

Running head: HE SAID SHE SAID: CONFLICT AND FEMINISM IN THE GHOMESHI TRIAL

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“Crime begins in the mind.” – (Quinney 2001)

Sexual assault is a form of violence against the person. It is defined as, “a term used to refer to all incidents of unwanted sexual activity, including sexual attacks and sexual touching” with “females accounting for 92% of sexual assault victims in Canada” (Brennan and Taylor-Butts 2008; Statistics Canada 2008). There are two major issues regarding sexual assault against women that must be recognized: its prevalence, “affecting as many as 1 in 3 women in Canada”; and that it is a highly underreported crime, only “about 8% of sexual assaults were reported to police” (Benoit et al. 2015; Statistics Canada 2008). Feminist theorists have pointed to the adversarial nature of the criminal justice system, and the fact that many investigations, through lack of physical evidence, are reduced to a simple ‘he said/she said’ trial of believability. Through an examination of the recent and highly publicized Jian Ghomeshi trial, this paper will use conflict and feminist criminological perspectives to explore the challenges female sexual assault victims face while interacting with the criminal justice system.

This essay will begin with a short case summary and an evaluation of its importance to the field of criminology. It will then examine Ghomeshi’s history at the Canadian Broadcasting Corporation (CBC). In particular, it will focus on Ghomeshi’s status as a “state celebrity” and his alleged abuse of power (Cormack and Cosgrave 2016). Finally, this paper will examine the judge’s decision in the trial especially focusing on the issue of believability in a conflict theoretical context. The paper will conclude with a feminist critique of the Ghomeshi trial and outcome, focusing on the ineffectiveness of the current criminal justice system to protect women and curb sexual assault.

CASE SUMMARY

In 2014 in Toronto, Ontario, Jian Ghomeshi, a celebrated national radio host, was charged with four counts of Sexual Assault and one of Overcoming Resistance By Choking. The charges were laid in connection to alleged assaults on three separate women, and followed months of speculation, and an investigation by the Toronto Star into Mr. Ghomeshi's conduct in and outside of his workplace at the Canadian Broadcasting Corporation. By the time his case came to trial two years later three more charges were laid. Quite spectacularly, however, the trial lasted only eight days and Ghomeshi was acquitted on all charges because the judge found the complainants' testimony inconsistent and that they had even lied. *The Globe and Mail's* report on the verdict states that "the judge questioned the three complainants' credibility and said they were 'less than full, frank and forthcoming' in their version of events" (Young 2017). Mr. Ghomeshi's lawyer, Marie Henein had managed to make the credibility of the complainants the focus of the trial instead of the substance of their accusations against her client.

Although he never took the stand in his own defense, Ghomeshi had, prior to being charged, already given an admission of sorts on a Facebook post describing his relations with one of the complainants as "being like a mild form of Fifty Shades of Grey" (as cited in Global News 2014). In their testimony, the complainants gave a more vivid account of Ghomeshi's actions: "He pulls my head down and at the same time he's punching me in the head multiple times and I'm terrified" and "grabbed her by the throat, pushed her up against a wall and hit her face repeatedly with an open hand" (Mehta 2016). Public opinion on Ghomeshi's acquittal was divided. Some believed that justice had been served because the Crown had failed to prove its case 'beyond a reasonable doubt', the high standard required for criminal conviction (Dietz 2016). Others, however, believed that a sexual predator escaped justice because of the inherent

bias of the Canadian criminal justice system against female victims of sexual assault (CBC News 2016). How are we to make sense of this confusing outcome? Whose version of events was true?

WHY IS THIS CASE IMPORTANT?

This trial is important for us to study as criminologists for several reasons. First, it highlights the difficulties that female sexual assault victims have while interacting with the criminal justice system. In a recent *Globe and Mail* feature report, Robyn Doolittle argues that, “The result is a game of chance for Canadian sex-assault complainants, whose odds of justice are determined not only by the facts of their case, but by where the crime took place, which police force picks up their file, and what officer shows up at their door” (Doolittle 2017). The impediment that Doolittle is alluding to is the latent misogyny embedded in the frontline police services where complaints are first investigated. Secondly, the Ghomeshi trial demonstrates the role that patriarchy plays as another obstacle that female complainants face interacting in a criminal justice system that is determined by males, and masculinity. As Anne Kingston states, “the courts often uphold a Victorian model of prim womanhood” (Kingston 2016). In this sense, there is an expectation that women are proper and sexually passive. Finally, the Ghomeshi trial illustrates how the forces of institutional power discriminate against women, as a class of persons. The resulting imbalance of power leaves many women vulnerable to their male coworkers, but particularly to their male ‘bosses’. The Ghomeshi case especially reminds us how often crimes of the powerful go unreported, or are covered up by institutional power. As an article from CBC reveals, “there were three instances where management failed to investigate allegations and concerns about Ghomeshi's behaviour while he was working for the corporation” (CBC 2015). Overall, the importance of this case is that it highlights the misogyny and patriarchy within the Canadian criminal justice system but it also reminds us that those problems

are social in nature. This case is ultimately about the relations of men and women, the powerful and the powerless, dominance and subjection.

CONFLICT THEORY

In his ‘conflict theory’ of criminology Richard Quinney (1980) lays the groundwork for understanding crime as a manifestation of the social relations between the dominant class and the oppressed in the capitalist society. As he explains, “Modern civilization, as epitomized in capitalist societies, is founded on the exploitation of one class by another” (Quinney 1980:176). This is the ethos of the political economy of capitalism and all social relations between individuals must be understood as flowing from this model. Quinney explains that the capitalist state arose to secure the interests of the dominant class, and to control the exploited class. This economic and social order, Quinney argues, is maintained by two methods of control: the law, “the coercive force of the state”; and “the perpetuation of the capitalist concept of reality” (Quinney 1980:176). Conflict theory is particularly applicable to the Jian Ghomeshi case first because it describes the power structure that allowed Ghomeshi to accumulate power and status at the CBC and it also explains why the CBC as an institution turned a blind eye to his alleged behaviour. Secondly, conflict theory also explains why Ghomeshi believed that he could normalize his abuses as a privilege of the boudoir. Finally, conflict theory shows why certain aspects of the justice system worked in Ghomeshi’s favour.

“State Celebrity”

To illustrate the first point, in *Class, State, And Crime*, Quinney (1980:173) mentions “alienation, (and) inequality” in his short list of “natural products and contradictions of capitalism”. In the Ghomeshi story we see alienation and inequality emerge in the early reports of Ghomeshi’s predatory behaviour at his place of employment, the Canadian Broadcasting

Corporation (CBC). In a December 2, 2014 article in *The Guardian*, Kathryn Borel, a former radio producer for the CBC gave an eye witness account of sexual harassment that she endured from Jian Ghomeshi on the job as early as 2007 and specifically details a 2010 sexual harassment complaint that she made through her union. Borel's complaint details unwanted sexual touching and "emotional abuse" from Ghomeshi on the job, but most surprising is her claim that the union and management did nothing about it (The Guardian 2014). Regarding the charges that Ghomeshi faced, Borel (2014) wrote,

A small part of me was shocked: not because I think he is innocent, but because when Ghomeshi was harassing me, it felt like the power dynamics of his fame-and those complicit in maintaining that fame- had inured my host to all consequences of his actions.

Borel's feelings of the imbalance of power, coupled with the fact that CBC failed to protect her, reinforce Quinney's argument that "the relation of the dialectics of domination and accommodation to patterns of crime in a capitalist society, produc(e) the crimes of domination and the crimes of accommodation" (1980:174). As Borel indicates Ghomeshi appeared to have license from his employer to do as he wished with subordinates and particularly female subordinates.

The conflict theory of crime also focuses on how different groups in society possess unequal amounts of power that in turn reinforces crime (Holmes et al. 2016). If Ghomeshi got away with this type of behaviour in 2010 this proves that Ghomeshi himself was well aware of the power imbalance between himself and his victims and thus targeted them for his sexual cravings. As his star power grew because of his popular radio show "Q" Ghomeshi accumulated power and influence within the corporation. In their article, "State, celebrity, institutional charisma and the public sphere: managing scandal at the Canadian Broadcasting Corporation", Cormack and Cosgrove use Althusser's concept of the Ideological State Apparatus (ISA) to

describe the relationship between the state institution, CBC, and its “state celebrity”, Mr. Ghomeshi, which allowed Ghomeshi unchallenged power while the CBC benefited from his ‘hip’ star celebrity to assert its dominance over the national cultural scene (Cormack and Cosgrave 2016:1048). The authors argue that when Ghomeshi’s alleged abusive behaviour became public knowledge the CBC quickly disavowed his alleged conduct and moved adroitly to excise his image and importance to the institution.

While the CBC turned a blind eye to their employee’s behaviour, Ghomeshi himself tried to erect a firewall of distorted privilege. In a book written by Quinney titled, *The Social Reality of Crime* he argues that “the extent to which a person engages in violent personal actions that may be defined as criminal depends upon his location in society, and consequently, upon his exposure to particular social norms” (2001:252). This assessment is pertinent to this point because it highlights how Ghomeshi’s social status had an influence on his belief that he could normalize his sexually violent behaviour against these women. After admitting to his dominance/subjectation and sexual sadistic preferences in his Facebook post that was published in *Global News* he makes a bold statement, “Sexual preferences are a human right” (Ghomeshi 2014). By making this statement it could be argued from a conflict theoretical perspective that Ghomeshi is trying to use his fame to try to influence his audience and subsequently public opinion.

Another key component of Quinney’s conflict theory is that, “the capitalist state is oppressive not only because it supports the interests of the dominant class but also because it is responsible for the design of the whole system” (1980:176). This characterization is particularly true of the Canadian criminal justice system as it pertains to women’s complaints of sexual assault. Because of his wealth, Ghomeshi was able to avail himself of perhaps the best criminal

defense lawyer available in Canada, Marie Henein. His trial was conducted in front of a judge alone instead of a judge and jury, limiting the influence of empathy in the proceedings.

Ghomeshi never had to testify in his own defense. Instead, he sat silently as his own scripted version of his relations with the complainants was unfolded by his lawyer through the highly scripted drama of the criminal trial. “The coercive force of the state, embodied in law and legal repression, is the traditional means of maintaining the social and economic order,” Quinney tells us (1980:176). By design the court mirrors the model of the oppressive state. The rules that govern the conduct of a criminal trial (especially those of standards of evidence) protect the interests of the state and the status quo, and as a consequence they favour the wealthy and powerful over the oppressed. As it acts to safeguard good order the court often represses the pursuit of justice for the less empowered. We are left to ask regarding this good order: Good for whom?

The Judge’s Decision

Another key portion of conflict theory is that criminality is determined by power figures, and more specifically that law enforcement is enforced unequally, punishing the powerless and benefiting the powerful (Holmes et al. 2016). Rather than focusing on the perpetrator’s conduct, the trial process re-victimizes the female complainants, putting their actions on trial instead. Perhaps the greatest obstacle to justice for complainants is the adversarial trial process itself. This is supported by Quinney’s (2001:159) argument that, “The adversary system of justice promotes a ‘fight’ method rather than a ‘truth’ method of trying cases”. Nowhere is this truer than in sexual assault trials. Because of the intimate nature of the crime there is often limited, or no physical evidence at all. Instead, the trier of fact must base his/her decision on the testimony

of the complainants who are called as witnesses by the prosecution (The Crown). In this way the trial boils down to a ‘he said/she said’ trial of believability.

In the Ghomeshi case this test of credibility became the crucible of justice. However, for the three female complainants the scales of justice were already tipped in favour of Ghomeshi for several reasons. First, as was mentioned, his wealth allowed him to procure the best criminal defense attorney in Canada, Marie Henein, a lawyer renowned for withering cross-examinations (Kingston 2016). Secondly, he benefited from the ‘presumption of innocence’ and the fact that he had no prior criminal record. Thirdly, Ghomeshi derived several advantages from the passage of time. More than ten years had elapsed since the alleged offenses had occurred. This fact became apparent as the complainants were tripped up under cross-examination; portions of their testimony such as the particular car that Ghomeshi was driving were disproved (Pazzano 2016). Of greater importance was the fact that the women had waited so many years to make a complaint. When asked why she had waited until 2014 to report, the first complainant explained that it was “because she didn’t think anyone would listen” ((Mehta 2016).

Living up to her billing, Ms. Henein shot holes in the testimony of the three complainants using caches of personal emails and other social media posts to prove that each of the women had “after-contact incidents”, and or intimacies with Ghomeshi (Mehta 2016). The complainants were forced to recount intimate and humiliating details of sexual contact, and under Henein’s withering cross-examination were forced to admit that they had been in communication with each other regarding Ghomeshi and their allegations.

In his decision to acquit Ghomeshi on all of the charges, Judge William Horkins was unequivocal regarding whom he believed:

The success of this prosecution depended entirely on the Court being able to accept each complainant as a sincere, honest and accurate witness. Each complainant was revealed at

trial to be lacking in these important attributes. The evidence of each complainant suffered not just from inconsistencies and questionable behaviour, but was tainted by outright deception” (Horkins 2016:24).

After a close consideration of the Judge’s entire decision it is impossible to imagine any other outcome in the context of the available method of trying these particular sexual assault complaints. Standards of evidence, and the threshold of “beyond a reasonable doubt” to convict made the believability of the witnesses of fundamental importance. Lost, however, in the process of this trial was truth of the complainants’ allegations of sexual assault by Mr. Ghomeshi. In fact, Judge Horkins, himself, admits: “My conclusion that the evidence in this case raises a reasonable doubt is not the same as deciding in any positive way that these events never happened.” (Horkins 2016:24) This is an admission of the failing of the Canadian criminal justice system to deal with the substance of these particular complaints. Did Ghomeshi punch complainant #1 in the head? Did he slap and choke Lucy DeCoutere? These are the troubling actions that ought to have been adjudged in this case but which were lost in the fight.

FEMINIST PERSPECTIVE

“Power, then,” Quinney (2001:11) argues, “is the ability of persons and groups to determine the conduct of other persons and groups”. It is here, in the concept of power that we find the intersection of conflict theory and feminist criminology. Feminist theory can be applied in many different ways to the challenges of criminological research. It can present reasons why women decide to be criminals, why they are often susceptible to victimization, and also examine the role that the dominant patriarchy plays in gender inequality in our society (Chesney-Lind and Morash 2013). For the purposes of this paper we will be focusing mainly on the feminist perspective of women as sexual assault victims and how patriarchy negatively influences this phenomenon.

Feminist theory also emphasizes how men and women experience different “realities”, and that women’s lower position in society in comparison to men influences criminal behaviour in ways that are uniquely gender specific (Holmes et al, 2016). This point is very interesting because it has the ability to explain why in sexual assault crimes men are often associated as perpetrators and women, as the victims. It also, for the matters of this case, can help explain the alleged collusion of the complainants in this trial. In his decision, Judge Horkins not only points to the possibility of collusion between the complainants but delineates the angry and vindictive quality of their communication with each other in the approximately five thousand emails that they shared. “Ms. DeCoutere and S.D. considered themselves to be a ‘team’ and the goal was to bring down Mr. Ghomeshi...They expressed their top priority in the crude vernacular that they sometimes employed, to ‘sink the prick...’ cause he’s a fucking piece of shit.” (Horkins 2016:18). The judge disclosed that he found it odd that the complainants were so angry a decade later, when they each seem to have split with Ghomeshi on friendly terms. From a feminist perspective, the reason behind the three complainants delayed and angry reactions could be due to the preconceived notion that there is often an “unresponsive and sometimes hostile reaction of police and the courts to the reporting of sexual assault (which) may make women’s decision to report appear irrational” (Taylor and Norma 2012:24). Robyn Doolittle’s (2017) study “Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless” is a present-day illustration of this ugly truth about the reaction of the criminal justice system towards sexual assault.

In his conclusion, Horkins lists the similarities in the timing and nature of the complaints registered by the three witnesses, but most importantly he alludes to the fact that, “Each one came forward in 2014 in the wake of, or in the midst of the extensive publicity surrounding the very public termination of Mr. Ghomeshi at the CBC” (Horkins 2016:22). Two feminist scholars,

Norma and Taylor, conducted a study and titled it “The ‘Symbolic Protest’ Behind Women’s Reporting of Sexual Assault Crime to Police” and they explain an interviewee’s reasoning for coming forward “not to get protection for herself... but because she found out there were girls who needed protection from him” and they even go further to explain that “This sense of responsibility extends even to the plight of sexual assault victims who may access the criminal justice system at some point in the future” (Taylor and Norma 2012:42). One can only imagine how angry the complainants must have been to read Ghomeshi’s dismissive characterization, in a Facebook post, of his own conduct as “a mild form of Fifty Shades of Grey” (Global News 2014). In fact Ghomeshi’s post was the replete with the kind of self-important, ‘brand-builder’ imperiousness that is the hallmark of patriarchal privilege. Even the language that Ghomeshi employs is full of dominance: “the truth will, finally, conquer all;” “And no one,...should have dominion over what people do....”(Global News 2014). The intersection of conflict theory and feminist criminology comes into view as the media is recognized as an institution of power in the oppression of women as a class of persons. “Mass communications do make a difference. My argument,...is that a specific kind of crime coverage in the media provides the source for building criminal conceptions.... Not only is a symbolic environment created within society, but personal actions take their reference from that environment” (Quinney 2001, p.285). Norma and Taylor would argue that once the first complainant came forward the other two females conquered their fear of reporting with the desire to protect and “symbolically protest” against Ghomeshi furthering his violent behaviour against other women.

Why, one might ask, would these three complainants put their personal reputations and careers in jeopardy to go after Jian Ghomeshi? Why did they feel that they needed to gang up to bring down this particular man? Most certainly there is the acknowledgment in their actions that

individually women are powerless before the law. In a very recent feature article in the *Globe and Mail*, reporter Robyn Doolittle describes the plight of female victims of sexual assault in Canada. The criminal justice system she argues is tipped in favour of male perpetrators and against their female victims. In many Canadian communities women face a police wall of patriarchal indifference or even hostility to the credibility of their complaints. Women who come forward to lodge a complaint of sexual assault are often deeply traumatized, violated and ashamed. At the first point of contact with the forces that ought to be there to help them they often encounter male investigators who challenge the veracity of their claims, and in many cases intimidate them into dropping their complaints. In fact Doolittle found that “one of every five sexual-assault allegations in Canada is dismissed as baseless and thus unfounded. The result is a national unfounded rate of 19.39 per cent – nearly twice as high as it is for physical assault (10.84 per cent), and dramatically higher than that of other types of crimes” (Doolittle 2017). These numbers are too striking to be sloughed off as an anomaly. They speak to a deeply entrenched masculinist bias in the Canadian criminal justice system.

The patriarchal bias is not only confined to the justice system, however, it is deeply entrenched in the fabric of Canadian society. The weight of male privilege and the intimidating power that accrues to it is also a harm to women because of the corrosive effects that it has on male agency. Even men who recognize or witness sexual violence against women are often cowed by the political, economic, and/or social clout of powerful males. In an article in *Slate*, Carl Wilson illustrates the different points of observation that men and women have of male sexual aggressors. “Then again, you are a man. You are well-aware that to many of the women you know, Jian is a creep” (Wilson 2014). Wilson superficially saw Ghomeshi through the public persona that he projected and only saw through him when he was forced to admit that women in

his social sphere needed to be protected from Ghomeshi's predatory behaviour. It was only then that Wilson was forced to confront his own complicity in Ghomeshi's actions. "You played nice.... Because you feel associated. You feel responsible. You stood by. You grinned and took the man's hand" (Wilson 2014). This confessional identifies the problem of the imbalance of power between men and women in Canadian society and it also points to a direction for the resolution of this inequity.

CONCLUSION

It can be argued that there is an intersection between conflict theory and feminist theory occurs when Quinney argues that there must be "An alliance of the oppressed must take place" (1980:178). The judge's reaction to the three complainants in the Ghomeshi trial was to view them as unreliable witnesses and therefore unbelievable. However, as a standard-bearer for a criminal justice system that conflict and feminist theorists have proven to be prejudiced against women, the judge's opinion is only reflective of a flawed and unjust system of repression. If viewed through the lens of the victim the three female complainants may be seen as a vanguard of "symbolic protest" and as agents of change. As Jan Jordan posits in her article, "if the police knew the extent to which victims feared being blamed for what happened, they would not be surprised when complainants said or did things to try to bolster their credibility in the police's eyes" (2004:53). On the whole it can be concluded that major reform is necessary to correct the current imbalance in the Canadian criminal justice system in regards to investigating sexual assault against women. Feminist theorists have suggested such measures as courts that take the adversarial paradigm out of the equation and replace it with a truth finding mechanism (Kingston 2016). Perhaps the answer lies, as the analysis of the problem has, in the intersection of conflict and feminist criminological perspectives. A regime that allows women as a class of persons to

take back power over their lives and sexuality from the dominant forces of male patriarchy must begin in a better understanding of how men and women view themselves, and subsequently, each other in society.

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