

SUSAN JORDAN

EVERYTHING CHANGES

The moment you attach to it, it changes.

—*John Daido Loori, contemporary Zen master*

Learning is movement from moment to moment.

—*J. Krishnamurti*

I recently interviewed Greta Van Susteren who is co-anchor on CNN Television's *Prime Time Justice*. Through live interviews and commentary, her program examines current trials and legal happenings. Greta used to be a criminal defense lawyer in Washington DC, before becoming one of the new breed of lawyer-turned-commentator for television. In her role as a commentator on criminal justice issues, she provides a strong and credible voice for the constitutional rights of defendants in a very public forum. I feel proud when I listen to her enthusiastically and intelligently describe defendants' constitutional rights and rights at trial. It is great to watch her argue with those who think that the Fourth Amendment should be abolished and who think the cops can do no wrong. She talked about what was important to her when she was a criminal defense lawyer: "There is no bigger honor than standing next to a client in the courtroom and arguing." She echoed something we all feel.

Talking with her made me reflect on a recent event in my legal life. Several months ago, I agreed to represent a man charged with rape, which was something I had long declined to do.

I felt very attached to this position, formed and held for almost 20 years. I was criticized by some and lauded by others. Some just shook their heads in disbelief at the insanity of this position for a person who held herself out as a criminal defense lawyer, and who apparently had no qualms about representing murderers, torturers, kidnappers, pornographers, and child molesters. Others thought fact that I took this position lent a moral integrity to criminal defense that often was not visible or apparent in our work. Still others felt that the true value of criminal defense was found in our ethical obligation to stand by the side of the un-

Susan Jordan is a criminal defense lawyer and criminal defense consultant in California. This article is reprinted from the *Women Defenders Newsletter*, Summer 1997.

popular client or the victim of race discrimination and argue for him. I do not disagree with this position, but as I have explained, "...undermining the credibility of a rape victim... was too much of a conflict of interest for me."

Change, and growth as it turned out, struck in the form of several phone calls asking me to represent a man whom the callers could not believe committed the rape with which he had been charged. Not only were they unable to believe the accusation, they told me no one else they knew could believe it either. After much angst resulting from my position on rape cases, I agreed to see him without making any commitment about taking his case. He was sincere, open, and I thought, frank. He described a date rape where both had fallen asleep, and awoke in an embrace which led to sex. The victim said it was not consensual, that she awoke to sex against her will. He said he thought they were both on the same wavelength, and no force was involved. There I was, exactly in the position I said I would never get myself into: judging the victim's credibility only on the say-so of the police reports and the defendant.

I grilled him on the facts, and told him in no uncertain terms how I felt about rape cases. Poor guy, he thought he was coming to see a lawyer about defending him and he ended up on the receiving end of an ultra-feminist diatribe. I went so far as to tell him that if at any point in the case I found he was lying to me he could find himself with a lawyer with a conflict of interest of such magnitude that it might require me to withdraw. Then I told him to call me back while I thought it over. Again, I say, poor guy.

All evening, into my sleeping hours, and again the next day, I wrestled with the facts and with the validity of my position. I found that I wanted to take the case, that I believed him, and that the only reason not to take the case was an ideology that perhaps was no longer valid.

I re-thought the underlying reasons for my original position, and I came to a realization that surprised me, though it should not have. I discovered what perhaps by this time should have been obvious to me: that the playing field in the courtroom had changed, that female lawyers had, in fact, succeeded in leveling it for rape victims. It used to be that when a rape accusation was made, all sympathy was with the defendant, not his accuser. All questions were resolved in his favor, not hers. The criminal justice system was downright hostile to the claims of rape victims. It was an unusual situation in criminal defense for the victim to

need more help than the defendant, but that was the case. Resulting from centuries of legalized sexism, victims in rape cases stood no chance in court against even a marginally competent defense lawyer. The defendants were acquitted almost invariably, and the victims were never vindicated. And so I refused to participate. There were plenty of male lawyers in those days who relished defending these cases because they were easy to win. Easy pickings and demeaning to women, I said. I won't play.

With that as my position, I did not have to participate in any further humiliation of the victim, and I did not have to engage in the stomach-turning exercise of examining her on her prior sexual conduct, which because it was a legally available tactic, seemed to be required for every defense lawyer to defend those cases adequately.

While on any given day one can still witness vestiges of the hostility and suspicion toward rape victims that used to exist, the system has gone a long way to accommodate and validate their accusations. Rape victims have a lot of support in the system, from police trained to listen to them, to victims' advocates and sexual assault prosecution teams. Some would say it has gone too far. The old jury instruction that was so insulting to rape victims that "rape is a charge easily made and hard to disprove" is gone. Also gone is the availability to the victim's prior sexual activity as fodder for cross-examination.

Although I frequently say that women lawyers have changed the legal landscape, I did not realize just how profoundly we have changed it. The support that rape victims receive from the system—for the initial police interview through sentencing—is due entirely to changes in the law urged at the outset by female lawyers.

As I reflected on all this, I realized that in the context of a criminal trial, rape victims no longer needed my help. Law enforcement and the prosecution, and even the legislature, are now fully equipped to help them. In rape cases as in all cases, the criminal justice system is stacked against defendants. For those charged with rape it may be especially stacked. The penalties are absurd, and growing worse, thanks to our female counterparts from the District Attorneys' associations making regular appearances before the legislature saying they speak for victims. We are in the midst of a religious/moral intolerance on matters sexual that could well, in and of itself, prevent a fair trial. These are the reasons to believe that the playing field has been leveled.

I understood, once again, that it is an honor to stand beside a client who asks for my help, and to present his case. I agreed to represent this client. In the end, my feeling that he was innocent was validated when the District Attorney dismissed all charges before trial, based in large measure on facts we had gathered. We disclosed a substantial part of the defense case to the prosecution, trying to engineer a dismissal. I never lost sympathy for the victim during the time I represented the defendant. I worked with an understanding of what it means to make a rape accusation. I tried to comprehend the motivations for the accusation. I did not need to humiliate her before or at trial. My sympathy for this victim did not impede my representation of the defendant in any way, and may well have served his interest, as it facilitated communication with the District Attorney. At least regarding the victim, we spoke the same language.

Throughout, I remained immensely proud of the changes we had wrung from the system for the benefit of rape victims. I saw them in action, perhaps for the first time. It was clear as day that rape victims were now far better off in the criminal justice system than the last time, many years before, when I had stood at the side of the defendant charged with rape. The District Attorney was well equipped, thanks to what female lawyers had accomplished, to represent the client, and I could finally get back to doing what I was best at, defending. I found that my conflict of interest had vanished, and that I could stand next to my client free of it.

The world had changed and so had I.