

Abstract

In this paper, I undertake the case study of the Jian Ghomeshi trial to understand how the criminal justice system responds to the problem of sexual violence against women. Specifically, I mobilize two criminological perspectives – conflict and feminist – to make sense of the trial and verdict. Drawing from the work of Richard Quinney, I argue that Ghomeshi's social status enabled him to avoid discipline by his employer, the Canadian Broadcasting Corporation, in the wake of sexual harassment complaints and to hire a highly regarded lawyer. This case clearly illustrates that the criminal justice system is designed to preserve the status quo and favours the wealthy and powerful. In this particular instance the trial re-victimized the female complainants, putting their actions on trial instead of Ghomeshi's. Feminist theorists have critiqued the adversarial nature of the criminal justice system and the tendency for sexual assault cases to be reduced to a simple 'he said/she said' trial of believability. I argue that in order to restore fairness and equity to the criminal justice process a more empathetic framework must be employed which takes into account the existing power differential between men and women in society.

He Said She Said: Conflict and Feminism in the Ghomeshi Trial

Sexual assault refers to “all incidents of unwanted sexual activity, including sexual attacks and sexual touching” and in Canada females account for 92% of sexual assault victims (Brennan & Taylor-Butts, 2008; Statistics Canada, 2008). There are two major issues regarding sexual assault against women that must be recognized: its prevalence – it affects as many as 1 in 3 women – and that it is a highly underreported crime, with approximately 8% of sexual assaults reported to police (Benoit, Shumka, Phillips, Kennedy, & Belle-Isle, 2015; Statistics Canada, 2008). In this paper, I mobilize conflict and feminist criminological perspectives to explore the challenges female sexual assault victims face while interacting with the criminal justice system. I undertake the case study of the recent and highly publicized Jian Ghomeshi trial.

This essay will begin with a short case summary and discussion of its importance to the field of criminology. Next, I examine Ghomeshi’s status as a “state celebrity” and alleged abuse of power while at the Canadian Broadcasting Corporation (CBC), as well as Judge Horkins’ decision through the lens of conflict theory (Cormack & Cosgrave, 2016). I then offer a critique of the Ghomeshi trial and outcome that is inspired by feminist criminology; specifically I comment on the current criminal justice system’s inability 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 count of Overcoming Resistance By Choking (Miller, 2016). The charges were laid in connection to alleged assaults on three separate women, following 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 the case came to trial two years later three more charges had been 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. As Chris Young (2017), writing for *The Globe and Mail*, reported “the judge questioned the three complainants’ credibility and said they were ‘less than full, frank and forthcoming’ in their version of events”. 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 (Gollom, 2016).

Although he never took the stand in his own defense, Ghomeshi had, prior to being charged, described his relations with one of the complainants in a Facebook post 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). In this paper, I draw from criminological theory in order to make sense of this outcome.

WHY IS THIS CASE IMPORTANT?

This trial is significant 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 likens these interactions to “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). In other words, a process that ought to be consistent and impartial is opaque and unpredictable. Second, the Ghomeshi trial demonstrates the patriarchy that underpins the criminal justice system. As Anne Kingston, writing for Maclean’s magazine, 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 and this leaves many women vulnerable to victimization and unprotected by the courts. The Ghomeshi case also serves as a reminder that the crimes of the powerful go unreported or unpunished. As the CBC itself acknowledges, “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, I argue that the Ghomeshi case and trial highlight the misogyny and patriarchy within the Canadian criminal justice system and remind 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

Richard Quinney (1980/2012) 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, 1980/2012, p. 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 (1980/2012) 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” (p. 176). Conflict theory is particularly applicable to the Jian Ghomeshi case because it describes the power structure that allowed Ghomeshi to accumulate power as well as status at the CBC and it also explains why the CBC as an institution turned a blind eye to his alleged behaviour. Moreover, conflict theory also explains why Ghomeshi believed that he could normalize his abuses as a privilege of the boudoir. Finally, conflict theory shows why the justice system worked in Ghomeshi’s favour.

“State Celebrity”

In *Class, State, And Crime*, Quinney (1980/2012) mentions “alienation, (and) inequality” in his short list of “natural products and contradictions of capitalism” (p. 173). 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, disclosed 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 (2014) 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. 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 inherent structure or relations in a capitalist society produce the crimes of domination and accommodation (Quinney, 1980/2012, p. 174). As Borel (2014) indicates, Ghomeshi appeared to have license from his employer to do as he wished with subordinates and particularly female subordinates. The power differential inherent in the celebrity supporting cast power structure necessarily alienates the subordinates and authorizes inequality.

The conflict theory of crime also focuses on how different groups in society possess unequal amounts of power and theorizes that this imbalance causes crime (Holmes, Mooney, Knox, & Schacht, 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. As his star power grew because of his popular radio show "Q", Ghomeshi accumulated power and influence within the corporation. Cormack and Cosgrove (2016) argue that Ghomeshi was the CBC's "state celebrity" and that this provided him with unchallenged power while the CBC benefited from his 'hip' star celebrity to assert its dominance over the national cultural scene (p. 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. Here again we can draw from Quinney's work. Specifically, Quinney (2001) 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" (p. 252). In this case Ghomeshi's social status could have lead him to believe that he could normalize his sexually violent behaviour against these women. After admitting to his dominance/subjection 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. Ghomeshi adopts the persona of human rights advocate to advance the notion that sexually violent behaviour is a sexual preference.

Because of his wealth, Ghomeshi was able to avail himself of perhaps the best criminal defense lawyer available in Canada, Marie Henein (Gollom, 2014). His trial was conducted in front of a judge alone instead of a judge and jury, limiting the influence of empathy in the proceedings. This option is a privilege inherent in the judicial process because it allows a single trier of fact to decide the central issue of believability, whereas a trial by a judge and jury might have a more sympathetic hearing for marginalized complainants. Ghomeshi never had to testify in his own defense. Instead, he sat silently as his own version of his relations with the complainants was relayed by his lawyer through the highly scripted drama of the criminal trial. As Quinney (1980/2012) tells us, "The coercive force of the state, embodied in law and legal

repression, is the traditional means of maintaining the social and economic order” (p. 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. The presumption of innocence, which is assumed for the defendant, becomes a hurdle that is often too high to surmount for complainants especially in cases of sexual assault. The passage of time between the offence and the trial affects the quality of victim testimony and is often a result of shame, guilt, humiliation and fear- all of which contribute to the alienation of the victim and the shielding of the perpetrator. In this way the status quo of male patriarchy is maintained through a system of bureaucratic repression. As it acts to safeguard good order, the court often represses the pursuit of justice for the disempowered. We are left to ask regarding this good order: Good for whom?

The Judge's Decision

Perhaps the greatest obstacle to justice for complainants is the adversarial trial process itself. This is supported by Quinney's (2001) argument that, “The adversary system of justice promotes a ‘fight’ method rather than a ‘truth’ method of trying cases” (p. 159). 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 (Yeung, 2013). 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 some instances this means that rather than focusing on the perpetrator's conduct, the trial process re-victimizes the female complainants, putting their actions on trial instead.

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, his wealth allowed him to procure a criminal defense attorney, Marie Henein, who was renowned for withering cross-examinations (Kingston, 2016). Second, he benefited from the ‘presumption of innocence’ and the fact that he had no prior criminal record. And third, Ghomeshi derived several advantages from the passage of time as 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 and portions of their testimony, such as the particular car that Ghomeshi was driving, were disproved (Pazzano, 2016). Of greater significance is that the women had waited so long to make a complaint because they “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 crushing 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, p. 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 the 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, p. 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. As Quinney (1980/2012) argues, "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" (p. 176). Because the system was designed to challenge and thwart the complainants' credibility it necessarily oppressed their pursuit of justice.

FEMINIST PERSPECTIVE

"Power, then," Quinney (2001) argues, "is the ability of persons and groups to determine the conduct of other persons and groups" (p. 11). 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 that consume 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 & 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 emphasizes that 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 perpetrators and women are often victims. It also can help explain the alleged collusion of the complainants in the Ghomeshi 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, p. 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.

In his conclusion, Horkins lists the similarities in the timing and nature of the complaints registered by the three witnesses. Specifically, he notes 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, p. 22). However, Taylor and Norma (2012) explain

an interviewee's reasoning for coming forward is "not to get protection for herself... but because she found out there were girls who needed protection from him" and 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" (p. 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 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). Viewed through a feminist lens, 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 & Norma, 2012, p. 24). Taylor and Norma might 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 (2017) 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. Doolittle (2017) suggests that at the first point of contact with the forces that ought to be there to help, women 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. This bias is deeply entrenched in the fabric of Canadian society. The weight of male privilege and the intimidating power that accrues to it is harming 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*, for instance, Carl Wilson (2014) 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 superficially saw through the public persona that Ghomeshi 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 (2014) 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". This shows that there are two agencies of oppression going on here, one is male/female dominance and subjection and the other is the power differential between a male and a powerful male. There was clearly a power differential between Ghomeshi and Wilson. This confession 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: empowerment.

CONCLUSION

Justice Horkins' reaction to the three complainants in the Ghomeshi trial was to view them as unreliable witnesses and therefore unbelievable. This opinion is reflective of a flawed and unjust system of repression. Instead, the three female complainants may be seen as a vanguard of "symbolic protest" and as agents of change. As Jan Jordan (2004) posits, "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" (p. 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. As Quinney (1980/2012) argues, "An alliance of the oppressed must take place" (p. 178). What might this look like? For their part, some feminist theorists have recommended that we abandon the adversarial system we use now 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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