (West 2008) (describing registration requirements for persons convicted of sexual abuse); see also CAL. PENAL CODE § 288 (West 2008) (describing registration requirements for persons convicted of lewd and lascivious behavior with a child under 14).

¹²⁴ 22 CAL. JUR. 3D *Criminal Law: Post-trial Proceedings* § 38.

¹²⁵ *Id.*

¹²⁶ 22 CAL. JUR. 3D *Criminal Law: Post-trial Proceedings* § 37 (2008).

¹²⁷ Bill Ainsworth, *Law to Boost Sex Offender Monitoring Falling Short*, SAN DIEGO UNION TRIBUNE, Feb. 14, 2008, at A1, available at 2008 WL 3069868.

¹²⁸ A “registerable sex offense” is one that requires registration under California Penal Code § 290(c). CAL. PENAL CODE § 3000.07 (West 2007).

¹²⁹ CAL. PENAL CODE § 3000.07(a)-(b).

¹³⁰ CAL. PENAL CODE § 290.4 (West 2008); see also Vitiello, *supra* note 52, at 668-74 (providing a detailed discussion of the various registration requirements under California law).

¹³¹ IND. CODE ANN. § 35-50-2-7 (West 2004). In Indiana sexual battery is a Class D felony barring aggravated circumstances. IND. CODE ANN. § 35-42-4-8(a) (West 2004).

¹³² IND. CODE ANN. § 35-42-4-11 (West 2006).

In New Jersey a person convicted of sexual assault is also subject to registration.¹³³ The registrant may file a motion to be removed from the New Jersey State Registry if fifteen years have passed since the offender's last offense.¹³⁴

As I have argued elsewhere,¹³⁵ the expansion of substantive sex offenses occurred separately from the expansion of criminal penalties and other disabilities, like registration requirements. The former, as in Italy, was driven by feminist concerns about the insensitivity of the law to women's plight.¹³⁶ The expansion of penalties has been an overheated reaction to the infrequent abduction and murder of young children, with resulting penalties applying far beyond the pathological sexual predator.¹³⁷

Thus, were G.G. or A.M. convicted in an American jurisdiction, depending on the degree of the offense, they might be subject to a wide variety of punishments and other disabilities. Certainly, as indicated above, convicting A.M. is more plausible today than would be convicting G.G. My research has not found such an extreme case, at least not among the reported cases in the four jurisdictions that I focused on.

*IV. Do the Italians (or the Americans) have it right?*¹³⁸

Should A.M. and G.G.'s 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 doing 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

¹³³ N.J. STAT. ANN. § 2C:7-2 (West 2005 & Supp. 2008).

¹³⁴ N.J. STAT. ANN. § 2C:7-2(f).

¹³⁵ Vitiello, *supra* note 52, at 651.

¹³⁶ *Id.* at 655-58.

¹³⁷ *Id.* at 674-85.

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. relates to punishment for sex offenders in the United States and to alternative remedies, including civil suits and workplace regulations whereby unwanted sexual behavior may be dealt with effectively.

As I indicated above, broadly worded sexual assault statutes might encompass A.M.'s behavior.¹³⁹ But finding analogous cases is another matter. The two closest cases, *Bailey* and *Scott-Gordon*, suggest some of the legal issues that a prosecutor might face in a case like A.M.'s. Not all jurisdictions have as broad an offense as California's misdemeanor sexual battery, which criminalizes any unwanted sexual touching.¹⁴⁰ Instead, jurisdictions like Indiana require an element of force.¹⁴¹ In *Scott-Gordon*,¹⁴² the Indiana supreme court recognized that the simple act of slapping a person's buttocks did not include a separate act of force. An Indiana appellate court distinguished *Scott-Gordon* in *Bailey*.¹⁴³ 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.¹⁴⁴

No doubt, A.M.'s conduct would amount to a simple battery and, if the state has in place a misdemeanor sexual battery like California's law, he would be guilty of that offense as well.

But whether he should be guilty under a statute like Indiana's¹⁴⁵ (or New Jersey's¹⁴⁶ or

¹³⁸ That is, according to Professor Vitiello, do the Italians or Americans have it right?

¹³⁹ See discussion *supra* note 89.

¹⁴⁰ CAL. PENAL CODE § 243.4(e)(1).

¹⁴¹ IND. CODE ANN. § 35-42-4-8.

¹⁴² 579 N.E. 2d 602.

¹⁴³ 764 N.E. 2d 728.

¹⁴⁴ *Id.* at 732.

¹⁴⁵ IND. CODE ANN. § 35-42-4-8.

Alabama's¹⁴⁷) is a much harder question. The court in *Bailey* strained to find the force element satisfied, but did so in a particularly troubling case: Bailey had accosted the victim on prior occasions, including one in which the victim saw him masturbating.¹⁴⁸ At the same time, 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.¹⁴⁹ Such a strained reading of the statute also raises questions of separation of powers, whereby the court may be substituting its judgment for that of the legislature.

Thus far, I have skirted the harder issue: should A.M. be a sexual offender? Here context is everything. Unlike Bailey, A.M. committed his acts in the work place. While federal law does not require employers to have printed procedures and guidelines regarding sexual harassment, virtually all employers do. Employers do have to designate someone to whom sexual harassment and other discrimination can be reported.¹⁵⁰ The risk of liability assures that employers limit sexual conduct in the workplace. Further, as the civil suit against former

¹⁴⁶ N.J. STAT. ANN. § 2C:14-3 (West 2005).

¹⁴⁷ ALA. CODE § 13A-6-66.

¹⁴⁸ 764 N.E.2d at 730.

¹⁴⁹ See, e.g., *United States v. Bass*, 404 U.S. 336 (1971); see also Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885 (2004) (stating that the rule of lenity directs courts to construe statutory ambiguities in favor of criminal defendants).

¹⁵⁰ 42 U.S.C.A. § 2000e et seq. (West 2009). The injured party typically sues the employer for damages. In a case like A.M.'s, liability would be premised on a hostile work environment. The plaintiff would have to show more than a single episode; instead, she would have to show that the conduct was severe, pervasive, and unwelcome. But if the conduct does meet that standard, the employer may raise a defense based on its guidelines and whether the victim reported the harassment pursuant to those guidelines. As a result, employers have incentive to put in place a set of guidelines for workplace behavior. 42 U.S.C.A. § 2000e-10(a) (West 2009). In addition, the Equal Employment Opportunity Commission, a federal agency, may also investigate a person's claim of job discrimination. 42 U.S.C.A. § 2000e-5 (West 2009).

President Bill Clinton demonstrated,¹⁵¹ courts have interpreted 42 U.S.C.A. §1983 as encompassing some severe forms of workplace harassment.¹⁵² Section 1983 allows suit against the offender, not just the employer.¹⁵³ And the women might readily seek civil damages for battery, including punitive damages.¹⁵⁴ In addition, although such cases are few and far between, A.M. might be subject to criminal charges for simple battery.¹⁵⁵

My hesitation in extending sexual offender laws (behind, 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 really is different from a traditional battery (a punch in the nose) and thereby implicates his victims' sexual autonomy, I remain troubled by A.M.'s case. As I have argued elsewhere,¹⁵⁶ the expansion of the law governing rape and related sex offenses, largely a response to the feminist movement, took place largely independently of the movement to expand punishments for sex offenders. Punishments for sex offenders have been driven by gruesome cases that make headlines in the news, involving offenders with long histories as sexual predators.¹⁵⁷ But the resulting statutes apply broadly, often to offenders who do not represent significant risks of continued misconduct.¹⁵⁸ Nonetheless, beyond being subject to long prison terms, they may be subject to life-time registration requirements, to having their personal information readily available to

¹⁵¹ See *Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996).

¹⁵² See *Fall v. Indiana Univ. Bd. of Trustees*, 33 F. Supp. 2d 729 (N.D.Ind. 1998).

¹⁵³ 42 U.S.C.A. § 1983 (West 1996).

¹⁵⁴ See *Fall*, 33 F. Supp. 2d at 742; see also *Smith v. Wade* 461 U.S. 30, 31 (1983) (demonstrating availability of punitive damages under 42 U.S.C.A. § 1983).

¹⁵⁵ IND. CODE ANN. § 35-42-2-1 (West 2004 & Supp. 2008).

¹⁵⁶ Vitiello, *supra* note 52, at 658.

¹⁵⁷ *Id.* at 667.

anyone who goes on-line to a state sponsored website,¹⁵⁹ and to restrictions on where they can live (for example, not within a specified distance from a school or playground.)¹⁶⁰

Hence my ambivalence may be summed up simply as follows: 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.¹⁶¹ If such sentences and other disabilities, 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 aberration cases¹⁶² and apply to a wide range of sexual activity not posing similar grave risks of harm.¹⁶³ Legislatures have enacted sex offender punishments based on misperceptions about the nature of sex offenders and their likely recidivism rates.¹⁶⁴ Neither adult nor teenage sex offenders are homogenous groups and many do not suffer from sexual pathologies.¹⁶⁵ Indeed,

¹⁵⁸ *Id.* at 669-72.

¹⁵⁹ *Id.* at 672.

¹⁶⁰ *Id.*

¹⁶¹ Despite the Georgia supreme court's holding in *Humphrey v. Wilson*, 652 S.E.2d 501,502 (Ga. 2007), American courts seldom overturn criminal sentences as excessive. *Cf.* *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).

¹⁶² See LAWRENCE A. GREENFELD, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 27 (Bureau of Justice Statistics, U.S. Dep't. of Justice 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%").

¹⁶³ See, e.g., *Humphrey*, 652 S.E.2d 501 (but for the eventual disposition of the case, *Wilson*, a seventeen-year-old male, would have spent ten years in prison and been subject to life-time registration requirements for receiving fellatio from a fifteen-year-old girl). 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 (University of Chicago Press 2004).

¹⁶⁴ See ZIMRING *supra* note 161, at 28 (stating that "recent legislation and policymaking" is 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").

¹⁶⁵ *Id.* at 29.

sex offenders are “relatively unlikely to commit future sexual offenses.”¹⁶⁶ Further, researchers have been able to identify factors that correlate with recidivism, making more accurate predictions about the need for incarceration.¹⁶⁷ Placing some low-risk offenders in prison may even increase the likelihood that they will re-offend.¹⁶⁸

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.¹⁶⁹ Judges might believe that an expansive interpretation of Article 609-2 was justified to make a statement that Italy will 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 face a similar strongly felt need to send a

¹⁶⁶ See Rose Corrigan, *Making Meaning of Megan’s Law*, 31 LAW & SOC. INQUIRY 267 (2006).

¹⁶⁷ See MODEL PENAL CODE: SENTENCING 34 (Tentative Draft No. 1, 2007) (“[A]ctuarial measures of 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 Correctional 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, 408 (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, at xi (2003) (“[T]here has been a dramatic increase in the development, validation, and revision of risk assessment procedures during the past decade.”); 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) (discussing the factors associated with increased risk of reoffending based on the findings of studies involving nearly 60,000 sex offenders).

¹⁶⁸ See, e.g., *id.* 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”).

¹⁶⁹ Ella Ide, *Charm of Italian Men is Lust in Translation*, TELEGRAPH, Feb. 14, 2008, available at <http://www.telegraph.co.uk/global/main.jhtml?xml=/global/2008/02/14/exlustitalia.xml>.

message about that particular kind of behavior that, while it occurs in the United States, is not epidemic among American men.¹⁷⁰

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.¹⁷¹ G.G. also 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 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. Thus, G.G. may have believed that his victim was interested in him; his clumsy attempt seems 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; one might argue that should 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, leaving the offender the responsibility of proving that his mistake was reasonable.¹⁷² That means that a sex offender may be guilty based on a civil negligence standard, without subjective awareness of his mistake or without taking a higher degree of risk

¹⁷⁰ Lisa Litterio, *Beware of the Natives in Italy*, THE CRUSADER, Nov. 5, 2004, 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).

¹⁷¹ See discussion *supra* note 138.

¹⁷² See discussion *infra* note 196.

than the level needed for civil liability.¹⁷³ At the end of the day, I remain convinced that a kiss is just a kiss.¹⁷⁴ 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.

V. Two Noteworthy American Cases and How an Italian Court would treat them

Sexual mores have changed dramatically in the United States since the 1950's. A majority of teenagers under the age of legal consent are sexually active.¹⁷⁵ Despite that, some prosecutors have shown an increased interest in pursuing statutory rape cases in recent years.¹⁷⁶ One commentator explains this continued interest in criminal prosecutions as product of concern about the high number of teen pregnancies.¹⁷⁷ Others justify the increased use of the criminal law in sex cases involving minors by reference to concern about the potential abuse of minors at the hands of adults.¹⁷⁸ Neither of those concerns explains the first noteworthy case that made headlines in the United States.

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. During the course of the evening, Wilson was videotaped engaging in two sex acts.¹⁷⁹ The videotape showed him engaging in intercourse with one girl and an act of fellatio with another girl.¹⁸⁰ Both girls were

¹⁷³ See *Commonwealth v. Sherry*, 437 N.E.2d 224, 233 (Mass. 1982) ("defense of mistake of fact [for the crime of rape] requires that the accused act in good faith and with reasonableness").

¹⁷⁴ I have no doubt that a creative law professor might come up with bizarre examples 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.

¹⁷⁵ See ZIMRING *supra* note 161, at 52.

¹⁷⁶ See Rigel Oliveri, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 475 (2000).

¹⁷⁷ Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 706 (2000).

¹⁷⁸ MODEL PENAL CODE § 213.3 (Official Draft 1962) *reprinted in* MODEL PENAL CODE AND COMMENTARIES: Part II §§ 210.0- 213.6, § 213.3 cmt. n.3 at 387, cmt. n.4 at 389 (American Law Institute 1980).

¹⁷⁹ *Wilson v. State*, 631 S.E.2d 391, 392 (Ga. App. 2006).

¹⁸⁰ *Id.*

under the age of consent, resulting in one charge of rape and one count of aggravated child molestation.¹⁸¹ 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.¹⁸²

The core issue on appeal was that the ten year prison term violated equal protection. Specifically, under Georgia law, a seventeen-year-old engages in intercourse with a female over the age of fourteen would be guilty of a misdemeanor.¹⁸³ By comparison, a seventeen-year-old who engages in an act of sodomy is guilty of a felony, subject to the mandatory minimum sentence.¹⁸⁴ The Georgia appellate court rejected the argument.¹⁸⁵

Wilson subsequently filed a habeas corpus petition in state court, resulting in a finding that the sentence was cruel and unusual punishment.¹⁸⁶ The state supreme court affirmed the trial court's finding that the sentence was grossly disproportionate under both the Eighth Amendment to the United States Constitution and the Georgia constitution.¹⁸⁷

Beyond the scope of this article is whether the holding was consistent with United States Supreme Court precedent.¹⁸⁸ Suffice it to say that many observers no doubt 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. For

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 392-93. That is so because Georgia law provides that if “the victim is 14 or 15 years of age and the person so convicted is no more than three years older than the victim,” statutory rape is a misdemeanor, not a felony. GA. CODE. ANN. §16-6-3(b) (West 2008).

¹⁸⁴ *Id.* at 392-93. **N.B.** The Georgia legislature has amended that provision, making the 17 year-old offender's conduct a misdemeanor today. See 2009 GA. Laws Act 149 (H.B. 123) available at http://www.legis.state.ga.us/legis/2009_10/versions/hb123_HB_123_AP_8.htm

¹⁸⁵ *Id.* at 393.

¹⁸⁶ *Humphrey*, 652 S.E.2d at 502.

¹⁸⁷ *Id.* at 505 (citing GA. CONST. art. I, § 1, ¶ XVII).

¹⁸⁸ 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).

purposes of this article, the case shows the long prison sentences meted out to some sexual offenders.¹⁸⁹

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.¹⁹⁰

In 2003, the state of Colorado filed a criminal complaint alleging that Kobe Bryant committed forcible sexual penetration on a woman against her will.¹⁹¹ The episode took place in Bryant's hotel room. After a nineteen-year-old hotel employee gave Bryant a tour of the hotel, they went to his room where they ended up engaging in an act of intercourse.¹⁹²

The case drew national attention, but never went to trial. Prosecutors dropped charges, in part, because the young woman also brought civil charges.¹⁹³ Her civil suit settled, without the terms of settlement being made public.¹⁹⁴

Accounts of the case suggest that it fits within an increasingly common fact pattern: the publicized version of the events suggests a situation in which the man believes that the woman has consented, but the woman has not in fact consented to the act of intercourse, even if she admits voluntarily engaging in some acts short of intercourse.¹⁹⁵ As Bryant later admitted

¹⁸⁹ Since the United States Supreme Court's holding in *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding the 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, as cases like *State v. Rodriguez*, *supra* note 103, and *Wilson* underscore, penalties are quite severe when one of the participants is a minor, even when the minor gives "factual" consent.

¹⁹⁰ Joe Jelly Bean Bryant played with the Italian clubs: Solsonica Rieti (1984-86), Reggio Calabria (1986-87), Pistoia (1987-89) and **Cantine Riunite of** Reggio Emilia (1989-91), available at http://en.wikipedia.org/wiki/Joe_Bryant; see also Wayne Coffey, *Father Time: Kobe' dad an ageless wonder in ABA*, NEW YORK DAILY NEWS, Jan. 16, 2005, available at http://www.nydailynews.com/archives/sports/2005/01/16/2005-01-16_father_time_kobe__dad_an_age.html.

¹⁹¹ *People v. Bryant*, 94 P.3d 624, 627 (Colo. 2004).

¹⁹² *Id.*

¹⁹³ MSNBC News, *Rape Case Against Bryant Dismissed*, Sept. 2, 2004, <http://nbcports.msnbc.com/id/5861379>.

¹⁹⁴ MSNBC News, *Suit Settlement Ends Bryant Saga*, March, 3, 2005, <http://nbcports.msnbc.com/id/7019659>.

¹⁹⁵ Compare Kobe Bryant Police Interview available at <http://www.thesmokinggun.com/archive/0924041kobe1.html> (last visited Nov. 6, 2007) (discussing Bryant's perspective on the events); with *Rape Case Against Bryant Dismissed* *supra* note 191) (discussing victim's perspective on the events); and *People v. Bryant*, 94 P.3d 624 (2004).

publicly, he believed that intercourse was consensual but, when he made the statement, could then understand how the victim could have perceived otherwise.¹⁹⁶

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 1970's and 1980's through the influence of feminist groups, prosecutors began at least occasionally prosecuting cases of acquaintance rape.¹⁹⁷ 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 from the woman's account. 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.¹⁹⁸ And here, American jurisdictions vary in their approach to the legal question.

In theory, the law ought to follow the general rule governing mistakes of fact, now reflected in Model Penal Code §2.04(a),¹⁹⁹ 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*.²⁰⁰ But American courts refused to follow *Morgan*.²⁰¹ Instead, American courts have followed one of two approaches to the question: Some have held that the defendant must prove that his mistake is reasonable.²⁰² Others have held that at least if the woman initially says no, the defendant proceeds at his own risk.²⁰³ The result may be a form of strict liability.

The question is a difficult one: as Catherine MacKinnon has argued, if the man has a reasonable mistake defense, "a woman [was] raped but not by a rapist."²⁰⁴ A woman's sense of

¹⁹⁶ Tom Kenworthy & Patrick O'Driscoll, *Judge dismisses Brant rape Case*, USA Today, available at http://www.usatoday.com/sports/basketball/nba/2004-09-01-kobe-bryant-case_x.htm, updated Sept. 3, 2004 (last visited Nov. 6, 2007).

¹⁹⁷ See, e.g., Sherry, 437 N.E.2d 224.

¹⁹⁸ *Id.*

¹⁹⁹ MODEL PENAL CODE § 2.04(a) (1985).

²⁰⁰ [1976] A.C. 182 (H.L.).

²⁰¹ See, e.g., Sherry, 437 N.E.2d 224.

²⁰² See, e.g., *People v. Stitely*, 108 P.3d 182 (Cal. 2005).

²⁰³ See, e.g., *Commonwealth v. Simcock*, 575 N.E.2d 1137 (Mass. App. Ct. 1991).

²⁰⁴ Catherine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 654 (1983).

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, sexual registration for life). Elsewhere, the criminal law has largely resolved the debate that the more serious crimes require some subjective awareness, 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.²⁰⁵

With that background, we think that it is worthwhile to see how these kinds of challenging questions would be resolved under Italian law.

VI. How would an Italian court treat Wilson and Bryant?

Under Italian law, Wilson would certainly be acquitted. As a matter of fact, the age of consent in Italy is fourteen and there are no exceptions related to the nature of the sexual acts committed.²⁰⁶

A case like Kobe Bryant's may be more debatable in its judicial outcome, even though the Italian law, at least in theory, is quite clear in this respect. Under Italian criminal code, the *mens rea* of rape makes no exception to the general rules regarding *mens rea*.²⁰⁷ This means that any mistake of fact on the part of the actor negates the relevant *mens rea* (*dolo*); even an unreasonable mistake, in principle, would negate *mens rea*. 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 concerning rape) might simply not believe to his allegations. But if the judicial findings confirm the mistake alleged by the defendant his defence will be successful. As far as I understand Kobe's case, I think that he would be acquitted because of mistake of fact, were he tried by an Italian Court. But

²⁰⁵ See MODEL PENAL CODE §2.02 (1985); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 140-42 (LexisNexis 4th ed. 2006).

²⁰⁶ See art. 609-*quater* c.p.

²⁰⁷ See art. 43 c.p. For some examples of case law on rape defining *mens rea* see *Cass. III 10 marzo 2000, Rinaldi, RV 220938, Cass. III 30.3.2000, p.m. in c. S.D.D. in Rivista penale 2000, p. 687.*

my opinion could be considered partial since I personally come from Reggio Emilia, a town that owes much to Kobe and his father.

*VII. Do the Italians (or the Americans) have it right?*²⁰⁸

Terming to more general points, I believe that both Italian and American laws on sexual offenses show some relevant defects. Italian law, from 1996 on, contains one single offense on rape²⁰⁹. This means that all kinds of acts showing 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 offense²¹⁰. Not even the different amount of force is relevant, because rape can be committed by a sudden and fleeting slap on the buttock or by threatening the victim with a knife²¹¹.

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 can hardly be labelled as rapes. This explains why cases such as GG and AM find such surprising decisions in court. I think that Italian law should try to develop a more structured system of sexual offenses, differentiating them from the most lenient to the most serious ones. In such a different context, Italian courts would certainly come to more understandable decisions.

With regards to American Law, I perfectly agree with Professor Vitiello. On the one hand, some of the offenses seem to be too harshly drafted (see e.g. the old Georgia Statute, mentioned by Professor Vitiello);²¹² 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 discriminations among various types of offenders. Of course, there is room for minor offenses where the *actus reus* or the *mens rea* are less serious; such offenses could provide for criminal negligence as the minimum subjective element.

²⁰⁸ That is, according to Professor Cadoppi, do the Italians or Americans have it right?

²⁰⁹ The other sex offenses can be considered “satellites” of the only sex offense described by art. 609-bis c.p.

²¹⁰ For some examples of cases where the Supreme Court discussed whether kisses could lead to a conviction for rape see: Cass. III 27.6.1998, Di Francia, in *Cassazione penale* 1998, p. 3281; Cass. III 4.12.1998, De Marco, RV 212821; Cass. III 15.11.2005, Beraldo, RV 233115; Cass. III 5.10.2006, Tisi, in *Giuda al diritto*, 1, 2007, p. 71; Cass. III 13.2.2007, Greco, RV 236964.

²¹¹ See, for an analysis of the case law and for a comment of the Italian provisions on rape, A. CADOPPI, *sub art. 609-bis c.p.*, in A. CADOPPI (directed by), *Commentario delle norme contro la violenza sessuale e contro la pedofilia*, IV ed., Padova, 2006, p. 439 ss.

²¹² See discussion, *supra* at nn. 177-87.

But the consequences of sexual offenses in US law – as Professor Vitiello has demonstrated elsewhere and here as well – are really 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 registrations of sexual offenders and so on. But such measures should only apply to the most serious cases and to the most vicious offenders, especially to offenders with high risk of recidivism, such as certain types of paedophiles.

With these specifications, I think that even 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 about introducing some form of “chemical castration”, that should be applied only in particular cases and with the consent of the offender.²¹³

The criminal law should be tailored to reflect criminal behaviours, and criminal sanctions and measures should be fair and proportioned to the crime and to the need of society. When laws depart from such a rule, they create injustices and lead citizens to lose confidence in the criminal justice system as a whole. On the contrary, the citizen should be proud of the laws of his country, and happy to say, with Cicero, “*secum justitiam habens, recte gloriari potest*”.

²¹³ See, *amplius*, A. CADOPPI, *sub art. 609-bis c.p.*, in A. CADOPPI (directed by), *Commentario delle norme contro la violenza sessuale e contro la pedofilia*, IV ed., Padova, 2006, p. 538.