

## #MeToo In Criminal Court

by Adam Sheppard

The #MeToo movement has catapulted sexual harassment into the public consciousness. Prosecutions for inappropriate sexual advances are increasingly common. This author's firm recently represented an 80-year-old man, with dementia, who was charged with battery based on an allegation that, while shopping at a clothing store, he told a 19-year-old saleswoman that he liked a tattoo on her neck, touched it, and stated that he would like to kiss her. After extensive negotiations with the State's Attorney's office, moments before the trial was due to start, the State agreed to dismiss all charges in exchange for a public apology and an agreement to stay out of the store. The case highlights the difficulty in distinguishing between inappropriate sexual advances and criminal conduct.

Criminal statutes do not provide a bright line rule for determining when an inappropriate sexual advance constitutes a crime. For example, the battery statute prohibits knowingly making physical contact "of an insulting or provoking nature." 720 ILCS 5/12-3(b). The statute does not define the terms, "insulting or provoking." The harassment through electronic communication statute prohibits using electronic communications (e.g., text messages or emails) for the purpose of "making any comment, request, suggestion or proposal which is *obscene* with an intent to offend." 720 ILCS 5/26.5-3(a)(emphasis added). The statute does not define the word, "obscene," but the Illinois Appellate Court, Second District, has held that the dictionary definition should apply: "disgusting to the senses" or "abhorrent to morality or virtue." *People v. Kucharski*, 2013 IL App (2d) 120270, ¶35 (2d Dist. 2013)(citing, Merriam-Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary/obscene> (last visited Jan. 17, 2013)). Such standards may be ambiguous.

Several commentators have recently pondered when an inappropriate sexual comment or advance becomes a crime. In January, one day after the Golden Globes, French actress Catherine Deneuve and more than 100 other women, including prominent actresses, academics, and publishers, submitted a letter to the newspaper *Le Monde* – *The New York Times* later republished it – which argued that the #MeToo movement has gone too far. The letter began as follows:

"Rape is a crime. But insistent or clumsy flirting is not a crime, nor is gallantry a chauvinist aggression."

<https://www.nytimes.com/2018/01/09/movies/catherine-deneuve-and-others-denounce-the-metoo-movement.html>

Carrie Lukas – president of the non-profit Independent Women's Forum and author of *The Politically Incorrect Guide to Women, Sex, and Feminism* – recently noted: "Safe romantic gestures - candy, cards, compliments and flowers - might be construed as aggressive and harassment." <https://www.reuters.com/article/us-valentines-day-usa/metoo-movement-means-changes-for-valentines-day-romance-idUSKBN1FLAUF>.

Generally, to constitute a crime, the accused must have acted with a *mens rea*, "a guilty mind." Accordingly, in determining whether an inappropriate sexual advance rises to the level of a crime, the primary focus should remain on the accused's *intent*. The harassment through electronic communication statute has the right idea in requiring proof that the accused acted with a specific intent to offend. 720 ILCS 5/26.5-3(a). Unfortunately, not all criminal statutes – such as the battery statute – require proof of a *specific* intent. But even in battery cases, the defendant's mental state remains an element of the offense. See *People v. Robinson*, 379 Ill.App.3d 679, 684-85 (2d Dist. 2008)("Regardless of whether one calls battery a specific intent crime or a general intent crime, however, the criminality of defendant's conduct depends on whether

he acted knowingly or intentionally, or whether his conduct was accidental."). In the aforementioned case involving the 80 year-old man, defense counsel presented a letter from the client's psychiatrist which documented that the defendant not only had dementia, but early onset of Alzheimer's disease.

The #MeToo movement is obviously well-intentioned. However, as Justice Brandeis cautioned: "The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928)(Brandeis, J., dissenting). Accordingly, those in the criminal justice system must carefully examine whether the alleged inappropriate behavior truly rises to the level of a crime.

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