

Discerning the purpose of the Criminal Code – The Dworkin’s principled-based approach in unlawful stalking (Vol 1: Issue 3) ISSN 2206-3145

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The work of Ronald Dworkin is useful when examining judicial statutory interpretation. The judiciary are often faced with challenges on how best to interpret statutes and other rules when such *lex scripta* are not clear or the facts give rise to challenging normative interpretations. One such challenge is presented by the anti-stalking legislation in the Queensland Criminal Code as to whether criminal responsibility should be assigned where the victim is not aware or has no knowledge of the alleged stalking. The dilemma for the judiciary is whether criminal responsibility should be assigned when a person commits certain acts that would otherwise constitute unlawful stalking but there is no knowledge or awareness on the part of the person to whom the stalking is directed. The judiciary must grapple with the question as to whether a person is criminally liable even though no harm has resulted of the stalker’s activities. How must the judiciary decide such issues?

Dworkin asserts that there are a range of factors that judges employ, whether knowingly or not, when considering their reasons for their decision. Dworkin states that in hard cases, judges rely on a number of ‘principles’ of law that they use in order to maintain law’s ‘integrity’^[1] rather than posited rules.^[2] Such ‘principles’ as argued by Dworkin, are engrained throughout the common law and include notions of fairness, proportionality,^[3] and any other principle that goes to the moral blameworthiness of the conduct on the part of the offender.^[4]

Essentially what Dworkin seems to be arguing is that such decisions are made on the basis of the individual judicial member’s own conception of morality regarding the facts of each case and the circumstances of the accused and the victim. The infusion of morals within the context of judicial decision-making would appear inevitable given that judges are not machines and would be susceptible to individualised notions of sentencing in each case. As such, it is doubtful that Dworkin is criticizing this inherent trait in relation to the judicial decision-making process, rather he is putting forward a plausible explanation as to some of the possible reasons for judicial reasoning in certain circumstances.

Dworkin argues that the use of ‘principles’ are integral in the process of interpreting law and maintaining integrity within the system.^[5] Principles, as posited by Dworkin, take on the appearance of social ‘standards’ and as such, stipulate or advance a particular social good.^[6] Lawyers use such ‘standards’ or ‘principles’ when arguing about rights and are integral in the requirement for justice, fairness or some other dimension of morality.^[7] Interpreting law therefore does consist of moral interpretation by the application of such principles.^[8] As an aside, it should be argued that the use of a disguised morality could be a cause of concern if doubts are raised regarding the nature of the ‘morality’ in question.

The use of ‘principles’ as Dworkin calls it, could encompass a wide variety of elements and there are numerous ‘principles’, as outlined above in which the judiciary might consider applying where the victim had no prior

knowledge of the alleged offender's actions. Parliament's intention is certainly one aspect courts could consider^[9] and there is some evidence of how this would be regarded in relation to the requirement of knowledge of the victim.^[10] Courts may also consider the proportionality and fairness aspects of imposing criminal liability for behaviour that could also be interpreted as 'normal'. The harm principle in combination with the above aspects might mean that unless there is clear evidence of the accused engaging in acts of unlawful stalking, the judiciary may be unwilling to impose criminal liability for unlawful stalking when the victim is unaware of the alleged perpetrator's acts and the victim suffers no physical or emotional harm.

As the above analysis shows, the criminal culpability of an individual alleged to have committed acts of stalking, could be discerned by applying various tests to determine if the offence of stalking has occurred. However, what is unique for this offence is the fact that the victim's own mental element must *also* be established in order for the Crown to prosecute its case. This may seem to be a strange state of affairs especially since it is usually the accused's state of mind that is critical for this purpose, rather than the victim's. Such an assumption would seem appropriate given that the function of the criminal law is to address the wrongful conduct of the accused. However, the cases of *Davies* and *Taylor* would seem to suggest that the prosecution does need to take into consideration, at least to some extent, whether the alleged victim had some form of knowledge of the accused's stalking behaviour, and/or requiring the former to apprehend some form of fear or threat.

Such a proposition nonetheless introduces, somewhat counter intuitively, a fault element on the part of the victim, into an assessment of the alleged offender's innocence or guilt. In most cases it will be plainly obvious to a person whether he or she is the subject of unwanted attention by another person, simply by the overtly manifest behaviour of the other. However there are instances where this will not be as clear to a potential victim as it might seem, and it appears that this question still remains unsettled – at least in Queensland.

^[1] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 22-3, See also, Ronald Dworkin, *Law's Empire* (Fontana, 1986).

^[2] Dworkin contrasts the positivist position throughout his writings and cites a number of specific examples to highlight differences between his theory and those of the positivists such as H L A Hart.

^[3] Andrew Von Hirsch, *Censure and Sanctions* (Oxford University Press, 1993) 3.

^[4] *Ibid*, 15.

^[5] Dworkin, above n 59, 22-3. Dworkin cites a number of examples of such principles (e.g. principle involving that a criminal should not benefit from their crime; murderer shall not receive property under a will; and principles that restrict manufacturers from limiting their liability). Such principles are engrained throughout the common law.

^[6] *Ibid* 24.

^[7] *Ibid* 22-3.

^[8] Suri Ratnapala, *Jurisprudence* (Cambridge 2009) 177, 181.

^[9] Although the use of extrinsic material in Code jurisdictions is certainly one aspect that may affect such decision.

[\[10\]](#) Queensland, *Parliamentary Debates*, Legislative Assembly, 27 April 1999, 1394 (Liz Cunningham, Honourable Member for Gladstone).