FROM GHOMESHI TO URURYAR:
Sexual assault as seen through two criminal cases

SEXUAL ASSAULT AWARENESS TRAINING: BE PART OF THE SOLUTION
Fort Frances, Ontario
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SPEAKING NOTES

Introduction
The past year has allowed those of us who pay attention to sexual assault - - which I imagine is most of us in this room – to see two very different outcomes in high profile sexual assault trials. The first, of course, is the Jian Ghomeshi trial, which surely garnered more attention than any sexual assault trial – maybe any criminal trial at all – in Canadian history. The second was the trial of Mustafa Ururyar, which many of us thought of as the "Mandi Gray trial" because Mandi, the courageous survivor in that case, went very public with her story.

There were both similarities and differences in these cases, and they both have a lot to tell us, which is what I am going to talk about for the next hour.

Before I do that, though, I want to make a couple of general points:

1. These cases, while higher profile than most sexual assault cases, were not unique in any way. Sadly, what happened in the Ghomeshi case in particular happens in criminal courtrooms across the country every day - -we just don't hear about it because the accused is not usually a national and beloved celebrity.

2. Police officers, Crown Attorneys, VWAP workers, judges – all those involved in the criminal system – are generally good at their jobs. Most want to support survivor/complainants. Most go the extra mile. But even so, there remains a lack of a comprehensive understanding of the impact of sexual assault on the survivor and how this affects the present criminal process.

3. Very few sexual assaults see their way to a guilty finding. According to Holly Johnston's research:
   - There are approximately 460,000 sexual assaults in Canada each year
   - Of every 1,000:
     - 33 are reported to the police
     - 29 are recorded as a crime
     - 12 have charges laid
     - 6 are prosecuted (some of the other 6 will be plea bargained or the charge is dropped in exchange for the accused entering into a peace bond)
     - 3 lead to a conviction

4. These numbers should be telling us something. It is not about a bad cop or a bad Crown Attorney or a bad judge. Sure, those exist, just as do bad teachers, doctors, dentists, shelter workers and sexual assault centre workers. No – the numbers should be telling us that there are serious flaws in the system itself. Some we can fix; but some we cannot. Maybe it is time to be thinking about whether we should be responding to sexual assault very differently than we are now.

I want you to keep this systemic analysis idea in the back of your head for the next 40 minutes or so, because I will come back to it at the end of my talk.

Reporting to police

As we know, from the numbers I just shared and from our daily work, few women report sexual assault to the police.

Some types of women are more likely to report than others. Listen to the words of Jennifer Leigh O'Neill, a young woman survivor of sexual assault about why she DID report. By her own description, she was a "victim: the criminal system could understand better than it understands some survivors.

In her submission to the Legislative Special Committee looking at sexual violence in Ontario, Jenni had this to say about reporting to the police:

"So, why did I report? We often ask why women don't report. Maybe asking why they do could narrow in on the necessary conditions for when to participate in our justice system.

Number one, I reported because it was horrible.

I reported because I needed to know that my country could recognize that what happened to me was a crime, because I care about sovereignty and government legitimacy.

I reported because I am a survivor of childhood sexual assault.

I reported because I have family support.

I reported because I have a supportive and progressive community who understand the complexity and relevance of sexual violence.

I have top-end, privately funded healing resources, due to a community member offering me funds.

I'm privileged. I'm white, I'm able-bodied. I'm hetero-seeming, I'm attractive. I did nothing to earn any of these things, but these attributes allow me more sympathy from the public at large. **I look like a perfect victim.**

I reported because my perpetrator was a stranger. Naming a strange as a rapist or a perpetrator is much easier than naming a community member, a family member, a spouse, a parent. We all like to think that evil lives outside the walls of our homes and familiarity.

I reported because I'm articulate and educated in the field of oppression. It gave me a toolkit to understand my experience and to defend myself against discrimination within the justice system.

For all these reasons, I reported. While some of them are logical, many of them are entirely tied to my unearned privilege.

There are a thousand and one reasons why women don't report and, honestly, all of them are really good reasons. There are few reasons why women do report ,and some of them aren't the best."

Her experience is further established if we look at the survivor/complainants in the Ghomeshi/Ururyar cases. These were well educated women. Women with good jobs or on their way to good jobs. White women. "Attractive" women. Women with self-confidence and self-esteem.

They were not sex workers. They were not junkies. They were not women with mental health issues. They were not Indigenous women or women with disabilities or newcomer women who did not speak English. They were not in the wrong part of town when they were sexually assaulted.

These women do not typically report to the police because they fear not being believed or having their personal characteristics questioned or challenged. Or they don't report to the police because their life experience with the cops has not been good. Or because they do not think there is anything the cops can do. Or because they do not identify what has happened to them as a crime because it has already happened to them so many times. Or they do not think they are worthwhile enough for anyone to care about what has happened to them.

Going to trial

For that small number of women who report to the police, a somewhat smaller number enter the criminal court process. And here begins another difficult experience. To return to the words of Jenni O'Neil: "Once you report, everything changes for the worse. . . the "sluts or nuts" mythology – the idea that she's either a slut or crazy – is so embedded in the beliefs of our justice system that it perpetuates itself."

Before I say anything more about how sexual assault is handled in the criminal system, I want to be clear about a couple of things. I am a lawyer. I went to law school because I believed in the power of the law to make the world a good and safe place. I am not so sure about that anymore, to tell you the truth, but I do still believe strongly and

passionately in the principles that underpin the criminal law in Canada. In particular, I believe in:

- The presumption of innocence
- The standard of proof in criminal court – beyond a reasonable doubt

I do not want to live in a country where someone is presumed to be guilty just because they have been arrested. We have seen too many stories of people being wrongfully convicted: often people from marginalized communities.

And, because the power of the state is generally greater than the power of the individual accused, I want the Crown to have to prove its case beyond a reasonable doubt. It is a serious thing to find someone guilty of a crime, and I want to be as sure as possible that the evidence supports that finding.

I don't believe in vigilante "justice." I want people to be accountable not individually to the direct victim of the crime but to all of us, because I want to live in a place where we think in communities.

However, it seems to me the more I work with survivors of male violence – sexual violence, but also domestic abuse and criminal harassment – that these crimes just don't fit into the neat squares of criminal law as it is written and applied, despite the considerable changes and improvements we have seen in the past 20 or 30 years.

We can fix lots of the problems that exist now.

Some we can fix with money:

- VWAP

Some we can fix with changes to the law or process:

- Allowing survivors to be parties in violence against women cases
- New rules for cross examination

Some we can fix with education:

- Better educated court personnel up to and including judges
- Dispelling the myths
- Lawyers – defence and Crowns – who have a deeper understanding of sexual violence

One exciting new initiative, part of the government's Sexual Violence Action Plan, is a pilot project that makes independent legal advice (ILA) available to survivors of sexual assault in three regions of the province – Toronto, Ottawa and Thunder Bay. This project just got underway at the end of June, so you may not have heard much about it yet.

Anyone who has experienced a sexual assault and who is involved with or is considering becoming involved with a criminal prosecution can access up to 4 hours of

free ILA. This can come all at once or over a period of several months or longer. A woman could get ILA before reporting to the police, for instance, so she will have a better idea of what to expect, then could talk to the lawyer again as she is preparing to give evidence.

The lawyers delivering this advice have received a one-day training. In Toronto, the ILA is being delivered through the Barbra Schlifer Commemorative Clinic, and I am one of the lawyers working on this.

At this point, the project is funded by MAG not LAO, so there is no financial eligibility requirement for someone to participate.

So far, I have talked to women who want information and advice about recent sexual assaults, sexual assaults from their past, adult and child sexual violence, intimate partner sexual violence, stranger rape – every kind of sexual violence you can think of. And, much as they want legal information and advice, they also want to be told that I believe them, that something bad happened to them and that **it was not their fault.**

This is a fantastic initiative, and we should all hope that it move on from being a pilot project to being a program that is available to survivors everywhere in Ontario.

I don't know about you, but I was not particularly surprised when Justice Horkins found Jian Ghomeshi not guilty last March. I was, however, disappointed that he seemed to feel the need to make so many disparaging, even vicious, comments about the women who had shown the courage to come forward, at the invitation of then-Toronto Police Chief Bill Blair.

At various points in his decision, Justice Horkins referred to the survivors as "deceptive and manipulative," as demonstrating "carelessness with the truth." He said one of them "deliberately chose not to be completely honest with the police." He claimed there was "no tangible evidence" of the offence. He even faulted one of the women for having become an advocate on the issue of sexual violence.

And then, that was that. Ghomeshi was not guilty, which quickly became translated in some conversations into innocent – too very different things, not guilty and innocent – and the women he harmed were relegated to yesterday's news, left on their own to cope with and heal from the violence and violation of the criminal system itself.

I am sure you, too, speculated about what might happen with the outstanding charge – surely the remaining survivor would not want to go through what the first three women had endured? My initial reaction to the withdrawal of the charge in exchange for Ghomeshi signing a peace bond was not positive, but then I took some time to think and I listened to what Kathryn Borel, the survivor, had to say, and I changed my mind.

"In a perfect world, people who commit sexual assaults would be convicted for their crimes. Jian Ghomeshi is guilty of having done the things that I've outlined today. So

when it was presented to me that the defence would be offering us an apology, I was prepared to forego the trial. **It seemed like the clearest path to the truth. A trial would have maintained his lie, the lie that he was not guilty, and it would have further subjected me to the very same pattern of abuse that I am currently trying to stop.**

Let's fast forward now to the summer decision in the Ururyar case, where Justice Zuker's decision – now under appeal, of course -- provided a thorough canvassing of case law and statutes as well as legal writing and research on violence against women. He said so many good things in his decision that I had trouble deciding which ones to share this morning. Here are a few:

"The myths of rape should be dispelled once and for all," writes Justice Zucker, and then proceeds to do just that:

- "No other crime is looked upon with the degree of blameworthiness, suspicion and doubt as a rape victim."
- "No one asks to be raped. The responsibility and blame lie with the perpetrator."
- "The question "why didn't she leave" is actually an objectifying statement that asserts that the woman did not leave. Law assumes, pretends, the autonomy of women. Why didn't she leave implies the woman could have left. We need to challenge the coercion of choices, reveal the complexity of experience and struggle and recast the entire discussion of separation in terms of violent attempts at control."

He upholds those important principles of presumption of innocence and proof beyond a reasonable doubt: in his own words, by quoting statutes and through an extensive review of case law.

He explores the thorny issue of consent – the issue on which most sexual assault trials hang, especially when the survivor and accused know one another.

In Justice Zuker's words: "Just because the complainant, Ms Gray, may not resist does not mean that she consented to what happened."

He also made clear that there is no presumption of consent and no doctrine of implied consent based on passivity or historical relationship between the parties in Canadian criminal law.

He seemed to understand why not all women fight back: "The fact that a victim ceased resistance to the assault for fear of greater harm or chose not to resist at all does not mean that the victim gave consent. Each rape victim does whatever is necessary to do at the time in order to survive."

Justice Zuker's decision also spoke strongly about credibility. He reviewed copious case law that says credibility is not negatively affected by delayed disclosure.

He tackled the question of how victims of sexual violence should behave if they are to be credible: “There may well be an unrealistic expectation as to how ‘real’ victims should behave. Blame the complainant for the attack where she was seen as behaving foolishly or inappropriately. . . A victim’s non-conformance with behavioural stereotypes should not impact the way we evaluate the complainant.”

He provides a list of factors that, in his words, “standing alone are not dispositive in determining a victim’s credibility: delayed reporting, the victim’s emotional state (eg whether a victim appears calm vs emotional or visibly upset), the victim’s lack of resistance.”

The decision looks at the question of post- assault memory:

- “Human memory is reconstructive in nature, and not only fallible but malleable and susceptible to suggestions and bias. Memories of past events tend to be distorted so they line up with one’s beliefs about oneself, others or how things work in general.”
- “The mere existence of internal inconsistencies in the testimony of a witness or inconsistencies between witnesses is not itself determinative of the credibility of the witness or the accuracy or reliability of their testimony.”
- “Who can, who should, remember the details of a rape? Asking her to remember the details is ridiculous.”

Justice Zuker also looks at trauma:

- “It is important to understand the unique dynamics, distinct emotional trauma and realities of sexual assault.”

And in reaching his guilty verdict, Justice Zuker is unequivocal, as he should be in a criminal trial:

- “I must and do reject his evidence. I do so without hesitation.”
- “Rape it surely was.”

As the title of this conference says, let’s be part of the solution. While it is important to understand the problems in the present criminal response to sexual violence, it is equally important not to get mired down in them, but to think about creative solutions.

There are many – including the ILA project I described earlier – underway, and more coming, as the province continues to roll out its SVAP. We need initiatives that encourage and mandate formal and informal collaborations between community groups and the criminal sector. We need more money – seemingly endlessly. We need more public education campaigns like the OCRCC’s Draw the Line and the province’s It’s Never Okay campaigns. We need to encourage our communities that we can no longer be bystanders to sexual violence.

We need to break down the widely held misbelief that a not guilty verdict in a criminal trial means there was no sexual assault so that women can emerge from the criminal process, no matter the outcome, confident in themselves and their truth.

But I want to challenge all of us to also start thinking outside the box by considering a role for restorative justice in responding to sexual violence.

I am sure many of you are familiar with the term restorative justice. Many of you may have an automatic "no" response to the idea of using RJ as a response to make violence against women. Indeed, that has been my response until recently.

However, my thinking has changed a lot, partly because of the increasingly obvious truth that the traditional criminal process does not deal well with many kinds of violence against women, partly because of the work of feminist lawyers who are talking about the possibilities RJ offers – law profs like Melanie Randall, Jennifer Llewelyn and Leigh Goodmark – and partly as a result of following the RJ process that was used at the Dalhousie Dental School last year.

Do I think RJ can replace the criminal law? No.

Do I think some perpetrators need to be held accountable through the criminal law and spend time sequestered from the rest of us? Yes.

Do I think RJ as a response to violence against women has to be carefully thought out? Yes, yes and yes again.

But, there are just so many situations where RJ could do a better job, could let both the person harmed and the person who has caused the harm to heal, could offer those who cause harm a true and real opportunity to learn. could offer a real voice to those who have been harmed and could invite communities to be part of the healing and learning processes.

As Leigh Goodmark puts it – in cases of violence against women, RJ only has to do better than doing nothing.

The criminal system, in some ways, discourages perpetrators of harm from taking accountability. Accused people are told not to admit to wrong-doing, not to apologize, not to self-incriminate. An RJ approach could allow for real accountability because the person responsible for the harm is not trying to dodge criminal liability. Then, this person can learn and change, which surely is what we want.

RJ puts real power in the hands of the person who has been harmed; creates the possibility of reparations that will make her whole.

And it lets communities be part of the healing and learning processes, thus creating a climate where there is less likely to be ongoing harm. RJ allows communities to own their problems rather than handing ownership over to the state.

For sure, there have to be some conditions in place:

1. Must be led by feminists who understand sexual violence

2. The person who has been harmed must be the one to say yes or no – if she does not want to use RJ, then it does not happen – back to traditional criminal system or nothing
3. There must be real acceptance of responsibility/real accountability on part of person who caused the harm
4. It must be led by third parties who understand the issue and dynamics
5. If the person who has been harmed wants it to stop, then it has to stop
6. There must be continued follow up in the community

Autonomy for the person harmed in the fundamental principle.

What does that look like on the ground? Here are just a few quotes from the Dalhousie RJ process:

From the women:

- "Restorative justice provided us with a different sort of justice than the punitive type most of the loudest public voices seemed to want. We were not looking to have our classmates expelled as 13 angry men who understood no more than they did the day the posts were uncovered. Nor did we want simply to forgive and forget.
- "Contrary to the more traditional form of justice, we were looking for positive changes rather than punishments."
- Only through the restorative justice approach could we play the active roles we wanted. The men began making apologies in December and, through the restorative process we have accepted those apologies. More than that, though, we have seen the men learn why they are sorry and what that requires of them."

From the men:

- "We learned that saying sorry is too easy. Being sorry, we have come to see, is much harder."
- "Restorative justice has allowed for an environment of learning, growth and development."
- "We see the world through a different lens now. . . It may be impossible to undo the harms but, we commit, individually and collectively, to work day by day to make positive changes in the world."

As one speaker said at a recent RJ conference, restorative justice offers a geography of hope.

I don't know about you, but I am ready to leave the state of almost constant despair I feel when supporting survivors of sexual violence. I am ready to work towards a geography of hope.