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Letters—Time and place

Judge Alex Kozinski[*]
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While purporting to disagree with me about so many things that they cannot fit on a full printed page, Edward L. Greenspan in fact concedes the central thesis of my earlier column (Judge Kozinski, I Beg to Differ, March 11). He now agrees it is okay for Supreme Court justices to criticize judges of the inferior courts when they say things that are truly out of line—such as anti-Semitic comments. So much for Mr. Greenspan's highfalutin' rhetoric about how it's unfair for super heavyweight Supreme Court justices to pick on little ole' middleweight Court of Appeal judges. Mr. Greenspan and I now agree there is a time and place for a scolding in a judicial opinion.

We differ only as to whether this was the time and place. No way, says Mr. Greenspan, because Judge John McClung was just giving us "evidence of personal background, demeanour, and appearance, all of which a finder of fact will be instructed to take into account." In Mr. Greenspan's view, Judge McClung was telling us the facts, and nothing but the facts.

But facts are powerful things. Which facts we select and how we describe them can send a potent message. By omitting some facts and emphasizing others, we can distort the truth. Take, for example, Judge McClung's observation that the victim was not wearing "a bonnet and crinolines." Well, yes, I suppose that's a fact, but why did Judge McClung choose to mention that particular fact? The complainant also was not wearing a swimsuit or

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a spacesuit or a Bugs Bunny outfit. Judge McClung mentioned her lack of bonnet and crinolines because he was sending a message: Complainant did not share the morals of women who did wear such acoutrements on a regular basis—women of the Victorian era.

And what about Judge McClung's comment that the victim had a baby and was living with her boyfriend? Neither her living arrangements nor her marital status were of any independent significance in the case. These "background facts," as Mr. Greenspan would call them, were only significant for the implication he was seeking to convey: Complainant was a woman of easy virtue who had a child out of wedlock and lived with a man not her husband. And why on earth should that matter? Why highlight it, as did Judge McClung in his inimitable way? Of course, it's to make the case that women of "that sort" lure unsuspecting chumps like Steve Ewanchuk into unzipping their trousers during job interviews.

And here we get to the meat of the coconut: Is it really true, as Mr. Greenspan says, that triers of fact should be free to consider all aspects of the "personal background, demeanour, and appearance" of the victim in a sexual assault case? Should defence lawyers—and appellate judges—be free to trash the character of a rape victim in an effort to show that the accused was acting out of excusable "hormonal" urges? Or, to use Judge McClung's pithy words, should an accused be acquitted of sexual assault because his victim "was not lost on her way home from the nunnery"?

As Mr. Greenspan knows, as Judge McClung surely knows, not all facts are created equal. Some facts are neutral; others are powerful. Some are comforting; others hurtful. Those of us who shape the law recognize the importance of balancing disclosure with compassion for the victim. Judge McClung's words thrust searing irons into the wounds the victim had already suffered. By calling Judge McClung on his hurtful language, Justice Claire L'Heureux-Dube was saying that victims of sexual assault should not suffer yet again by having to endure public comments about their chastity, marital status, and other intimate aspects of their personal lives.

This is not such an earth-shattering proposition. Canada, like other civilized countries, has already adopted this as the standard of behaviour in its

courtrooms by passing strong rape shield laws that severely limit inquiry into a victim's private life. This was done by the people's elected representatives, not by out-of-control judicial feminists. It's a bit of a mystery to me why Mr. Greenspan and Judge McClung still believe this is controversial.