

## Empathy in the Law: Does the Robin Camp Inquiry Committee Recommendation Encourage a “Postempathy era”?

By: Alice Woolley

Case Commented On: [Canadian Judicial Council Inquiry Committee Report Regarding Justice Robin Camp](#)

What role should empathy have in a system of laws? What does an empathetic legal system look like? In a recent article on the Robin Camp case, Brenda Cossman raised concerns about the Canadian Judicial Council Inquiry Committee recommendation that Justice Camp be removed from the bench. She raised, in particular, the concern that removing rather than educating Justice Camp facilitates a growing “post-empathy” culture:

I worry even more about the impulse to punish in light of the recent rise of a powerful backlash against any and all equality-seeking groups. We have moved into a new postempathy era, where more people are prepared to stand defiantly and unapologetically in favour of discrimination, sexism, and racism. I worry that we dismiss the possibility of education and move to punish those who are genuinely remorseful (“For Judge ‘knees together’ Camp: Education is Power”, *Globe and Mail*, [December 1, 2016](#)).

I am not entirely sure what Professor Cossman meant, but I think that her point is that the absence of empathy in those who seek to remove Justice Camp encourages by example the absence of empathy in those who “stand...in favour of discrimination, sexism, and racism”. Our own insufficient empathy creates and empowers the post-empathy culture, which in turn creates the very sexism and discrimination that we seek to prevent.

Not surprisingly given my role in initiating the Camp complaint, and my publicly stated support for the outcome, I disagree with Professor Cossman’s specific position on that matter. But I am nonetheless intrigued by her analysis, and I want to explore it further. Because I certainly agree with her underlying proposition: empathy matters. Indeed, I would argue that a legal system that fails to be empathetic fails to accomplish the moral function of legality and, specifically, respect for the dignity of those governed by laws. That is, it fails *as law*. But that then leads to the obvious follow-up: what does empathy require of law? What does empathy mean in a legal context?

The dictionary definition of empathy is the ability to understand and share the feelings of others ([here](#)). For the purposes of law, though, I think empathy requires something a bit more specific. I think it requires accounting for a person’s *personal* perspective on an event or experience – i.e., how they themselves experienced or perceived it - rather than considering only an *external* assessment of that event or experience – i.e., how it is perceived from an independent and impartial point of view. Empathy in law requires that our external assessments of a person’s behaviour consider and account for the personal perspective.

To use a non-law example, I might externally label the behaviour of a customer at a store as rude but if I consider the customer's personal perspective, I will account for the bad day he'd had at work, the financial troubles that he can't seem to escape from, and the fight he just had with his girlfriend. Doing so may not make the behaviour any less rude – any independent and impartial observer would judge his conduct to have been rude – but it does see and account for the full humanity of the customer, rather than reducing him only to the observation of his rudeness. And it may shift the external assessment – at least to allow for the possibility that even if what he did that day was rude, the customer is not a rude person. To be legitimate and accurate, my external assessment must account for the personal perspective of the person being judged.

In the case of Robin Camp, this sort of empathy requires considering what led him to act as he did during the *Wagar* trial, what experiences in his life might have explained his attitude to the complainant and the accused. It requires accounting for the ignorance or lack of education that may explain his antipathy to the law and his reliance on discredited myths and stereotypes. It also requires recognizing that Robin Camp is not *only* what he did during the *Wagar* trial. He is a human being, with a wife and a family who supported him during the proceedings, and professional colleagues who did so as well. He was said during the Inquiry Committee proceedings to have been an effective lawyer with a commitment to social justice. Empathy also requires seeing and appreciating the personal consequences to him not only of the potential removal from the bench, but from the international media storm that his conduct has generated.

The law systemically accounts for the personal perspective, most obviously in the procedures it affords to people whose conduct the law has put at issue. The information about Robin Camp in the prior paragraph arises from the testimony and evidence he presented during the CJC Inquiry Committee hearing. This is also true in criminal trials, particularly in relation to sentencing, where we systemically take into account factors that may shade or even shift how we assess or judge the person whose conduct is at issue. The system is structured to ensure that external assessments only occur after the personal context has been taken into account.

In law empathy also requires that we test accounts that other people or the state give about a person's behaviour, particularly where those accounts are not independent or impartial. The law does not allow claims to be made about a party to a legal proceeding unless those claims can be proven in some way; it preserves respect for personal perspective by requiring that claims from outside that perspective be proven before they are treated as true. In the criminal context, we go so far as to assume that the external claims are false – that is, we presume the innocence of the accused – until those claims are established as true. Ironically enough, the cross-examination of witnesses in a criminal case, including a complainant in a sexual assault case, expresses this type of empathy. We recognize the personal perspective of an accused person by choosing not to believe accusations brought against that person until they have been properly proved, including by testing them through cross-examination.

The law requires that cross-examination be respectful and not abusive. A lawyer cannot demean or degrade a witness, because doing so would deny the personhood and dignity of a witness in order to preserve the personhood of an accused, and our system's rules and procedures – our constitution – preclude that trade-off. But within that boundary, when a lawyer vigorously but respectfully cross-examines a witness, however difficult and even horrible that cross-examination is for the witness subject to it, she preserves the empathy necessary for the functioning of the legal system; she does not contravene or undermine it.

Empathy in law allows for the personal perspective to shift the external assessment of a person's conduct as wrongful. We allow reasonable but mistaken belief in consent as a defence to a charge of sexual assault; the defence has an external element, in that it must be plausible when viewed from another point of view (the mistaken belief must be reasonable and the accused must have taken steps to ascertain consent). But it rests significantly on the personal perspective of the accused – because the defence necessarily contemplates that, if the conditions of the defence are satisfied, the accused may be acquitted based on his own erroneous belief. The mistaken personal belief precludes the external judgment that the accused committed sexual assault, even though the accused did in fact have unconsented to sexual contact with the victim.

There are, though, things that empathy in law does not require. Most of the time, a person's own perspective does not alter how the law assesses the person's behaviour. An unreasonable mistaken belief in consent, no matter how deeply held or believed, will not prevent an accused's conviction for sexual assault. A person who deliberately and intentionally kills someone (i.e., commits murder) will not escape conviction and a life sentence because the person otherwise made positive contributions to the community, or because we can understand the weakness and jealousy that led to that event. We can read *Othello* or *Macbeth* and pity the tragic heroes because the plays reveal their personal perspectives – their weaknesses and vulnerability – but we still see them as wrongdoers. A properly functioning legal system will do the same. We empathize, but we still judge. The personal perspective has to be accounted for, and can shift the external point of view in some cases, but it does not eliminate the possibility or need for an independent and impartial external point of view.

In the case of Robin Camp, his personal perspective invites empathy and compassion, and allows for the possibility that he is more than what he did in *Wagar*. It is possible that with less serious misconduct a judge's ignorance or apology would be sufficient to excuse his conduct. But on the information provided to them, the CJC Inquiry Committee could – as it did – determine that in this case, Justice Camp's personal perspective did *not* alter its assessment of his conduct. It did not undo the identification of the injury to the administration of justice, to public confidence in the administration of justice, to the *Wagar* complainant or to the *Wagar* accused, which his behavior created. The question for the CJC Inquiry Committee – for the legal system – was not what consequence befits Robin Camp the man, as understood fully and with account for his humanity and personal perspective. The question was what consequence befitted the external assessment of his wrongdoing, an assessment reached after consideration of his personal perspective.

In my view, the Inquiry Committee was correct to answer that question with a recommendation for removal. Not because Robin Camp is a bad person. Not because his personal perspective is irrelevant or unworthy of consideration. It was considered. But because, independently and impartially assessed, the wrongs that his conduct created are fully and properly addressed only by that consequence. The consequence is not imposed in order to punish him, or to judge him unworthy (although of course personally it will feel that way to him). It is to preserve the administration of justice, confidence in the administration of justice, and to recognize the wrong done to the *Wagar* complainant, the accused, and ultimately the public. It is a hard consequence, but not a post-empathetic one.

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