CHARTER IMPLICATIONS IN CRIMINAL JUSTICE: A COMMENTARY ON KLINCK AND WEISER

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Professor Dennis Klinck's analysis of the Supreme Court's approach towards the appropriate degree of *mens rea* required for various crimes reveals the unsatisfactory state of the Court's jurisprudence on this point. Further, it intimates that it is unsatisfactory because it is incomplete. Klinck ends his paper by suggesting that "focusing exclusively on the accused, 'what has he done that justified this treatment,' may not account for factors that may be relevant to an adequate appreciation of 'justice'."[1] He asks whether it is appropriate to think of justice primarily from the perspective of the accused and his or her state of mind. I will consider this question from the perspective Klinck has indicated as guiding the court, using Irit Weiser's paper as an example.[2]

Klinck's and Weiser's papers raise a very important question: is it just to shift the focus from the accused to the complainant in sexual assault cases? In doing so, do we risk a departure from the "basic tenets" to which members of the Court have deferred, a deference Klinck rightly describes as "conceal[ing] an ambiguity and a tautology"?[3] The answer to this question requires us to step outside the framework of a particular case and to bring the reality and context of sexual assault into the courtroom: what is the context of this crime for its victims?

Weiser indicated that the new sexual assault provisions were not really anything new.[4] The Supreme Court is increasingly grounding its understanding of various cases, whether in tort or in criminal law, in the total circumstances of the case. I recognize the differences between tort and criminal law and do not ignore them. However, I believe it is useful to treat those distinctions loosely in considering the appropriateness of criminal law as a response to undesirable behaviour. For example, the Court has recognized the harm done to women as a group by pornography (which we can expand to the members of the community who constitute the object of pornography), as distinct from harm to an individual woman. This harm is found in the mere existence of pornography as a form of discrimination against women. The understanding of the impact of pornography relates neither to the accused nor to the state, but to those who are represented by the state or who are invisible complainants.

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[1]D.R. Klinck, "The Charter and Substantive Criminal Justice" (1993) 43 U.N.B.L.J. 191 at 210.

[2]I. Weiser, "Sexual Assault Legislation: The Balancing Act" (1993) 43 U.N.B.L.J. 213 at 213.

[3]*Supra,* note 1 at 197.

[4]*Supra,* note 2 at 222.

In a recent case on incest and the limitation period, the Court acknowledged and took into account the unique and complex nature of incestuous abuse.[5] As well, it considered the major, consequential harm of such abuse – the victim's lack of recognition of the incestuous conduct as wrong or linked to the harm. This acknowledgement relates to the complainant. The court has also concluded that self-defence must be redefined to take into account, where factually appropriate, the reality of what it means to be a battered spouse. This acknowledgement relates, of course, to the accused.

These approaches are grounded in equity and equality, as they are analyses that recognize where the power and disadvantage lies. In the preamble to the new sexual assault legislation there is a recognition of "the unique character of the offence of sexual assault." If we are to approach this issue from a contextual perspective, we must start with the nature of the offence and its "unique character." It is an offence which is committed primarily by men against women (although certainly not exclusively). It is an offence which occurs in "every day" situations. It arises often out of the *normal* relations between men and women. It is an offence which perpetuates the power men exert over women and is one of the means by which women's subordination is maintained. The reality of sexual assault is described succinctly by Weiser's paper: "inextricably linked to that problem is the pervasive and negative influence of rape mythology on the commission of the crime of sexual assault, the subsequent investigation, prosecution and trial, and the application of the law."[6]

In attempting to discover some underlying principle or pattern to the Supreme Court's treatment of *mens rea*, Klinck suggests that "if we postulate that the will, the power of choice, is important to what we are as persons, then justice can perhaps be explained in terms of attaching consequences only to the exercise of that human faculty."[7] He finds that principle tentatively in the concept of "moral proportionality," although I am not sure even he is convinced that this connection is justified.[8] We return to the notion that we do not convict a person who has not done anything wrong, but the application of s. 7 of the *Charter*[9] requires us to refine this principal. The punishment, the conviction and the stigma attached to it, must be congruent with the actual deliberate wrongdoing and not only with the consequences. Klinck suggests that the source of this principle lies beyond the law ("our law"). It lies in something we might call natural law, basic principles of

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[5]*R.M.* v. *H.M.* (1992), 96 D.L.R. (4th) 289 (S.C.C.).

[6]*Supra*, note 2 at 215.

[7]*Supra*, note 1 at 203.

[8]*Ibid.*

[9]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

human interrelations or "belief in the dignity and worth of the human person."[10]

But if we are talking about "the dignity and worth of the human person," how can we ignore the dignity and worth of women who are vulnerable to being treated as a source of sexual satisfaction by men who give little thought to the women's wishes? The new legislation provides that in determining whether evidence relating to the complainant's history of sexual activity is admissible, the judge is required to take into account, among other factors, "the potential prejudice to the complainant's personal dignity and right of privacy."[11]

But that is at the trial stage. The invasion of a woman's right to choose how she will act and how she will have other people treat her arises from the very activity which will form the basis of the sexual assault. As Weiser pointed out, "it is fair to describe sexual assault legislation as a response to the s. 7 right of women to security of the person and the s. 15 right, complemented by s. 28, to equal benefit of the law."[12] Thus, the legislation addresses constitutionally protected rights of the complainant, of women as a community, and of the accused. If we look at sexual assault from the perspective of the complainant, rather than the accused, what does that say about the way in which we treat consent and mistaken belief? What does it say about "moral proportionality"?

The locus of "consent" is placed in the person who has allegedly been assaulted. This means that sexual assault is seen from the perspective of the person assaulted rather than from the perspective of the accused. As a question of practice, rather than of law, this means that the circumstances of sexual assault and the determination of the most significant element of assault (the lack of consent), is identified by women. It is the experience of women which counts in this respect.

In the new legislation, there are circumstances in which no consent can be obtained. For example, if "the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority," there is no consent.[13] This legislation recognizes that in these circumstances we cannot realistically talk about choice, will or self-determination. For instance, the relationship between clients and lawyers and patients and doctors must be one of trust if it is to work effectively. In Ontario, the special relationship between doctors and their patients was considered at some length in the inquiry into sexual assault of patients by their

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[10]*Supra,* note 1.

[11]R.S.C. 1985, c. C-46, s. 276(3)(f) as am. *An Act to amend the Criminal Code (sexual assault),* S.C. 1992, c. 38.

[12]*Supra,* note 2 at 216.

[13]*Supra*, note 11 at s. 273.1(2)(c).

doctors. The abuse of this trust, which is integral to the doctor-patient relationship and *which the doctor both reinforces and relies on in treating the patient*, is particularly problematic.

Under the new legislation, the defence of belief that there has been consent is not available if "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting."[14] The accused has the onus of showing that he took reasonable steps. There is a positive, continuing obligation on the accused to ascertain that the complainant was consenting. There is no consent where "the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity."[15] The words "lack of agreement" in the definition of consent is significant. If I have not said "yes," I have said "no."

What is the intention necessary to commit sexual assault? It is the intention to ignore the victim's wishes or to be *reckless* as to whether one knows the victim's wishes. What is it that we want to discourage? We want to discourage reckless, thoughtless behaviour or behaviour which disregards the wishes of one party. Therefore, it is appropriate to impose on the accused a requirement that he establish whether the woman consents. There is not a due diligence defence where the belief that the complainant consented arose from the accused's "recklessness or wilful blindness." Klinck has indicated that the lack of a due diligence defence is problematic for the Supreme Court, at least in non-regulatory situations.[16] In the context of sexual assault, however, it would be oxymoronic to permit a defence of due diligence because, by definition, the accused has shown no interest in deciding whether the complainant has consented.

Read together, these two papers allow us to evaluate the principles the Supreme Court has been developing with respect to *mens rea* and the meaning of "justice" within the specific context of a crime which, as Irit Weiser's analysis shows, brings to the fore the very security of women and the mythologies by which we are judged.

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[14] *Ibid.* at s. 273.2(b).

[15] *Ibid.* at s. 273.2(2)(d).

[16] *Supra,* note 1 at 205-06.