# LAW AND JUSTICE

## *A Woman Judge's Insight*

by

THE HON. MARIE CORBETT, Q.C.

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It's been over twenty years since I said the following in a speech in Toronto: that women's fight for equality and equity had to take into account two realities - first, that the bulk of child care is being done and will in all likelihood continue to be done by women, and second, the reality of the nature of violence. "Over 90% of violent crime is committed by men, and the overwhelming number of victims of violent crime are women and children."

As Leonard Cohen sings: 'I can't say much has happened since'

Let's explore what *is* happening today:

Despite the enactment of laws against it, sexual harassment thrives, particularly in male-dominated occupations.

Brenda Seymour, the lone female member of the volunteer Fire Department of Spaniards Bay, NL resigned after a guest instructor played a pornographic film at the end of a classroom session. A co-worker joked when handing her a balaclava "you might want to go home and wash that – we jerked all over it."

A fire chief in Fort St. James, BC, found guilty of sexual assault said to the women firefighters "if you want a promotion why don't you put on my knee pads and blow me under the desk."

A study by the Canadian Armed Forces found that there was an underlying sexual culture in the military that was hostile to women. Women experienced degrading expressions, sexual jokes, and unwanted touching.

Inside the workplace or not, over 80% of sexual assault victims are women and children. Native women and disabled women are more likely to be sexually assaulted. Native women are more likely to experience violence than non-native women. Over 80% of disabled women will be sexually assaulted during their lifetime.

And after such occurrences, a mere 6% of sexual assaults are reported and 1-2% of date rape incidents are reported.

And what has criminal justice been doing?

In Toronto, sexual assault charges were dismissed against Jian Ghomeshi in the highly-publicized trial because the complainants were discredited.

In Alberta, McIlhargey J. acquitted a 16-year-old boy of raping a 13-year-old girl in a park. The conviction was overturned on appeal and a new trial ordered. The Alberta Court of Appeal said that the judge's comments that she did not scream or run for help are tied to the idea that true victims of sexual assault will resist their attack. The court also said that the judge's comment that she did not tell her friend or her aunt resurrected the abrogated doctrine of recent complaint. Under that doctrine, judges are not to determine a victim's credibility based solely on delayed disclosure.

This past September, The Canadian Judicial Council conducted an inquiry into the conduct of Justice Robin Camp of the Federal Court of Canada during a sexual assault trial when he was a provincial court judge in Alberta. The inquiry was requested by the Minister of Justice of Canada and the Minister of Justice of Quebec and was undertaken because there is a direct connection between public confidence in the judicial system and the integrity of judges, both real and perceived.

At the trial of a 19 year old Cree woman who was homeless at the time, Justice Camp interrogated her, asking "Why couldn't you just keep your knees together?....Why didn't you just sink your bottom down into the basin so he wouldn't penetrate you?" He observed young women want to have sex, particularly if they're drunk. In his view there was no real talk of real force. The Court of Appeal of Alberta ordered a new trial doubting Justice Camp understood the law governing sexual assault. During the trial Justice Camp characterized the

rape shield law as “very, very incursive legislation” as preventing otherwise permissible questions “because of contemporary thinking”. He allowed questions about whether she had said no in the past. He exhibited virtually all of the sexist stereotyping of the rape myths. “If you were frightened you could have screamed.”

Camp J. did not know the purpose of the rape shield law and he disdained it. At the inquiry, he admitted that he had a ‘deep-rooted bias’ about women that was ‘unconscious’. He appeared to have little insight into the wrongness of his statements describing the remarks as ‘facetious’. He has clearly brought the administration of justice into disrepute. He has disparaged the law he was duty-bound to uphold. He has caused an erosion of public confidence in the administration of criminal justice.

These judicial attitudes epitomize not one but most of the rape culture myths.

These myths persist and are designed to show that victims invite rape, that they consent to assault. These myths downplay sexually aggressive behavior by men with the result that men are exonerated for sexual violence. These myths include:

- the belief that women invite rape by their manner of dress and their behavior,
- the belief that if it were a genuine assault, the woman would report it immediately,
- the belief that a women who is assaulted will fight back,
- the belief that a woman’s behavior before and after the assault is relevant to the truth of her allegations.

And make no mistake many rape culture myths were once a part of the law. They have a long ingrained history. The law required that the evidence of so-called “unchaste” women had to be corroborated by another witness – in other words, a woman’s sexual nature made her inherently unworthy of belief. A married woman could not refuse to have sex with her husband. If a woman did not resist ‘to the utmost’, she must have consented.

Two forces are at work….First, the rape culture myths actually reflect how many in society view rape victims and are ingrained social assumptions. As we have seen some judges share these biases. Second, these myths become a basis of cross-

examination in the courtroom and this cross-examination of sexual assault victims deters victims from coming forward.

Let's look at the function of cross-examination.

First of all, in any trial, civil or criminal, every witness is subject to cross-examination. Judges and juries assess the truthfulness of the witness and the weight to be given to their testimony.

A primary purpose of cross-examination is to discredit the witness. Judges instruct juries on how to assess credibility, which is no different from how judges themselves assess credibility. Judges tell juries to use their own common sense in assessing credibility. Then factors in determining truthfulness are reviewed:

- the ability of the witness to see and hear what the witness described…It was dark out, you couldn't really see the accused, were you wearing your glasses? Weren't you were too far away to hear what was said…
- whether the witness is impartial or has an interest in the outcome … you have a vendetta against my client, don't you
- the manner of testifying, whether the witness was forthright or evasive
- whether the witness has made statements in court that are inconsistent with earlier statements…whether the discrepancies are deliberate or a lapse of memory…you told the police that you couldn't really tell which one did it and now you say it was my client?

What happens when these sensible criteria are applied in sexual assault trials?

Women are cross-examined on the basis of rape myths and personal characteristics:

You're a sex trade worker aren't you? As if a sex trade worker will consent to all sex.

You were looking for a good time by going to that club, weren't you? You invited him up to have sex? As if every woman who is partying will not refuse sex.

You didn't go to the police after? As if there is a particular time a witness should reveal what is likely a traumatizing shameful occurrence.

If that happened, why did you see him again? As if to say, if it really happened you would not ever see him again.

And then there is the cross-examination on any and every inconsistency with previous statements, sworn or unsworn, significant or insignificant. You said it happened out of the blue and now you say it happened when you were intertwined at the time? You said he pulled your hair while kissing and before you said it was after kissing?

The ordeal of cross-examination has a dissuading effect on victims and can be humiliating and demeaning. Unless changes occur, victims may become even more reluctant to have recourse to the criminal justice system.

What can be changed?

The cornerstone of criminal law is that an accused person is presumed innocent and has a right to silence.

There is nothing inherently offensive about requiring an accused person to testify. Indeed in the earliest common law trials, the injured party prosecuted and the accused responded. The jury would decide if the accused adequately explained away the evidence. It was considered that the accused was the most obvious witness. From that perspective, the right to silence is a barrier to truth.

With the lawyerization of criminal law, the presumption of innocence became law and with it, the burden on the Crown to prove the accused's guilt beyond a reasonable doubt. Some argue that this standard is too high. I disagree. Even in the face of this high standard, many innocent people are convicted. Further, it is a standard of proof that benefits all of us in a myriad of circumstances where the state imposes penalties….It applies to regulatory offences…parking tickets, zoning infractions, breach of statutory regulations and the like. Clearly it is in the public interest to maintain this standard.

Each accused person has a right to a fair trial, namely, trial that assumes innocence and proves guilt beyond a reasonable doubt.

So the right to silence remains, the burden of proof remains. Systemic problems arise not because of these essential elements of the criminal law but because of

the method used to determine guilt, namely the adversarial system. We do not have an inquisitorial system where the court or judge is actively involved in investigating the facts, such as in much of Europe. We have an adversarial where the role of judge is that of an impartial referee between the prosecution and the defense.

Facts are proven by the evidence adduced. A trial is not a search for truth. It is a regulated two-sided storytelling contest. If only the complainant is testifying, the trial is one-sided. It is a system of procedural justice not substantive justice. There is a higher value on winning than on finding the truth. A duty to a client is not a duty to truth.
Justice may require a more multi-faceted method. There are not only two sides to every story. Criminal proceedings are really three-sided…society or the state, the victim, and the accused. In an adversary system the judge's function is more procedural. Judges decide a case on the evidence adduced. Judges cannot compel witnesses whom the parties do not call to come forward. Judges cannot say what evidence they would like adduced.

I put it this way in my book:

> What was my role in righting social wrongs? "Dispensing justice" or "finding truth" are responses too wide of the mark. I was realizing that my function was narrower and more modest: as a criminal trial judge, my job was to ensure that an accused person received a fair trial. Certainly, a fair trial is part of the goal of justice. Increasingly, I concluded that justice meant ensuring a fair trial for the accused, not necessarily redress for the victim, not necessarily the protection of others, and not necessarily the prevention of crime.

There is little judges can do to constrain the questioning during cross-examination as cross-examination is considered the cornerstone of the adversarial trial process and a fundamental feature of a fair trial. The Supreme Court of Canada has described cross-examination as the "ultimate means of demonstrating truth". In a sexual assault case, the credibility of the complainant is the central issue. Defense lawyers want to discredit the complainant without calling the accused as a

witness. The focus is on ‘destroying’ the witness. And unlike an accused, a witness has no right to a fair trial. Yes, there have been inroads made in the law respecting victims, such as the publication ban on identifying the complainant and the introduction of witness impact statements. However, these do not address the impact of cross-examination in the adversarial system

What can be done? Legal initiatives may be commenced.

First, recourse to the criminal justice system may not be the appropriate remedy in sexual assault cases in ongoing relationships. Boyfriends and intimate partners are the most common perpetrators of sexual assaults. Toronto lawyer David Butt advocates a new approach whereby the Attorney-General would undertake an alternate avenue of redress on behalf of the complainant against the perpetrator involving the civil standard of proof on a balance of probabilities. For example, in the Ghomeshi case, a watershed case, but hardly typical in that each complainant had consented to the sexual acts but did not consent to the alleged assaults. On the evidence, it was a case of physical assault in an ongoing sexual relationship and may very well be the type of case proceeded with as proposed by Mr. Butt.

Opponents counter this proposal by saying that victims now have the right to commence a civil action against the perpetrator. In my view, requiring victims to hire a lawyer and undertake legal action is oppressive both financially and emotionally and is tantamount to further victimization.

Second, legal advice should be offered to victims at some stage of the process and complainants should be told at an early stage that statements given to those in authority and others may be used in cross-examination at trial. Ontario has instituted a pilot project giving 4 hours of free legal advice to sexual assault complainants.

Third, complainants should be given copies of their statements prior to trial. Consideration might also be given to requiring disclosure of statements made by complainant witnesses that are in the hands of the defense.

Fourth, it’s time to re-examine the rule against allowing prior consistent statements. Prior consistent statements are considered self-serving and a form of hearsay and are not generally allowed. There are many exceptions to this rule and

it may be time to discard the rule providing the person to whom the statement was given is available to testify. The rule is particularly iniquitous in child sexual assault cases where statements made at earlier times to family members, school teachers, and social workers are not generally admitted. If inconsistency is the mark of untruth, why can't consistency be the mark of truth?

Fifth, a small change: allow witnesses to answer in their own way. Too much use is made of requiring the witness to "just answer the question. Say yes or say no" as if to suggest the hesitation might be a sign the witness is lying. In fact, there may be a truthful answer that the witness should be allowed to fully explain. Judges have ample ability to contain rambling answers.

Finally, the real culprit is not so much the criminal justice system as the lack of respect for women.

And in this regard, judges are not immune from holding and, as we have seen, expressing sexist views. There must be a culture shift to combat sexism in and out of court. The face of justice cannot be that of the white middle-aged male or to be more precise, the face of disrespect in the courtroom cannot be that of the white middle-aged male. I have no doubt that with the report of the Justice Camp inquiry, significant educational programs will be undertaken. Judges will be made more aware of sexist and disrespectful attitudes they may hold. The judiciary must ensure that sexual assault victims will not be further deterred from coming forward and that confidence in the administration of justice will increase.

Law is one thing, culture is another. We have to overturn long-held societal beliefs. Men and women alike must get rid of any notion that women are subordinate to men. Women should not feel that their own sexuality provokes male violence. Feeling sexual desire and attractiveness is not asking for it. We are grounded in a history where sex was shameful. If it weren't so shameful we might not need a ban on publication. We are grounded in a history, where marital rape was not a crime, where women were one person with their husband upon marriage, where women had to fight to get the right to vote, to be educated. We are faced with this history of laws made by men for men.

Yet there is no plausible reason to justify the subordination of women. We are more than sex objects, baby makers, and caregivers. Men do not have the right to

control women. As I quoted at the beginning, ‘I can’t say much has happened since.’ The rates of sexual assault have remained relatively stable. Why? Because attitudes have not changed. It’s a common belief that men have the right to control women. Our culture, our media glamorizes male violence and hypermasculinity.

What are we doing to deter the male violence so glorified in social media, in entertainment? Justice Camp said to the accused before finding him not guilty, “I want you to tell your friends, your male friends that they have to be more gentle with women.” Is that the answer? To accept that violence by males is normal and “boys will be boys”? And that we have to put up with it?

We must deal with the gender gap in perceptions. In instances of date rape there is a chasm between the male and the females. Many males feel that if some sex is consented to, intercourse is also consented to. Men are brought up to treat women as objects. In the historical carry over of the Madonna/whore dichotomy, many men think that if a woman is sexually active she will do it with any one. And when will men appreciate that their arousal is not a justification for the use of force. Arousal is not a license to have sex with the object of the arousal.

At Dalhousie University, 13 male dental students were members of a Facebook group featuring sexist and sexually violent posts. Like most men in the military, they did not view sexual language as harassing. The students had little or no insight into their misogynistic statements until they heard from the victims themselves. They gave the statements no weight as one student said because it was like a private conversation. These young men participated in a restorative justice process under the NS Restorative Justice Act and were eventually allowed in class and allowed to graduate. The women too realized that they had been unconcerned about the objectification of other women because inappropriate sexualization is common and they had only reacted because the posts were about themselves.

Finally, to change the culture we need to know more about the abusers, the assaulters. We have endless data about victims: data on the ages, ethnicity, disabilities, relationship to the assaulter.

What do we know about perpetrators? We know that a majority of those convicted are known to the victim, that half are under 30 years of age, and that 57% are white. But what of the would-be rapists, assaulters?

We need to know more about and address male risk factors. There is data that these risk factors include:

- having a previous history of violence against women,
- holding traditional gender role beliefs. Men who view women as their equal are less likely to commit sexual assault.
- having a personal history of exposure to abuse.

We need to know who the potential perps are and to develop and effective rape-prevention and rape-deterrence programs for men. It's time we had a new rape kit: a rape kit to identify potential sexual predators.

I have often reminded women that change affecting women came about because women fought for it. Women went to jail to get the vote, women sued to be treated as 'persons' in law, to be educated, to be lawyers. These laws were not enacted by enlightened male legislatures. We fought. We still must fight. You here today are on the front lines. Keep up the good fight.

I will close with a quote from my book:

> After thirteen years on the bench, I seemed to be half living other people's lives yet not living my own. I was re-living the lives of other – the father who sodomized his stepdaughter on their walks in the local park; the six-year-old on the stand who plaited and unplaited the ears of her worn,
> stuffed bunny, unable to look at her molester in the prisoner's box; the wife who had allowed her children to be tortured for years by her husband and who now carried a hat pin to stab herself as she crossed the street, lest she begin to go into another personality; the husband and wife who broke every major bone in their newborn's body … The horrors were unending and too many details stayed fresh. I was always on the outside required to look in, seeing what they did and who they did it to and those accused and innocent and guilty and not guilty who lived rent-free in my mind and appeared at will.

… Exhausted by being a witness to the lives of others, I wanted to find the energy to live my own life…. I no longer wanted to dissect what had gone on before, a robed institutional cog in the machine of justice.